Reference: *Air Canada v. Commissioner of Competition*, 2000 Comp. Trib. 26
File no.: CT2000004
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IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an application by Air Canada pursuant to subsection 104.1(7) of the *Competition Act,* R.S.C. 1985, c. C-34, as amended.

B E T W E E N:

Air Canada
(applicant)

and

The Commissioner of Competition
(respondent)

and

I.M.P. Group Limited (CanJet Airlines)
(affected party)

Date of hearing: 20001116 to 20001117
Member: Simpson J. (presiding)
Date of order: 20001207
Order signed by: Sandra J. Simpson

REASONS FOR AN ORDER DATED FRIDAY, NOVEMBER 24, 2000 (A copy of the Order of November 24, 2000, is attached as Schedule A)

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I. THE FACTS

[1] On June 29, 2000, Royal Assent was given for Bill C-26 (*An Act to amend the Canada Transportation Act, the Competition Act, the Competition Tribunal Act and the Air Canada Public Participation Act and to amend another Act in consequence,* S.C. 2000, c. 15) and it came into force on July 5, 2000, which, *inter alia*, amended the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"), by adding section 104.1. It gave the Commissioner of Competition (the "Commissioner") a new power to issue temporary orders against persons operating a domestic air service as defined in subsection 55(1) of the *Canada Transportation Act*, S.C. 1996, c. 10. A temporary order could be made if, in the Commissioner's opinion, an operator's conduct could constitute an anti-competitive act. Section 104.1 also gave persons against whom such orders were made the right to apply to the Competition Tribunal (the "Tribunal") to challenge those orders. This case concerns the first temporary order and the first application to challenge such an order under the new legislation (the full text of section 104.1 is attached as Schedule B).

[2] The Commissioner made a temporary order against Air Canada on October 12, 2000. It was made under subsection 104.1(1) of the Act and had a term of 20 days (the "Original Order"). On October 31, 2000, the Commissioner extended the order for a further 30-day period (the "Extended Order"). The Original and Extended Orders will together be referred to as the "Order" (the Original Order and the Extended Order are attached as Schedule C). The Original Order prohibited Air Canada from offering certain discount fares known as L14EASTS or any similar fares on five routes (three out of Halifax and two out of Windsor). The Extended Order reduced the scope of the Original Order and prohibited Air Canada from offering the L14EASTS or any similar fares on only three routes: Halifax/Ottawa, Halifax/Montreal, and Halifax/St. John's.

A. AIR CANADA'S APPLICATION TO THE TRIBUNAL

[3] On November 1, 2000, Air Canada applied to the Tribunal, pursuant to subsection 104.1(7) of the Act (the "Application"), to have the Order set aside. In the alternative, if the Order were to be confirmed, Air Canada asked that it be varied to delete the reference to "any similar fares" and that it expire on December 1, 2000. In response, the Commissioner asked that the Order be confirmed without variation and that it expire on December 31, 2000.

B. CANJET'S MARKET ENTRY

[4] In April 2000, I.M.P. Group Limited ("IMP") announced its intention to start CanJet Airlines ("CanJet") as a low-cost "no frills" domestic air service in Eastern Canada. IMP is a Canadian aerospace, general aviation, and flight management company based in Halifax, Nova Scotia.

[5] On July 31, 2000, CanJet began to sell advance tickets for its initial flights, which were scheduled to start on September 5, 2000. CanJet entered the market offering one-way fares at prices which were substantially below Air Canada's full economy fares. These introductory fares will be described as CanJet's "Announced Fares".

[6] CanJet commenced its flight operations on September 5, 2000, with two leased Boeing 737 aircraft. At that time, its initial routes included the following six city-pairs: Halifax/Ottawa, Ottawa/Toronto, Halifax/Toronto, Halifax/Windsor, Windsor/Toronto, and Windsor/Ottawa. On September 7, 2000, two days after CanJet began to fly, it complained to the Commissioner about Air Canada's L14EASTS fares, which, as will be described below, had been offered for sale as of September 1, 2000 for flights commencing September 15, 2000.

[7] On September 25, 2000, CanJet leased another plane and offered service on three additional routes. They were: Montreal/Halifax, St. John's/Halifax, and Winnipeg/Toronto. As of the date on which the Application was heard (November 16 and 17, 2000), CanJet offered flights on a total of 14 routes. However, as a result of "inadequate bookings", CanJet decided, on October 24, 2000, to terminate all flights on its Ottawa/Windsor and Toronto/Windsor routes, effective November 26, 2000.

C. ROYAL AIRLINE'S PRICING AND CANJET'S RESPONSE

[8] On August 24, 2000, Royal Airlines ("Royal"), another discount air carrier, issued a press release announcing that it would be increasing the number of flights it offered per day in Canada. The press release stated that, as of September 11, 2000, Royal would "double its domestic scheduled flights on key Air Canada routes and offer dramatically lower prices". Seven of the ten routes described in the press release were routes that CanJet had announced it planned to serve. Royal stated that it would be offering one-way fares at prices that matched CanJet's Announced Fares on two routes. The balance of Royal's one-way fares would be between 3 and 33 percent lower than CanJet's Announced Fares. Collectively, these fares will be described as Royal's "Lower Fares".

[9] On August 28, 2000, in response to competition from Royal, CanJet lowered its Announced Fares by up to 25 percent when it introduced its "Special" and "Smart" fares, (together the "Reduced Fares"). CanJet offered the Reduced Fares on all its flights. These included flights on routes that Royal did not serve and flights at times when Royal did not offer a competing flight.

[10] On September 6, 2000, an article in the *National Post* newspaper reported that CanJet and Royal were starting a "price war" in Eastern Canada. The article said:

> A price war is already brewing between the two discounters. CanJet fired the first shot in a fare war last week by reducing prices to undercut Royal, which it accused of misleading advertising.

[11] Although it may have appeared that, by introducing its Reduced Fares on all its flights, CanJet was responding aggressively to Royal's Lower Fares, Kenneth C. Rowe, IMP's Chief Executive Officer, minimized Royal's impact on CanJet. He indicated in his affidavit of November 9, 2000, that CanJet made its Reduced Fares available on only a few seats per flight. Mr. Rowe said:

> In August 2000, CanJet did lower its originally published fares in response to a price reduction by Royal Airlines. However, Royal has only 2 flights per day on the Halifax/Ottawa and Halifax/Montreal routes and does not serve Halifax/St. John's. Royal also made few seats available at these fares, meaning that CanJet would not have had to make many seats available at a lower fare in order to compete.

D. AIR CANADA'S RESPONSE TO CANJET

[12] At the end of August 2000, Air Canada finalized its competitive response to CanJet's market entry. That response included the introduction on September 1, 2000, of a discounted one-way fare called the "L14EASTS" fare. It was made available on six routes which CanJet proposed to fly. They were: Halifax/Ottawa, Halifax/Montreal, Halifax/St. John's, Windsor/Toronto, Windsor/Ottawa, and Toronto/Winnipeg. Flights carrying passengers at L14EASTS fares were to commence on September 15, 2000. Air Canada did not advertise the introduction of these new fares.

[13] The Tribunal was advised that an air fare has two components. One is the price of the ticket and the other is the conditions related to its purchase. The price of the L14EASTS fare matched the price of CanJet's Announced Fares. However, the price of Air Canada's L14EASTS fare never matched the prices of the Reduced Fares which CanJet introduced in response to Royal's Lower Fares. The L14EASTS prices remained $10 to $60 higher than those charged at CanJet's Reduced Fares. As well, the L14EASTS fare carried more restrictions than either CanJet's Announced or Reduced Fares (together, "CanJet's Fares"). L14EASTS fares were only available on selected flights, while CanJet's Fares were available on all its flights (this was made clear in non-confidential Exhibit C, which was filed during the hearing of the Application). L14EASTS fares had to be purchased 14 days before the flight, but CanJet's Fares had no advance purchase requirement. L14EASTS imposed a maximum 30-day stay restriction. However, there was no maximum stay required with CanJet's Fares. Both the L14EASTS and CanJet's Fares were one-way fares with no minimum stay requirement, but the L14EASTS carried a $100 change fee while CanJet tickets could be changed for a $40 fee. Finally, although the L14EASTS fares were always more expensive and more restrictive than CanJet's Reduced Fares, only passengers who chose the L14EASTS fares earned Air Canada Aeroplan Points and received meal services.

[14] The following chart has been developed from the evidence adduced at the hearing of the Application. It shows CanJet's Announced Fares and indicates how Royal responded with its Lower Fares. It also demonstrates how CanJet then countered with its Reduced Fares. Lastly, it shows Air Canada's introduction of the L14EASTS fares.

