CT - 88 / 1

IN THE MATTER OF an application by the Director of Investigation and Research under subsection 64(1) of the *Competition Act*, R.S.C. 1970, c. C-23, as amended;

AND IN THE MATTER OF a Limited Partnership formed to combine the operations of the Reservec and Pegasus computer reservation systems;

AND IN THE MATTER OF The Gemini Group Automated Distribution Systems Inc.;

AND IN THE MATTER OF an application by the Director of Investigation and Research under section 106 of the *Competition Act*, R.S.C., 1985, c. C-34, as amended,to vary the Consent Order of the Tribunal dated July 7, 1989.

B E T W E E N :

The Director of Investigation and Research

Applicant

- and -

Air Canada
PWA Corporation
Canadian Airlines International Ltd.
The Gemini Group Limited Partnership
The Gemini Group Automated Distribution Systems Inc.
Covia Canada Corp.
Covia Canada Partnership Corp.

Respondents

- and -

Consumers' Association of Canada
American Airlines, Inc.
Attorney General of Manitoba
Alliance of Canadian Travel Associations
Bios Computing Corporation
IBM Canada Ltd.
VIA Rail Canada Inc.
Unisys Canada Inc.
Council of Canadian Airlines Employees
Attorney General of Alberta

Intervenors

REASONS FOR ORDER VARYING CONSENT ORDER DATED JULY 7, 1989

Date of Hearing:

November 15-19, 1993

Presiding Member:

The Honourable Mr. Justice Barry L. Strayer

Lay Members:

Dr. Frank Roseman
Mr. L. Jack Smith

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Director of Investigation and Research

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The Gemini Group Limited Partnership and The Gemini Group Automated Distribution Systems Inc.

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COMPETITION TRIBUNAL

REASONS FOR ORDER VARYING CONSENT ORDER DATED JULY 7, 1989

The Director of Investigation and Research

v.

Air Canada et al.

I. INTRODUCTION

The Tribunal issued its order in this matter on November 24, 1993. In that order we indicated that reasons would follow shortly. These are those reasons.

In these reasons we do not intend to repeat the background information and findings of fact set out in our Reasons and Order dated April 22, 1993.[1] Although that decision was overturned on appeal to the Federal Court of Appeal on the question of the Tribunal's jurisdiction under section 106 of the *Competition Act* ("Act"),[2] a related cross-appeal on the Tribunal's "alternate" findings of fact was dismissed. The Court of Appeal set aside the decision of the Tribunal and returned the matter to us for "reconsideration on the basis that the condition precedent to the exercise of the power to

[1] *Director of Investigation and Research v. Air Canada* (1993), 49 C.P.R. (3d) 7, [1993] C.C.T.D. No. 14 (QL).

[2] R.S.C. 1985, c. C-34.

rescind or vary has been met, but that the power to rescind or vary may only be exercised in accordance with the provisions of section 92 of the *Competition Act*."[3]

In a subsequent order of September 29, 1993, the Tribunal set out its interpretation of the issues to be addressed on the reconsideration in order to comply with the direction of the Court of Appeal.[4] The Tribunal concluded that the scope of the hearing on the reconsideration should be confined to two questions: whether the merger, as modified by the Consent Order dated July 7, 1989,[5] is now likely to prevent or lessen competition substantially in the domestic airline industry (referred to as the "causation" issue) and the choice and terms of any remedy (the "remedies" issue). On appeal of that order, the Court of Appeal confirmed that the Tribunal was correct in so construing the reach of the reconsideration.[6]

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[3] *Director of Investigation and Research v. Air Canada* (30 July 1993), A-302-93 at 1-2 (Judgment), leave to appeal denied *(sub nom. The Gemini Group Limited Partnership v. Director of Investigation and Research)* (14 October 1993) 23709 (S.C.C.).

[4] *Director of Investigation and Research v. Air Canada* (29 September 1993), CT8801/838, [1993] C.C.T.D. No. 17 (QL).

[5] *Director of Investigation and Research v. Air Canada* (1989), 27 C.P.R. (3d) 476 (reported with reasons), [1989] C.C.T.D. No. 30 (QL) (Comp. Trib.).

[6] *Air Canada v. Director of Investigation and Research* (9 November 1993), A-576-93 (F.C.A.).

II. CAUSATION: IS THE MERGER LIKELY TO LESSEN AIRLINE COMPETITION?

The Tribunal in its order of September 29, 1993 identified this as an issue for further consideration at the rehearing without deciding whether it had already been determined by the Tribunal or the Federal Court of Appeal, explicitly or implicitly.

This issue has two aspects: does the hosting contract dated June 30, 1989,[7] binding Canadian Airlines International Ltd. ("Canadian") to buy hosting services from Gemini[8] until at least 1999, constitute part of the "merger" so as to make section 92 of the Act relevant; and if so, is it this aspect of the merger which is lessening, or likely to lessen, airline competition or must this effect be attributed to other factors? The Director relies on this hosting contract as part of a merger and as the relevant source of the lessening of airline competition which the Tribunal has said would flow from the collapse of Canadian.

On the rehearing before the Tribunal there was some debate as to whether it had already been decided that the hosting contract was part of the merger. In its decision of April 22, 1993 the difference of opinion in the Tribunal panel was as to whether the purposes of the 1989 Consent Order included the protection of an airline duopoly and whether the danger to that duopoly was

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[7] Exhibit A-I-43.

[8] The term "Gemini" is used in these reasons to refer collectively to both the limited partnership (The Gemini Group Limited Partnership) and the general partner (The Gemini Group Automated Distribution Systems Inc.). If necessary in the context to refer to only one or the other, the "limited partnership" or the "general partner" is specifically referred to.

relevant to the use of the power given by section 106 of the Act to vary a previous order. On the question of hosting, however, the majority observed that the Consent Order "permitted, but did not require . . . the continuation of the hosting of both airlines in Gemini until 1999."[9] The majority thus recognized that though the hosting contract was not specifically dealt with in the Consent Order, it was part of the business arrangements connected with the merger implicitly permitted by that order. For his part, Dr. Roseman in his dissent on the application of section 106 considered hosting to be an integral part of both vertical and horizontal integration involved in the merger.[10] In the Federal Court of Appeal, MacGuigan J.A. specifically found hosting to be an integral part of the merger.[11] It is unclear whether the other two judges of that panel concurred on that point but they clearly did not hold to the contrary. It is unnecessary to consider further these previous decisions.

It has not been disputed that the combination of the two airlines' internal reservation systems through Gemini constituted a merger as defined by section 91 of the Act. It appears from the documentation surrounding the merger that hosting was integral to that total business arrangement. The Memorandum of Understanding between Air Canada and PWA Corporation ("PWA") of April 1987 provided for the assignment of the airlines' reservation systems to Gemini and their contracting for "exclusive hosting" from Gemini.[12] Their partnership agreement of June 1, 1987 contemplated

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[9] *Supra* note 1 at 24.

[10] *Ibid.* at 30-31.

[11] *Supra* note 3 at 19 (Reasons of MacGuigan J.A.).

[12] Exhibit R-IA-1 at 1.

Air Canada and Canadian obtaining "exclusive airline hosting service" from the partnership.[13] This commitment was repeated again in their Computer Reservations System Contract of that date.[14] After the issue of the Consent Order on July 7, 1989, and after the addition of Covia Canada Partnership Corp. and Covia Canada Corp. (collectively "Covia") to the partnership, a new hosting contract was signed by Gemini, Air Canada and Canadian in which the two airlines continued the undertaking to give Gemini exclusive hosting rights.[15] The Tribunal therefore concludes that hosting by Gemini was from the outset integral to the merger of the Reservec and Pegasus systems of the two airlines. The 1989 hosting contract is simply a continuation and affirmation of that relationship and must equally be seen as a part of the merger of the two systems, it not being in dispute that long-term commitments are normal in hosting arrangements.

It then remains to be considered whether the merger, through this contract, "prevents or lessens, or is likely to prevent or lessen, competition substantially" as required before an order can be made under section 92, the only source (according to the Court of Appeal) of our power to vary the 1989 Consent Order.

We have been invited to read into section 92 theories of causation mostly drawn from the field of torts. Having regard to the decision of the Court of Appeal with respect to the interpretation

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[13] Exhibit R-IA-2 at art. 2.02.

[14] Exhibit A-V-105 at 2.

[15] *Supra* note 7 at art. 2.2.

of section 106, it would appear unwise and unnecessary to seek to define the meaning of section 92 beyond the requirements of this case. It will suffice to say that tort concepts will not be applied by us in the present circumstances. Causation tests in tort ultimately involve a finding of fault: an act to be relevant for purposes of liability must in some sense have been wrongful as an act of omission (where there was a duty to act) or of commission. Section 92 says nothing of the intent of, or degree of care owed by, anyone who may be the object of an order of dissolution or divestiture. The section appears to be concerned only with the factual consequences for competition of a merger. Nor does it require that the merger be the only circumstance contributing to a lessening of competition.

We are satisfied that in the present circumstances the hosting contract is likely to lessen competition substantially in the airline industry by increasing Air Canada's market power. We have already held, in our earlier decision, that AMR Corporation will not complete its transaction to inject capital into Canadian without the transfer of hosting to Sabre, that such injection is as a practical matter the only transaction available to Canadian for its rescue, and that Canadian's failure would "undoubtedly" result in a substantial lessening of competition in most if not all airline passenger markets on southern routes in Canada.[16] We need not determine whether in the past other causes have also contributed to the present state of affairs, or who if anyone is to blame. While we are unable to say with complete assurance that the release of Canadian from its present hosting contract will ensure its success, we find that without an exit of its hosting from Gemini Canadian will probably fail, and that with an exit Canadian will probably be able to recover its financial stability.