A COMPARISON OF THE PRICES OF ONE-WAY FARES ANNOUNCED ON THE THREE RESTRAINED ROUTES				
Route	**CanJet's Announced Fares July 31/00**	**Royal's Lower Fares Aug. 24/00**	**CanJet's Reduced Fares Aug. 28/00**	**Air Canada's L14EASTS Fares Sept. 1/00**
Halifax/St. John's	$109	Royal did not fly this route	$89 or $69	$109
Halifax/Ottawa	$109	$106	$99 or $87	$109
Halifax/Montreal	$99	$99	$89 or $67	$99

E. THE COMMISSIONER'S INVESTIGATION AND HIS INQUIRY

[15] As mentioned above, on September 7, 2000, CanJet complained to the Commissioner. On receipt of the complaint, the Commissioner began to investigate Air Canada's L14EASTS fares on the seven routes CanJet had identified. They were Halifax/Ottawa, Halifax/Montreal, Halifax/St. John's, Halifax/Toronto, Windsor/Toronto, Windsor/Ottawa, and Toronto/Winnipeg.

[16] Approximately three weeks later, on September 27, 2000, the Commissioner received a six-resident application for an inquiry pursuant to section 9 of the Act. It came from Mr. Rowe and five other IMP officials. Their application was made with respect to Air Canada's fares on the seven routes described above. The next day, the Commissioner converted his investigation into a formal inquiry into Air Canada's pricing pursuant to paragraph 10(1)(*a*) of the Act. The inquiry was to consider whether Air Canada was in breach of sections 50 and/or 79 of the Act.

F. THE ORIGINAL ORDER OF OCTOBER 12, 2000

[17] The Commissioner issued the Original Order pursuant to subsection 104.1(1) of the Act on October 12, 2000. It had effect for 20 days pursuant to subsection 104.1(4) of the Act and it prohibited Air Canada "from directly or indirectly offering or selling L14EASTS fares, or any similar fares", on five city-pair routes. They were: Halifax/Ottawa, Halifax/Montreal, Halifax/St. John's, Toronto/Windsor, and Ottawa/Windsor. They will be referred to collectively as the "Five Restrained Routes". As well, the two routes serving Windsor will be described as the "Windsor Routes".

[18] The Original Order stated that it was made on the basis that:

(a) the Commissioner had commenced an inquiry pursuant to subsection 10(1) of the Act regarding whether Air Canada had engaged in conduct that was reviewable under section 79 of the Act;

(b) Air Canada was operating a domestic service as defined in subsection 55(1) of the *Canada Transportation Act*, S.C. 1996, c. 10;

(c) the Commissioner considered that, in the absence of the Order, CanJet was "likely to be eliminated as a competitor on specific routes and suffer other harm that cannot be adequately remedied by the Tribunal"; and

(d) the Commissioner was of the opinion that "Air Canada has engaged in conduct which could constitute anti-competitive acts in that Air Canada has reduced its fares to target CanJet" on the Five Restrained Routes.

[19] At the hearing of this Application, counsel for the Commissioner informed the Tribunal that the anti-competitive act referred to in the Original Order was the one described in section 1(*a*) of the *Regulations Respecting Anti-competitive Acts of Persons Operating a Domestic Service*, SOR/2000-324, 30 August, 2000 (the "Regulations"). Section 1(*a*) provides that "operating capacity on a route or routes at fares that do not cover the avoidable cost of providing the service" is an anti-competitive act for the purpose of paragraph 78(1)(*j*) of the Act. This new provision was adopted by Parliament after Air Canada's acquisition of Canadian Airlines. Prior to the introduction of the Regulations, the term "avoidable costs" had never been used in the Act.

[20] The Regulatory Impact Analysis Statement which accompanied the Regulations described them as a "code of conduct" for Air Canada. It stated, *inter alia*, that:

> These Regulations extend the existing abuse of dominance provisions of the *Competition Act* and could be viewed as a code of conduct by Air Canada inasmuch as they specify the type of behaviour which is likely to be challenged by the Competition Bureau.

[21] According to Air Canada (the Commissioner's evidence did not respond to Air Canada's suggestion that guidelines had been promised), the Commissioner acknowledged that guidance was needed about how he intended to interpret and treat avoidable costs. Air Canada said that, to this end, the Commissioner indicated that his office would publish guidelines about avoidable costs (the "Guidelines") by mid-October 2000. However, as of the hearing of the Application they had not been released. Air Canada stressed that it had been assured by the Commissioner's office that, until the Guidelines appeared, the "usual rules" regarding predatory pricing (section 50 of the Act) and abuse of dominance (section 79 of the Act) would apply to the Regulations (the Commissioner's evidence did not respond to Air Canada's allegation that it has been assured that the "usual rules" would be followed). Air Canada further stated that the Commissioner's assurance was relevant because, as will be discussed below, Air Canada's position was that

pricing to match a competitor's price is not considered to be predatory conduct under the "usual rules".

G. THE EXTENDED ORDER OF OCTOBER 31, 2000

[22] According to the affidavit of David W. McAllister of the Commissioner's office, which was sworn on November 9, 2000, CanJet informed the Commissioner on October 24, 2000, that it intended to terminate its flights on the Windsor Routes as of November 26, 2000. In those circumstances, and because he no longer believed that the L14EASTS fares were causing CanJet harm on the Windsor Routes, the Commissioner eliminated the Windsor Routes when he made the Extended Order. The three routes which remained subject to the Order were: Halifax/Ottawa, Halifax/Montreal, and Halifax/St. John's (the "Three Restrained Routes").

II THE TRIBUNAL'S JURISDICTION

[23] As this Application was the first of its kind, much of the hearing was devoted to submissions about the scope of the Tribunal's jurisdiction to review the Order. In considering this issue, the following questions will be addressed:

(a) Is the Tribunal to review all aspects of the Order, or is its review restricted by subsection 104.1(7) to the conditions relating to harm either to competition or to a person described in paragraph 104.1(1)(*b*) of the Act?

(b) What meaning is to be given to the word "likely" in section 104.1?

(c) When the Tribunal looks at whether harm existed when the Original Order was made under paragraph 104.1(1)(*b*) and paragraph 104.1(7)(*a*) and (*b*), is it to satisfy itself only about the harm the Commissioner considered when he made the Original Order, or is it to take a fresh look at the harm to determine whether, apart from the harm the Commissioner described in the Order, harm existed when the Original Order was made?

A. ARE ALL ASPECTS OF THE ORDER TO BE REVIEWED?

[24] Air Canada submitted that the Tribunal has broad jurisdiction to review of all aspects of the Order, including:
(a) whether the Commissioner met the conditions precedent to the issuance of a valid order;

(b) the correctness of the Commissioner's opinion about whether Air Canada's conduct could constitute an anti-competitive act; and

(c) the existence of the harm to CanJet described in subparagraph 104.1(1)(*b*)(ii).

[25] Air Canada also submitted that, for the reasons listed below, subsection 104.1(7) of the Act should be interpreted to permit the Tribunal to undertake an in-depth *de novo* review of all aspects of the Order:

(a) the Order has not yet received any outside scrutiny because it was made without representations by Air Canada and without any judicial oversight;

(b) the Order is made by the Commissioner in circumstances in which he is assigned a judicial or quasi-judicial role. As well, he is not independent because subsection 104.1(9) of the Act requires him to be named as a respondent to the Application;

(c) the Order will not receive any judicial scrutiny except from the Tribunal by reason of the broad privative clause in subsection 104.1(11), which says that no court has jurisdiction to question or review the Order;

(d) the Application is made to a judicial member of the Tribunal sitting alone pursuant to subsection 11(1) of the *Competition Tribunal Act*, R.S.C. 1985 (2d Supp.), c. 19 (the "Tribunal Act"). This suggests that the Tribunal is to undertake a broad review of the Commissioner's exercise of his jurisdiction because, if harm were the only issue for consideration, a lay member of the Tribunal could hear the Application;

(e) the Tribunal is empowered to hear the Application before it "and any related matters" by reason of subsection 11(1) of the Tribunal Act. This language gives the Tribunal broad powers of review on this Application;

(f) the unusual length of a temporary order (up to 80 days), together with the Tribunal's power to confirm an order for up to 60 days (which could potentially leave it in force longer than the 80 days originally allowed to the Commissioner) suggests that the Tribunal is to take a fresh look at all the circumstances of the Order. Air Canada noted that, in contrast, *ex parte* orders are issued in the Federal Court of Canada for a maximum of 28 days, and in the Ontario Superior Court for a maximum of only 20 days. As well, in those courts a judge must be persuaded of the need for the order, and there is a special onus on the moving party to provide the issuing judge with comprehensive and accurate information. The fact that these protections are not available when the Commissioner makes and extends an order suggests that, once the matter comes before the Tribunal, a broad *de novo* review is appropriate;

(g) the fact that subsection 104.1(7) gives the Tribunal jurisdiction to vary the Order suggests that it must undertake a broad review;

(h) the fact that the Order itself is anti-competitive suggests that it requires an in-depth review. The Extended Order is anti-competitive because it prevents Air Canada from offering its customers competitive prices on the Three Restrained Routes; and

(i) finally, subsection 104.1(10) of the Act suggests that the Tribunal is to undertake a broad *de novo* review of the Order because it says that, on the application before the Tribunal, all parties shall be provided "...with a full opportunity to present evidence and make representations...".

[26] The Commissioner took a different view of the scope of the Tribunal's review, which focused, in large measure, on the legislative history of section 104.1. He noted that the legislation was part of Parliament's response to the restructuring of the airline industry, which saw Air Canada emerge as the dominant domestic carrier. He demonstrated that Parliament enacted section 104.1 because it recognized that, in the airline industry, fare changes can be implemented rapidly and competitors may quickly be forced out of business. Parliament accepted that a rapid response is required to deal with such situations, and therefore decided to give the Commissioner the power in subsection 104.1(1) to issue his own *ex parte* orders against persons who operate domestic air services.

[27] The Commissioner argued that, given that subsection 104.1(1) says only that the Commissioner must form a preliminary opinion that the prohibited conduct "could" constitute an anti-competitive act, and that temporary orders can be issued when an inquiry has just been commenced and therefore at a time when the Commissioner may not have a complete understanding of the facts, and given Parliament's acceptance of the need for prompt temporary orders, and because of the relatively short duration of the Order (80 days), I should conclude that the Tribunal's review of the Order is not all-encompassing, as Air Canada suggested, but is ordinarily restricted to the issue of harm. I have said "ordinarily" because counsel for the Commissioner acknowledged that, if the Tribunal were to conclude that an order was void, the Tribunal would have jurisdiction to set it aside under subsection 104.1(7) because that subsection must be read to presume the existence of a valid order.

[28] Counsel for the Commissioner agreed with Air Canada that the Tribunal is to undertake a broad review on the issue of harm, but he said that the Tribunal is not entitled to look behind the Commissioner's opinion about whether Air Canada's conduct constituted an anti-competitive act.

[29] CanJet took a different view and said that, according to a plain reading of subsections 104.1(7) and (11), the Tribunal is only entitled to consider harm. CanJet also said that, if an order were void, the Tribunal would nevertheless be required to confirm it if it were satisfied about the harm. CanJet submitted that, even if the Commissioner were to abuse his discretion and issue an illegal order, his conduct in that regard could not be reviewed in any forum.

Discussion

[30] I was not persuaded by CanJet's submission. It was based on the unstated premise that somehow, because Air Canada has become the dominant carrier, it has lost its right to be treated according to law. It cannot be that Parliament intended to leave Air Canada bound by orders which were issued without jurisdiction. Any suggestion that the Commissioner cannot be required to obey the law in his dealings with Air Canada is unacceptable.

[31] I have also not been persuaded by Air Canada's submission that the anti-competitive nature of the Order justifies a broad review of its validity and reasonableness. While I accept that Air Canada's inability to offer the L14EASTS fare prevents Air Canada from competing with CanJet and Royal for the duration of the Order, it does not necessarily follow that the Order is anti-competitive. One of the stated purposes of the Act (in section 1.1) is to provide consumers with competitive prices and product choices. Another purpose is to ensure that small and

medium-sized enterprises have an equitable opportunity to participate in the Canadian economy. The risk in the present case was that, without the Order, CanJet might have been forced out of business. In this context, it is my view that the Order is pro-competitive. It seeks to preserve CanJet's operations until the Commissioner is able to reach a final view about whether Air Canada's conduct amounts to an abuse of its dominant position under section 79 of the Act.

[32] I have accepted the submissions of Air Canada and the Commissioner that, if a condition precedent to the making of the Order were not satisfied, the Tribunal would have jurisdiction to set aside the Order under subsection 11(1) of the Tribunal Act, which allows it to consider the Application and "any related matters". However, in spite of Air Canada's able and detailed submissions, I do not agree that, if an order says that an opinion has been formed, the Tribunal should undertake a broad *de novo* review to assess the validity of the opinion.

[33] It is simply too early in the proceedings to undertake such a review. Pursuant to an order made under section 11 of the Act, many of Air Canada's documents had just reached the Commissioner as the Application was being heard. It is clear to me that the Commissioner's opinion, which the Act allows him to express in a tentative manner when it uses the word "could", is simply not ready to withstand a stringent analysis. Accordingly, to use the words "and any related matters" in subsection 11(1) of the Tribunal Act to justify an in-depth review of the Commissioner's tentative opinion would, in my view, be wrong. However, if the Commissioner's opinion were to be challenged, as it was in this case, the Tribunal should consider whether it was reasonably open to the Commissioner when the Original Order was made.

[34] At this point, let me summarize my conclusions about the scope of the Tribunal's jurisdiction on this Application:

(a) the Tribunal's jurisdiction clearly includes, but is not limited to, considering the issue of harm on a review of the Order under subsection 104.1(7) of the Act;

(b) the Tribunal has jurisdiction to consider the Application "and any related matters" under subsection 11(1) of the Tribunal Act, and this consideration includes a determination about whether the Order is valid. This, in turn, would include a determination about whether the Commissioner had started an inquiry in the proper manner and whether his opinion was reasonably open to him on the evidence he had when the Original Order was made; and

(c) however, the Tribunal does not have broad jurisdiction to consider *de novo* the nature or merits of the Commissioner's inquiry or the validity of the Commissioner's opinion about Air Canada's conduct. In my view, such an in-depth review of the Order would be outside the purview of "and any related matters" in subsection 11(1) of the Tribunal Act, given that the purpose of the Order is to maintain the status quo for a limited period so that the Commissioner can complete his investigation and reach an informed opinion about whether to bring an application under section 79 of the Act.

B. THE MEANING OF "LIKELY" IN SECTION 104.1 OF THE ACT

[35] Air Canada submitted that the word "likely" in paragraph 104.1(1)(*b*) and in subsection 104.1(7) of the Act should be given its ordinary meaning of "probable" or "more probable than not". Air Canada cited *Regina. v. K.C. Irving Ltd.* (1995), 62 D.L.R. (3d) 157 (N.B.C.A.), in support of this definition. The *Irving* case concerned a criminal prosecution under the *Combines Investigation Act*, R.S.C. 1970, c. C-25, for the offences of establishing or operating a monopoly or establishing a merger contrary to section 33 of that act. One issue was the proper definition of the phrase *where control or substantial control of a business is exercised or likely to be exercised to the detriment or against the interest of the public* in section 2 of the act. The trial judge defined "likelihood" under the section as "possibility". But the New Brunswick Court of Appeal ruled that "likely" in section 2 meant "will probably" and not "may possibly".

[36] Air Canada also relied on *Sayle v. Kansa Insurance Co.*, (1985) 16 C.C.L.I. 309 (B.C.C.A.). In that case, the plaintiff real estate agent was suing her insurance company. It had denied her coverage because she had incorrectly said on her application form that she was unaware of any circumstances which were "likely to give rise to a claim against the firm". The British Columbia Court of Appeal ruled that the phrase clearly meant "at least more probable than not".

[37] The Commissioner took a different view and argued that "likely" means a "real" or "reasonable possibility" of harm and not the "probability" of harm suggested by Air Canada. He relied on a decision of the House of Lords in *Re H.*, [1996] 1 All.E.R. 1. In that case, the issue was the meaning of the phrase "likely to suffer harm" in connection with whether a court should make an order about the custody of a child. The House of Lords recognized that the primary meaning of "likely" was "probably", in the sense of "more likely than not", but went on to conclude that this was not the word's only meaning. Their Lordships decided that, because the harm at stake (i.e. to a child) was particularly great, it was not Parliament's intention to establish the higher threshold suggested by the ordinary meaning of "likely". They therefore interpreted "likely" in the context of child protection to mean a "real possibility".

[38] I have concluded that the interpretation of "likely" suggested by Air Canada is preferable because:

(a) "Probable" is generally recognized as the synonym for "likely" and if Parliament had wished to impose a lower threshold it would have done so.

(b) "Probable" is the meaning for "likely" which suits the context in which a complaint has been made against Air Canada. The Commissioner necessarily relies on a complainant (CanJet in this case) to prepare and present a convincing case for harm. It is the complainant who has all the relevant information and who bears the onus of preparing the case for harm and satisfying the Commissioner that the tests in paragraph 104.1(1)(*b*) have been met. The Commissioner's role is to assess the alleged harm with a critical eye to see whether it meets the statutory test. In a situation in which the Commissioner has just begun his investigation, he may have no independent view of the actual or potential harm. It therefore makes sense that a complainant

must satisfy the Commissioner that its concerns about harm are "likely" in the sense of "probable".

(c) "Probable" is also the meaning for "likely" which suits the broader commercial context. Presumably, Parliament was concerned that complainants not ask the Commissioner to use his power to make orders against other carriers for improper or "strategic" motives, including a complainant's wish to sabotage legitimate competition. If "likely" meant "possible", rather than "probable" harm, there would be, in my view, an unacceptable risk that frivolous or strategic complaints could result in orders under subsection 104.1(1).

C. HOW IS THE TRIBUNAL TO REVIEW THE ISSUE OF HARM?

[39] Paragraph 104.1(7)(*a*) of the Act requires the Tribunal to confirm an order if one or more of the conditions relating to harm set out in paragraph 104.1(1)(*b*) "existed or are likely to exist". In my view, these paragraphs require the Tribunal to consider, first of all, whether one or more of the conditions relating to harm described in subparagraph 104.1(1)(*b*)(ii) (in this Application, the Commissioner has not alleged the harm to competition described in subparagraph 104.1(1)(*b*)(i)) likely existed on the date when the Commissioner made an order. Next, the Tribunal must consider whether the harm is likely to exist at the date it hears an application to challenge an order. Although I find it odd, it appears clear that, if the Tribunal is satisfied that the harm existed at the time of an order but no longer exists at the time an application is heard, the Tribunal is nevertheless directed to confirm an order (however, the duration of the confirmed order, in the absence of any continuing harm, might be short). The converse also appears to be true: the Tribunal might not be satisfied that the harm was likely to exist when an order was made, but new evidence or intervening events prior to the hearing of an application might satisfy the Tribunal that harm was likely to exist at the hearing date. Lastly, the Commissioner and the complainant bear the onus of "satisfying" (subsection 104.1(7) requires the Tribunal to be “satisfied” of the existence of harm) the Tribunal that the harm likely existed when he made an order or likely existed when an application is heard.

[40] Finally, I have also concluded that subsection 104.1(7) does not require the Tribunal to consider the reasonableness of the Commissioner's belief that the harm he identified, either in an order or in an accompanying statement of grounds for an order, was likely to exist when he made that order. Instead, on a fresh look, the Tribunal may (if the evidence is available) go beyond the harm which the Commissioner considered in order to be satisfied that the harm described in paragraph 104.1(1)(*b*) likely existed when an order was made. In this case, this exercise proved necessary because, as will be seen, the allegations of harm in the Original Order were not meaningfully described and no grounds were given which discussed the alleged harm to CanJet in the necessary detail.

III. AIR CANADA'S CRITICISMS OF THE ORDER

[41] Air Canada said:

(a) that the Order is void because the evidence showed that the Commissioner did not actually consider, and was incapable of considering, the opinion he expressed in the Original Order to the effect that Air Canada's conduct could constitute an anti-competitive act;

(b) that the Order is void because Air Canada's L14EASTS fares did not match CanJet's Announced Fares and therefore could not be anti-competitive according to the usual rules related to predatory pricing;

(c) that the Order is void because the Commissioner was required to set out the grounds in the Original Order and failed to do so;

(d) that the Order is void because the conduct relied on by the Commissioner in making the Order, which was "that Air Canada has reduced its fares to target CanJet...", is not an anti-competitive act;

(e) that the harm to CanJet which the Commissioner relied on when he issued the Original Order did not exist;

(f) that no harm to CanJet has been shown to be likely to exist at the date of the hearing of the Application;

(g) that the prohibition against charging any fares which are "similar" to the L14EASTS fares is vague and should be struck from the Order; and

(h) that, if confirmed, the Order should expire on December 1, 2000.

A. COULD THE COMMISSIONER FORM THE OPINION REQUIRED BY SUBSECTION 104.1(1)?

[42] Air Canada said that the evidence showed that the Commissioner did not, in fact, consider and was not capable of considering whether Air Canada's conduct could have been the anti-competitive act of "operating capacity on a route or routes at fares that do not cover the avoidable cost of providing the service" as defined in section 1(a) of the Regulations.

[43] Air Canada based this submission on the following facts:

(a) Air Canada was not asked, prior to the making of the Original Order on October 12, 2000, for its views about how it calculated avoidable costs, or for any specific information about avoidable costs;

(b) the memo from the deputy commissioner to the Commissioner of October 12, 2000, which recommended the issuance of the Original Order, nowhere mentioned avoidable costs;

(c) the Original Order did not mention avoidable costs and no grounds for the Order were provided which showed that avoidable costs had been considered; and

(d) the Commissioner had not developed a view about the proper calculation of avoidable costs. In particular, he had no view about issues such as the appropriate period over which to calculate avoidable costs, and whether avoidable costs should be considered on a per flight or a per route basis. This was demonstrated by the fact that he had not provided the Guidelines giving his interpretation of avoidable costs, which were promised by mid-October 2000.

[44] In my view, it is clear that the Commissioner spent no discernible time considering which anti-competitive act might be at issue because the answer was obvious. The Regulations make clear what conduct constitutes anti-competitive acts for the airline industry, and only section 1(*a*) applies when the issue concerns operating capacity at particular fares. In these circumstances, it is clear that, when he identified Air Canada's problematic conduct (i.e. reducing its fares to target CanJet) in the Original Order and prohibited the L14EASTS and similar fares, the Commissioner was considering the anti-competitive act described in section 1(*a*) of the Regulations. As will be discussed below, he should have clearly identified the relevant anti-competitive act in his grounds for the Order, but there was no requirement that the anti-competitive act be mentioned in the Order itself.

[45] The next issue is whether the Commissioner was capable of sensibly addressing the question of whether Air Canada was pricing at fares which did not cover its avoidable costs. Air Canada argued that, because the Commissioner had not issued the Guidelines, he had no view about the meaning of avoidable costs and therefore could not have reached a conclusion about Air Canada's L14EASTS fares in relation to such costs.

[46] I have concluded that the fact that the Commissioner has not announced his position on avoidable costs does not mean that he has not decided how they should be treated for the purpose of his inquiry. However, even if Air Canada were correct and the Commissioner had not yet reached a final view about the manner in which he would treat avoidable costs, he would, in my view, still be able to conclude that Air Canada's conduct "could" constitute an anti-competitive act. The "could" it seems to me can be read to suggest that the Commissioner need not be certain about whether an anti-competitive act existed and his uncertainty could stem either from uncertainty about the nature or effect of Air Canada's conduct, or from uncertainty about the proper meaning of avoidable costs.

B. CAN MATCHING BE PREDATORY?

[47] Air Canada has suggested that, when he forms the opinion expressed in the Original Order, the Commissioner must make at least a preliminary assessment about whether the anti-competitive act of pricing below avoidable cost, as defined in the Regulations, could ever be accepted as anti-competitive for the purpose of section 79 of the Act. To paraphrase, section 79 requires the Commissioner to show, *inter alia*, that the anti-competitive act is capable of preventing or lessening competition substantially in a market. Air Canada says that, in circumstances in which its L14EASTS fares do not even match CanJet's Announced Fares, there could be no such effect on competition.

[48] In this regard, Air Canada relied on the expert evidence of William J. Baumol of New York University. In his affidavit for this Application, he expressed the opinion that, since Air Canada's L14EASTS fares were higher than CanJet's Fares and were also more restrictive, the L14EASTS could not be considered to be anti-competitive.

[49] Air Canada also relied on the decision of Dambrot J. in *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51 (Ont. Gen. Div.) in which he concluded, at paragraphs 27 and 28, that reducing prices to match lower prices already being charged by a competitor cannot be predatory regardless of the costs of the matching company.

[50] The Commissioner relied on the evidence of Douglas S. West of the University of Alberta, who expressed a different view. Professor West stated that "the introduction of such low fares on these routes constituted a reasonable basis for concluding that the avoidable costs of operating some of these flights would not be covered by the revenue from the flight". Counsel for the Commissioner submitted that the experts clearly have opposing views about what *could* constitute an anti-competitive act and that the hearing of the Application is not the forum in which to resolve the issue.

[51] In my view, the two experts were discussing different subjects. Professor Baumol was considering whether pricing below avoidable costs, if shown, could be an abuse of dominant position under section 79 of the Act, and Professor West was considering a question which arises at an earlier stage. He asked whether Air Canada's sale of the L14EASTS could involve pricing below avoidable costs.

[52] These are both issues to be decided on another day. I have determined that the Commissioner is not required to make the preliminary assessment suggested by Air Canada. All that subsection 104.1(1) requires is that he decide whether he thinks Air Canada's conduct "could" be an anti-competitive act at the time he makes the Original Order. At this early stage of his inquiry, he is not required to form any further opinion about whether Air Canada's conduct "could" amount to an abuse of its dominant position under section 79 of the Act. This is a matter he need only address in the course of deciding whether to make an application to the Tribunal for an order under section 79 of the Act.

[53] To conclude on this issue, I have found sufficient evidence to show that the Commissioner's opinion was reasonably open to him on the information which was available to him when he made the Original Order.

C. THE FAILURE TO SPECIFY THE GROUNDS IN THE ORDER

[54] In the Original Order, the Commissioner said, firstly, that CanJet was "likely to be eliminated as a competitor on specific routes" and, secondly, that CanJet was likely to "suffer other harm that cannot be adequately remedied by the Tribunal". Air Canada has submitted, and I agree, that the first alleged harm is not even listed in subparagraph 104.1(1)(*b*)(ii). That section requires the Commissioner to consider whether CanJet "is likely to be eliminated as a competitor". It deals with CanJet's overall elimination and does not refer to the elimination of CanJet only as a competitor on "specific routes". Air Canada also correctly noted that the

Commissioner's second ground merely parrots the generic language of subparagraph 104.1(1)(*b*)(ii). Lastly, Air Canada accurately observed that, although the Commissioner described Air Canada's problematic conduct, he did not allege what anti-competitive act was at issue. For all these reasons, Air Canada took the position that the Order is void.

[55] The threshold issue is - what must be included in the Order? As a starting point, subsection 104.1(3) of the Act indicates that the grounds for an order need not be included. It reads:

> *Notice to persons affected*
>
> (3) On making a temporary order, the Commissioner shall promptly give written notice of the order, together with the grounds for it, to every person against whom it was made or who is directly affected by it.

While it would be preferable to have the grounds for an order stated therein, that is not required by subsection 104.1(3). Accordingly, the grounds for the order may be stated in a letter or in some other document which accompanies an order when written notice of an order is given.

[56] In my view, the grounds in this situation include a description of all the relevant anti-competitive acts and a detailed description of the harm which the Commissioner considers justifies an order. I should note here that, in my view, a recital of the provisions of paragraph 104.1(1)(*b*) of the Act does not meet the requirement to set out the grounds for an order.

[57] Having reviewed subsection 104.1(1), I have concluded that an order must include the following:

(a) a statement that the order is against a person operating a domestic air service as defined in subsection 55(1) of the *Canada Transportation Act*;

(b) a clear description of the conduct prohibited or the steps required by the order;

(c) a statement that, in the Commissioner's opinion, the conduct prohibited could constitute an anti-competitive act;

(d) a statement that the Commissioner has started an inquiry into the possibility of reviewable conduct under section 79 of the Act; and

(e) a statement that the Commissioner considers that the harm identified in subparagraph 104.1(1)(*b*)(i) is likely in the absence of a temporary order.

[58] In my view, the Original Order met these requirements. However, although the Order is valid, the Commissioner breached subsection 104.1(3) of the Act when he failed to provide adequate grounds for the Order. Air Canada was entitled to a detailed and meaningful description of the alleged harm and the relevant anti-competitive act(s). In future, this information must either be included in an order or made available in a document provided to an affected party when notice is given of an order (if, in future, the Commissioner failed to provide the grounds

for an order, an affected party could make an application under subsection 104.1(7) of the Act and then bring a motion asking the Tribunal to order the Commissioner to provide the required grounds).

D. THE ORDER DOES NOT ALLEGE AN ANTI-COMPETITIVE ACT

[59] Air Canada alleged that, because the conduct described in the Original Order is not an anti-competitive act, and because the Order must state which anti-competitive act is at issue, the Order is void.

[60] I agree with Air Canada that the allegation that "Air Canada has reduced its fares to target CanJet" in the Original Order is not a description of an anti-competitive act. In my view, this allegation is plainly a partial description of the conduct engaged in by Air Canada which the Commissioner concluded could constitute an anti-competitive act. He also clearly considered the L14EASTS fares or other similar fares to be part of the description of the problematic conduct. However, since I have concluded that the Commissioner was not required to identify an anti-competitive act in the Order, his failure to do so does not make the Order void.

E. THE HARM WHEN THE ORIGINAL ORDER WAS MADE

[61] Air Canada submitted that CanJet's complaints to the Commissioner about the harm caused by the L14EASTS fares lacked credibility in light of the conflicting statements made by CanJet officials to the Commissioner and to the media. For example, on September 6, 2000, in a *National Post* newspaper article describing Air Canada's new L14EASTS fares, Mark Winders, CanJet's Chief Operating Officer, commented that:

> We fully expected it [competition from Air Canada]. In some ways we're competing but, in other ways, we're in a different market segment than Air Canada.

[62] As well, on October 11, 2000, one day before the Commissioner issued the Original Order, Mr. Rowe told the *Halifax Herald* newspaper that:

> We are not going out of business. Our loads are increasing and we are getting a lot of support. CanJet is here to stay, and it would be helpful if the government got Air Canada off our backs.

Air Canada correctly observed that these two public statements contradicted CanJet's complaints to the Commissioner about the harm it was suffering due to the introduction of the L14EASTS fares.

[63] I have concluded that CanJet's optimistic public statements cannot be taken at face value. It is obvious that, from a public relations perspective, CanJet could not admit that it was in trouble for fear of deterring passengers who would otherwise have booked flights. However, the fact that CanJet's officials must say what it takes to stay in business suggests that CanJet's allegations of harm must be closely scrutinized. In circumstances such as these, when there is a

possibility that CanJet's claims are exaggerated, the Tribunal needs more than imprecise allegations to satisfy it about the likely existence of significant harm to CanJet.

[64] It is evident from the record that, when he made the Original Order, the Commissioner had little detailed information about the impact of the L14EASTS fares on CanJet's revenues from the Five Restrained Routes. This is not surprising because, by October 12, 2000, when the Original Order was made, CanJet had been flying for less than six weeks (since September 5, 2000) and Air Canada's passengers had only flown on L14EASTS fares for about three weeks (since September 15, 2000).

[65] In the period after September 7, 2000, when CanJet first made its complaint about the L14EASTS fares, CanJet provided the Commissioner with financial information, including its budgets and revenue projections, in order to demonstrate how it was being harmed by the L14EASTS fares. However, this information was not before the Tribunal. Instead, it was referred to in general terms in affidavits sworn by David W. McAllister on the Commissioner's behalf and by Kenneth C. Rowe on behalf of CanJet. Lise Fournel on behalf of Air Canada also commented on the harm alleged by CanJet. This evidence is considered below.

(1) CanJet had to allocate more seats to its Reduced Fares

[66] Mr. Rowe's affidavit stated that the introduction by Air Canada of the L14EASTS fares "had a direct and substantial adverse impact on CanJet's cash flow". According to Mr. Rowe, CanJet was forced to respond to the L14EASTS fare by "substantially increasing its allocation of seats to the lowest fare category". This in turn "significantly" drove down revenues and caused "significant" financial losses. As mentioned earlier, Mr. Rowe said that CanJet's Reduced Fares were introduced in response to competition from Royal Airlines but, because Royal made relatively few seats available at its Lower Fares, CanJet was required to make relatively few seats available at its Reduced Fares to compete with Royal (I should observe that it is not clear how Mr. Rowe knew how many seats Royal offered at its Lower Fares). Mr. Rowe stated that, in contrast, the introduction of Air Canada's L14EASTS fares required CanJet to "significantly" increase its allocation of seats at its Reduced Fares. This change, he said, had a "substantially greater" adverse financial impact on CanJet than was caused by CanJet's response to Royal.

[67] However, neither the Commissioner nor CanJet provided any figures to support Mr. Rowe's bald allegations. The following information would have been helpful:

(a) CanJet's total seat capacity on the Five Restrained Routes prior to October 12, 2000;

(b) the number of seats made available for sale and sold at CanJet's Reduced Fares in response to Royal's Lower Fares (expressed in total numbers and as a percentage of CanJet's total capacity);

(c) the number of seats made available for sale and sold at CanJet's Reduced Fares in response to Air Canada's L14EASTS fares (again expressed in total numbers and as a percentage); and

(d) reasonable estimates of any losses resulting from the allocation of seats at the Reduced Fares in response to competition from the L14EASTS fares and in response to Royal's Lower Fares, when compared to projected revenues.

[68] Without evidence of this kind, I was unable to distinguish the harm which may have been done to CanJet by its response to competition from Royal from any harm to CanJet caused by Air Canada's L14EASTS fares. Accordingly, I am not "satisfied" pursuant to subsection 104.1(7) that CanJet, by offering an undisclosed number of additional seats at its Reduced Fares in response to the L14EASTS fares, would likely have suffered the significant loss of revenue required by subparagraph 104.1(1)(*b*)(ii).

(2) CanJet suffered a revenue shortfall on the Five Restrained Routes

[69] Mr. Rowe also stated in his affidavit that CanJet suffered significant revenue shortfalls on the Five Restrained Routes in the period prior to October 12, 2000. Those revenue shortfalls were based on CanJet's revenue projections. Mr. Rowe acknowledged that other factors contributed to the shortfall, but he stated that it was "predominantly attributable" to Air Canada's fare reductions. Mr. Rowe further alleged that, if the revenue shortfall was projected over the course of CanJet's first year of operations, it "would have contributed" to transforming the company's projected first-year profit into a significant projected total loss.

[70] In this case, dollar figures were provided but, again, I am not satisfied that the harm described was likely attributable to the competition provided by the L14EASTS fares. CanJet's calculations of revenue shortfall were based on financial projections but, as Air Canada pointed out, the Tribunal had no information about the assumptions behind the projections. Of fundamental importance was the question of whether the projections were based on CanJet's Announced Fares or whether they were revised once CanJet introduced its Reduced Fares. It would also have been helpful to know whether CanJet factored in competition from Air Canada and/or Royal when it set its Announced Fares. The Tribunal also expected that CanJet would have provided an analysis breaking out the causes of the alleged revenue shortfall. These might have included matters such as unrealistic initial projections, poor business decisions, competition from Royal, and competition from Air Canada.

[71] I should note here that CanJet suggested that the Tribunal should not consider Air Canada's criticisms of CanJet's revenue projections because Air Canada had not cross-examined Mr. Rowe on his affidavit. However, I have not found this submission persuasive. In my view, Air Canada could not be expected to have cross-examined in the circumstances of this case. Time was short and CanJet would undoubtedly have refused to answer Air Canada's questions on the grounds of commercial confidentiality.

(3) Air Canada's conduct destroyed CanJet's "launch momentum"

[72] Mr. Rowe emphasized in his affidavit that CanJet relied heavily on the media attention and marketing benefit of its launch as the "preferred scheduled discount alternative to Air Canada". He stated that Air Canada's "strategic conduct" largely destroyed CanJet's "launch momentum".

[73] It is not at all clear that Air Canada caused the harm alleged by Mr. Rowe. The evidence before the Tribunal suggested that the competition from Royal was primarily responsible for interfering with CanJet's launch as the preferred alternative to Air Canada. As described above, only days before CanJet began its flights, Royal lowered its fares on seven routes that CanJet had announced it planned to serve. CanJet almost immediately responded with its Reduced Fares. Other evidence, in the form of newspaper articles, suggested that Royal and CanJet were direct competitors in the discount airline market, at least in the eyes of the public. On this evidence, I am not satisfied that CanJet "likely" suffered irreparable harm to its image and reputation because of Air Canada's unadvertised introduction of the L14EASTS fares.

(4) Sales of Air Canada's discount "L" class fares increased

[74] In early October, the Commissioner received from Air Canada advanced booking information and incomplete information about the number of passengers who actually flew on L14EASTS fares on the Five Restrained Routes for the period from September 15 to 25, 2000. This was the only data about Air Canada's sales of L14EASTS fares which was available to the Commissioner prior to the Original Order. An economist from the Competition Bureau (the “Bureau”) reviewed the data and concluded that, for some of the flights which offered L14EASTS fares, the share of bookings in the "L" class of fares (The L class is Air Canada’s discount fare class. It includes a large number of discount fares such as the L14EASTS fares.) "increased dramatically" in the latter part of September compared to the first two weeks of the month (prior to the introduction of the L14EASTS fares). The economist also noted that L14EASTS fares comprised a "significant fraction" of the bookings of the "L" class of fares. The inference which could be drawn from this evidence was that the "dramatic" increase in "L" class bookings in the latter part of September was caused primarily by the introduction of the L14EASTS fares. Unfortunately, from the information available, I had no way of satisfying myself that the actual number of seats sold to passengers who flew on L14EASTS fares on the Five Restrained Routes was large enough to have been likely to cause harm to CanJet at the time of the Original Order, and I was unable to determine the magnitude of the numbers described by phrases such as "dramatic increase" or "significant fraction". I should also add that I was not convinced of the relevance of actual L14EASTS sales numbers since I understood CanJet to say that the number of seats made available at L14EASTS fares, rather than the number sold, was the cause of the harm to CanJet.

[75] For all these reasons, the Tribunal is not satisfied that harm to CanJet was likely to have existed on October 12, 2000. However, this is not the end of the Tribunal's inquiry on the existence of harm. As noted earlier, subparagraph 104.1(1)(*b*)(ii) also requires the Tribunal to examine all the available evidence to determine whether the harm described in the subparagraph is likely to exist at the hearing date. This requires a review of evidence that was not available to the Commissioner at the time the Original Order was made.

F. HARM AT THE DATE OF HEARING

(1) The Windsor Routes

[76] On October 24, 2000, CanJet announced that it was discontinuing its flights on the Windsor Routes effective November 26, 2000. Mr. Rowe's affidavit explained that these routes were being cancelled because of "low passenger loads". Mr. Rowe also claimed that Air Canada's L14EASTS fares had "contributed" to CanJet's inability to make the Windsor Routes viable.

[77] However, the evidence from the Commissioner indicates that the failure of CanJet's Windsor Routes was largely unrelated to competition from Air Canada. Mr. McAllister's affidavit stated that the suspension of the L14EASTS fares by the Original Order "did not have a significant effect on CanJet's performance on these two routes". An October 31, 2000, memorandum to the Commissioner from a deputy commissioner noted that CanJet's performance on the two Windsor Routes "continued to be very poor" even after the Original Order was implemented. The deputy commissioner concluded that, contrary to CanJet's submissions to the Commissioner, the L14EASTS fares were not having "any discernible impact" on the Windsor Routes. Although CanJet had asked that the Extended Order include the Windsor Routes, the Commissioner rejected CanJet's request.

[78] Air Canada also put into evidence a *Globe and Mail* article dated October 24, 2000, wherein an analyst with Yorkton Securities in Toronto was quoted as attributing the demise of CanJet's Windsor Routes, and CanJet's revenue woes generally, to competition from Royal. He was quoted as concluding that "CanJet appeared to be losing the discount airline war in Eastern Canada".

[79] Air Canada said that the failure of CanJet's Windsor Routes, which the Commissioner accepted was not caused by the L14EASTS fares, showed that all CanJet's allegations of harm based on Air Canada's L14EASTS were unreliable and ought to be rejected. I accept that CanJet's complaints are suspect and note that, after the failure of the Windsor Routes, the Commissioner was required to take, and presumably took, an extremely critical approach to CanJet's allegations about the Three Restrained Routes. However, I do not have sufficient information to conclude at this time that CanJet has misled the Commissioner about the harm caused to its operations on the Three Restrained Routes.

(2) The number of L14EASTS fares sold

[80] The Fournel affidavit of October 31, 2000, provided the Bureau for the first time with detailed and complete information about the number of passengers who booked and flew on L14EASTS fares in the September 15-30 period. The affidavit described the total number of passengers who flew on L14EASTS fares on the Five Restrained Routes and assigned a number to each route. Air Canada also showed that the number of passengers who flew on L14EASTS fares in this period was a small percentage of Air Canada's capacity on the Five Restrained Routes. Air Canada concluded from this evidence that the relatively insignificant number of L14EASTS fares sold was unlikely to have caused CanJet significant harm. In contrast, the McAllister affidavit stated that, in the Commissioner's view, the data revealed a "significant upward trend" in the number of passengers travelling on L14EASTS fares.

[81] However, CanJet's position was that the mere existence of the L14EASTS fares, rather than the number sold, was what forced CanJet to offer more Reduced Fares. Air Canada's information about the number of L14EASTS fares sold will be relevant to the issue of whether Air Canada actually sold those fares below avoidable cost, but on the issue of harm, it is my conclusion that this evidence is neutral.

(3) CanJet's booking revenues

[82] The strongest evidence about whether CanJet suffered harm from the L14EASTS fares came from CanJet's figures which showed that its booking revenues increased after October 12, 2000. The McAllister affidavit contained information about CanJet's booking revenues on the Three Restrained Routes for the 12-day period immediately after the Original Order. Those numbers indicated that CanJet's booking revenues after the Original Order were significantly greater than its booking revenues in the 12 days which preceded the Original Order. The source of this information was a letter of October 26, 2000, from John Bodrug, counsel to CanJet, to the Commissioner which enclosed CanJet's comparative booking revenues for the October 1-12 and 13-24 periods (the "Bodrug Letter").

[83] The Bodrug Letter revealed that, as of October 15, 2000, CanJet added an extra daily flight in each direction on two of the Three Restrained Routes. CanJet admitted that some of the increase in booking revenues was caused by this increased capacity. However, Air Canada suggested that the increases in CanJet's booking revenues on these two routes in the period October 13-24 were primarily attributable to CanJet's increased capacity.

[84] Counsel for Air Canada prepared a chart based on data attached to the Bodrug Letter which showed that, on the two routes which received added capacity, the number of passengers travelling on those routes in the October 13-24 period also increased. However, on the route which did not have any increased capacity, the number of passengers travelling declined. Air Canada submitted that this chart revealed a "stark" correlation between the increases in CanJet's booking revenues and its load capacities in the October 13-24 period. Air Canada said that this meant that CanJet's increased capacity, and not the Original Order, was the principal cause of CanJet's increased booking revenues in the two-week period after the Original Order was made.

[85] I cannot agree with Air Canada's submissions on this point. Clearly, CanJet's increased capacity after October 15, 2000, contributed in part to its increase in booking revenues in the October 13-24 period. That much is admitted. But Air Canada's argument fails to account for the increase in booking revenues for the route that did not have any capacity increase. As well, Air Canada's submissions assume that the booking revenues from the October 13-24 period can be compared to CanJet's loads in the same period. Since CanJet's fares have no advance booking restrictions, some of its booking revenues in the October 13-24 period were likely for flights flown in the same time period. However, it seems probable that many, and perhaps most, of CanJet's passengers (who were described as primarily "leisure travellers") were booking flights more than two weeks in advance. In other words, it is possible that most of the booking revenues received by CanJet for the October 13-24 period were for flights scheduled after October 24. Similarly, many of the passengers who flew in the October 13-24 period may have booked their

flights prior to October 12. Accordingly, it is my view that passenger loads and booking revenues do not reliably correlate over a two-week period.

[86] The Bodrug Letter also noted that CanJet's overall sales jumped significantly on October 13th, the day after the Original Order was made. This was prior to CanJet adding additional capacity on two of the Three Restrained Routes. In my view, CanJet's booking revenues increased on October 13th either because more passengers booked flights or because CanJet raised its prices, either directly by charging more for a ticket or indirectly by offering fewer seats at its Reduced Fares. The Bodrug Letter hinted at the latter explanation, noting that the "mix of rates at which the seats are sold can have a significant impact on CanJet's revenue and long-term viability". However, there was no clear evidence which explained the October 13th increase in booking revenues.

[87] Leaving aside increased capacity, the other causes of increased booking revenues, such as fare increases or changes in the "mix of rates", were likely possible because of the absence of Air Canada's L14EASTS fares. On balance, I am satisfied that the substantial increase in booking revenues in the October 13-24 period was attributable primarily to the Original Order's prohibition of the L14EASTS fares, and I have therefore concluded that the harm identified in subparagraph 104.1(1)(*b*)(ii) is likely to exist in the absence of the Order. In particular, I am satisfied that, in the absence of the Order, CanJet would likely suffer a significant loss of revenue.

G. "ANY SIMILAR FARES"

[88] Until the Commissioner describes the prices and conditions which he considers could constitute "similar fares", it is my view that it would be impossible to determine whether any other fares charged by Air Canada were similar to the L14EASTS fares. In these circumstances, the provision of the Order relating to "any similar fares" is vague and therefore unenforceable.

H. THE DURATION OF THE ORDER

[89] Pursuant to paragraph 104.1(7)(*a*), the Tribunal may extend an order for a maximum of 60 days from the date on which an order is confirmed. Air Canada asked that the Order be extended only until December 1, 2000, for the following reasons:

(a) just prior to the hearing, the Commissioner received from Air Canada documents which it obtained pursuant to an order of October 24, 2000, under section 11 of the Act (non-confidential Exhibit "B"). The Commissioner's material filed in support of his application for the section 11 order took the position that the documents he was requesting would give him sufficient information to decide whether to file an application under section 79 of the Act. Air Canada submitted that December 1, 2000, gave the Commissioner ample time to review the documents and decide whether to file a section 79 application; and

(b) Air Canada also noted that, if Air Canada had not challenged the Order, it would have expired on December 1, 2000, unless the Commissioner had extended it for another 30 days (until December 31, 2000) as he was entitled to do. Air Canada submitted that it should not be

penalized for bringing this application and thereby facing the prospect of having the Order extended beyond December 31, 2000.

[90] The Commissioner asked that the Order be extended until December 31, 2000, to allow his office time to review and analyze the information which had just been received from Air Canada.

[91] CanJet initially took the position that the Order should be extended beyond December 31, 2000, for the full 60 days allowed under subsection 104.1(7), but subsequently indicated that it would support the Commissioner's position on this issue.

[92] In this case, the Tribunal is confirming an Order in circumstances in which a present risk of harm has been identified. In this context, it is my view that the Tribunal should be concerned primarily with the question of the time the Commissioner needs in order to be in a position to decide whether or not to file an application under section 79 of the Act. The Commissioner has the onus of satisfying the Tribunal that the time he seeks is reasonable. In this case, considering the Commissioner's need to review the information his office has just received from Air Canada, I am satisfied that the Order should be extended to December 31, 2000.

IV CONCLUSION

[93] For all these reasons, an order was made on November 24, 2000, which confirmed the Order until December 31, 2000, but varied it to delete the phrase "any similar fares".

DATED at Vancouver, British Columbia. this 7th day of December, 2000.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Sandra J. Simpson

[94] SCHEDULE A: Order of November 24, 2000

Reference: *Air Canada v. Commissioner of Competition*, 2000 Comp. Trib. 24
File no.: CT2000004
Registry document no.: 23

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an application by Air Canada pursuant to subsection 104.1(7) of the *Competition Act,* R.S.C. 1985, c. C-34, as amended.

B E T W E E N:

Air Canada
(applicant)

and

The Commissioner of Competition
(respondent)

and

I.M.P. Group Ltd. (CanJet Airlines)
(affected party)

Dates of hearing: 20001116 to 20001117
Member: Simpson J. (presiding)
Date of order: 20001124
Order signed by: Sandra J. Simpson

ORDER

[1] UPON APPLICATION by Air Canada pursuant to section 104.1(7) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act"), for an order setting aside a temporary order made by the Commissioner of Competition (the "Commissioner") on October 12, 2000 and extended by further order of the Commissioner dated October 31, 2000 (together the "Order");

[2] AND UPON hearing counsel for all parties on November 16 and 17, 2000, in Ottawa, Ontario;

[3] AND UPON determining the following:

(a) that the Competition Tribunal has jurisdiction under section 104.1(7) to determine whether the Order is valid and whether the harm described in section 104.1(1)*(b)*(ii) existed when the Order was first made or is likely to exist at the present time;

(b) that the Order is valid because the Commissioner started an inquiry pursuant to section 10(1)*(a)* of the Act on September 28, 2000, and expressed in the Order his opinion that Air Canada's conduct could constitute an anti-competitive act. Further, this was an opinion which was open to the Commissioner on the evidence before him;

(c) that, on an application under section 104.1(7) of the Act, the Tribunal is not to consider the correctness or reasonableness of the Commissioner's opinion about whether Air Canada's conduct could constitute an anti-competitive act. Its consideration is limited to the question of whether the opinion is patently unreasonable. As well, the Tribunal is not to examine the merits of the Commissioner's decision to continue an inquiry started pursuant to section 10(1)*(a)* of the Act after receiving a six resident complaint under section 9(1) of the Act. The Tribunal need only be satisfied of the existence of an inquiry;

(d) that there is no requirement in section 104.1(3) that the grounds for the Order be stated in the Order. Accordingly, the anti-competitive act which, in the Commissioner's opinion could have occurred need not be specified in the Order. To be valid, the Order must only describe the conduct which, in the Commissioner's opinion, could constitute an anti-competitive act;

(e) that the term "likely" in section 104.1(1) and (7) is to be given its plain meaning of "probable" or "more probable than not";

(f) that the harm identified in section 104.1(1) and (7) must, in this application, relate to Air Canada's offering of the L14EASTS fares;

(g) that, in this case, the Tribunal is not satisfied that the harm described in section 104.1(1)*(b)*(ii) existed at the time the Order was made on October 12, 2000. However, the Tribunal is satisfied that the harm described in section 104.1(1)*(b)*(ii) is now likely to exist;

(h) that the prohibition in the Order which prevents Air Canada from offering "any similar fares" is imprecise and therefore unenforceable;

[4] NOW THEREFORE for reasons which will be issued shortly, this Tribunal orders:

(a) that the Commissioner's order of October 12, 2000, as extended by his further order of October 31, 2000, is hereby varied, pursuant to section 104.1(7)*(a)* of the Act, to delete the reference to "any similar fares", but is otherwise confirmed for a period which is to expire at midnight Eastern Standard Time on December 31, 2000;

(b) That I.M.P. Group Limited (CanJet Airlines) is hereby added as a party.

DATED at Vancouver, B.C. this 24th day of November, 2000.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Sandra J. Simpson

APPEARANCES:

For the applicant:

Air Canada

Katherine L. Kay
Eliot N. Kolers
Lawson A.W. Hunter

For the respondent:

The Commissioner of Competition

Brian J. Saunders
Donald J. Rennie
Donna Blois

For the affected party:

I.M.P. Group Ltd. (CanJet Airlines)

Neil Finkelstein
Brian N. Radnoff
Mark Katz

[95] SCHEDULE B: Full text of section 104.1

TEMPORARY ORDER

104.1(l) The Commissioner may make a temporary order prohibiting a person operating a domestic service, as defined in subsection 55(l) of the *Canada Transportation Act*, from doing an act or a thing that could, in the opinion of the Commissioner, constitute an anti-competitive act or requiring the person to take the steps that the Commissioner considers necessary to prevent injury to competition or harm to another person if

(*a*) the Commissioner has commenced an inquiry under subsection 10(1) in regard to whether the person has engaged in conduct that is reviewable under section 79; and

(*b*) the Commissioner considers that in the absence of a temporary order

(i) injury to competition that cannot adequately be remedied by the Tribunal is likely to occur, or

(ii) a person is likely to be eliminated as a competitor, suffer a significant loss of market share, suffer a significant loss of revenue or suffer other harm that cannot be adequately remedied by the Tribunal.

NOTICE NOT REQUIRED

(2) The Commissioner is not obliged to give notice to or receive representations from any person before making a temporary order.

NOTICE TO PERSONS AFFECTED

(3) On making a temporary order, the Commissioner shall promptly give written notice of the order, together with the grounds for it, to every person against whom it was made or who is directly affected by it.

DURATION OF TEMPORARY ORDER

(4) Subject to subsections (5) and (6), a temporary order has effect for 20 days.

EXTENSION AND REVOCATION

(5) The Commissioner may extend the 20-day period for one or two periods of 30 days each or may revoke a temporary order. The Commissioner shall promptly give written notice of the extension or revocation to every person to whom notice was given under subsection (3).

WHEN APPLICATION MADE TO TRIBUNAL

(6) If an application is made under subsection (7), the temporary order has effect until the Tribunal makes an order under that subsection.

CONFIRMATION

(7) A person against whom the Commissioner has made a temporary order may, within the period referred to in subsection (4), apply to the Tribunal to have the temporary order varied or set aside and the Tribunal shall

(*a*) if it is satisfied that one or more of the conditions set out in paragraph (l)(*b*) existed or are likely to exist, make an order confirming the temporary order, with or without variation as the Tribunal considers necessary and sufficient to meet the circumstances, and fixing the effective period of its order for a maximum of 60 days after the day on which it is made; and

(*b*) if it is not satisfied that one or more of the conditions set out in paragraph (l)(*b*) existed or are likely to exist, make an order setting aside the temporary order.

NOTICE

(8) The applicant shall give written notice of the application to every person to whom notice was given under subsection (3).

COMMISSIONER IS RESPONDENT

(9) In the event of an application under subsection (7), the Commissioner is the respondent.

REPRESENTATIONS

(10) At the hearing of an application under subsection (7), the Tribunal shall provide the applicant, the Commissioner and any person directly affected by the temporary order with a fall opportunity to present evidence and make representations before the Tribunal makes an order under that subsection.

PROHIBITION OF EXTRAORDINARY RELIEF

(11) Except as provided for by subsection (7),

(*a*) a temporary order made by the Commissioner shall not be questioned or reviewed in any court; and

(*b*) no order shall be made, process entered or proceedings taken in any court, whether by way of injunction, *certiorari*, *mandamus*, prohibition, *quo warranto*, declaratory judgment or otherwise, to question, review, prohibit or restrain the Commissioner in the exercise of the jurisdiction granted by this section.

POWERS AND DUTIES NOT AFFECTED BY ORDER

(12) The making of a temporary order does not in any way limit, restrict or qualify the powers, duties or responsibilities of the Commissioner under this Act, including the Commissioner's power to conduct inquiries and to make applications to the Tribunal in regard to conduct that is the subject of the temporary order.

REGISTRATION OF ORDERS
(13) The Commissioner shall file each temporary order with the Registry of the Tribunal. Once registered, the order is enforceable in the same manner as an order of the Tribunal.

DUTY OF COMMISSIONER
(14) When a temporary order is in effect, the Commissioner shall proceed as expeditiously as possible to complete the investigation arising out of the conduct in respect of which the temporary order was made.

IMMUNITY
(15) No action lies against Her Majesty in right of Canada, the Minister, the Commissioner, any Deputy Commissioner, any person employed in the public service of Canada or any person acting under the direction of the Commissioner for anything done or omitted to be done in good faith under this section.

[96] SCHEDULE C: Original Order and Extended Order

[96] SCHEDULE C: Original Order and Extended Order

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER of an inquiry pursuant to subsection 10(1) of the *Competition Act* into the *conduct of Air Canada in the Eastern Canadian airline market.*

ORDER UNDER SECTION 104.1 OF THE *COMPETITION ACT*

THE COMMISSIONER has commenced an inquiry pursuant to subsection 10(1) of the *Competition Act* (the "Act") in regard to whether Air Canada has engaged in conduct that is reviewable under section 79;

AND THE COMMISSIONER is satisfied that Air Canada is operating a domestic service as defined in subsection 55(1) of the *Canada Transportation Act;*

AND THE COMMISSIONER considers that in the absence of a temporary order CanJet is likely to be eliminated as a competitor on specific routes and suffer other harm that cannot be adequately remedied by the Tribunal;

AND THE COMMISSIONER is of the opinion that Air Canada has engaged in conduct which could constitute anti-competitive acts in that Air Canada has reduced its fares to target CanJet on the following five city-pair routes:

- Halifax-Ottawa
- Halifax-Montreal
- Halifax-Saint John's
- Toronto-Windsor
- Ottawa-Windsor;

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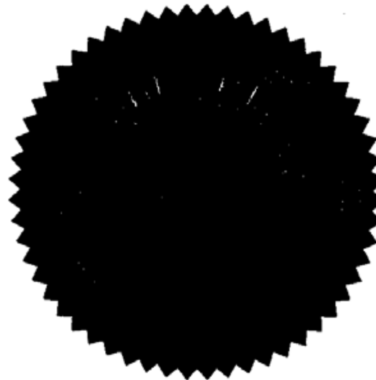
OTTAWA, ONT. # 1(a)

AND BEING SATISFIED that the requirements of subsection 104.1(1) have been met, the Commissioner hereby orders that Air Canada is prohibited from directly or indirectly offering or selling L14EASTS fares, or any similar fares, on the above routes.

This order has effect for 20 days from this date.

Signed at Hull, in the Province of Quebec, this 12th day of October 2000



Commissioner of Competition

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER of an inquiry pursuant to subsection 10(1) of the *Competition Act* into the conduct of Air Canada in the Eastern Canadian airline market.

EXTENSION OF TEMPORARY ORDER
UNDER SUBSECTION 104.1(5) OF THE *COMPETITION ACT*

THE COMMISSIONER having issued an order on October 12, 2000 pursuant to section 104.1 *Competition Act* (the "Act");

THE COMMISSIONER hereby orders that the order issued on October 12, 2000 be extended for the following routes:

- Halifax-Ottawa
- Halifax-Montreal
- Halifax-Saint John's

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OCT 31 2000
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OTTAWA, ONT. 12(a)

THE COMMISSIONER hereby orders that Air Canada is prohibited from directly or indirectly offering or selling L14EASTS fares or any similar fares on the above routes.

The order has effect for 30 days from the first of November 2000.

Signed at Hull, in the Province of Quebec,
this 31st of October 2000

Commissioner of Competition

APPEARANCES:

For the applicant:

Air Canada

Katherine L. Kay
Eliot N. Kolers
Lawson A.W. Hunter, Q.C.

For the respondent:

The Commissioner of Competition

Brian J. Saunders
Donald J. Rennie
Donna Blois

For the affected party:

I.M.P. Group Limited (CanJet Airlines)

Neil Finkelstein
Brian N. Radnoff
Mark Katz