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[16] *Supra* note 1 at 39, 49-50.

We rely on the balance of probabilities as to these results and we speculate no further on questions of causality.

III. REMEDIES

A. Exercise of Discretion

Subsection 92(1) provides that where a substantial lessening of competition is found, the Tribunal "may" order dissolution or divestiture. It has therefore been urged upon us, particularly by Air Canada and Gemini, that even if the pre-conditions are found to exist for making an order under section 92 we should not do so. In part this argument appears to be based on tests of equity and fairness to parties which might be harmed by such an order, and in part it is based on concern for the effect of an order on competition in computer reservation system ("CRS") services.

With respect to the first point, it is our understanding that our primary concern in deciding whether or not to issue an order under section 92 must be the protection of the public interest in competition and not the preservation of private contractual entitlements. Thus the potential harm to be caused, by an order, to the parties to a merger is not very relevant in deciding whether an order should be made.[17] As we noted in our earlier decision in the present case, however, we do think it

[17] See *Director of Investigation and Research v. Southam Inc.* (1992), 47 C.P.R. (3d) 240 at 246, [1992] C.C.T.D. No. 14 (QL) (Comp. Trib.).

reasonable in making an order to do it on terms that are the least harmful to all parties consistently with protecting the public interest in competition.

On the second point we found in our April 22, 1993 decision that competition in CRS services would most likely continue if Canadian's hosting in Gemini were terminated. It was our view that Gemini could successfully survive this change and that, if it did not, market conditions would sustain a successor. While the further evidence which we heard on reconsideration raised more doubts as to the willingness of its remaining partners to preserve Gemini, it has not altered our view that in all probability a successful competitor to Sabre can and will be established. Accepting that a decision to make an order under section 92 should have regard to the effects on competition in other sectors,[18] we see no need for hesitation in making the order to prevent a lessening of airline competition.

B. Remedies Proposed by the Director

The Director has proposed four alternative remedies, all of which meet his basic objective of transferring Canadian's data base used in its hosting from Gemini to Sabre and removing or extinguishing any subsequent obligations that Canadian might have to Gemini with respect to hosting. Another common element in the proposals is that Canadian transfer its ownership interest in Gemini to Covia and Air Canada. The Director did not suggest that this element was motivated

[18] As we recognized in our April 22, 1993 decision, *supra* note 1 at 50.

by competition concerns. It apparently arises from an offer by PWA to transfer its ownership interest to its partners for one dollar, made at the conclusion of the hearings in March 1993, and which PWA clearly intended as an offer of compensation to its partners in Gemini.

The Director's first proposed remedy ("Remedy 1") dissolves the merger of the CRS businesses of Air Canada and PWA (although not the limited partnership) by requiring that PWA transfer its interest in Gemini to Air Canada and Covia, that Canadian's hosting be transferred as directed by Canadian and that PWA and Canadian's obligations under the hosting contract be extinguished. Under this scenario, Gemini continues minus the participation of PWA and Canadian.

The Director's fourth proposal ("Remedy 4") is similar in effect. The principal difference between the two proposals is in the manner that the transfer of hosting and of PWA's ownership interest are described. In Remedy 4, these transfers are treated as a disposal or divestiture of shares (PWA's interest in Gemini) and assets (those assets of Gemini necessary to the hosting of Canadian). Gemini is required to dispose of the assets associated with Canadian's hosting and its rights and interest in the hosting contract as directed by Canadian. PWA is required to dispose of all interest in Gemini. As in Remedy 1, Gemini continues in existence without PWA or Canadian.

Under the remaining two proposals ("Remedy 2" and "Remedy 3") the limited partnership is dissolved when Canadian's hosting is transferred out and then eventually wound up. In Remedy 2, the deadline for winding up the partnership is the end of 1995 and there is a specific provision for

extinguishing obligations relating to Canadian's hosting subsequent to its transfer out of Gemini in November 1994, as there is in the other proposals that do not require the partnership to be dissolved. In Remedy 3 termination of the partnership would occur by the end of 1994, more or less coincident with its dissolution and the transfer of hosting, and there is thus no need to extinguish separately any subsequent obligations of Canadian to Gemini. In both Remedy 2 and Remedy 3, Air Canada and Covia would wind up the partnership without the participation of PWA.

Certain provisions are common to all four remedies. The transfer of hosting responsibility from Gemini to Sabre would occur between November 1 and November 15, 1994; Air Canada, Covia and the general partner would be required to co-operate in the transfer; and PWA and Canadian would be required to pay all direct costs incurred by Air Canada, Covia and the general partner in connection with the transfer.

In the view of the Director, all four remedies fall within the authority of the Tribunal under section 92, as required by the ruling of the Federal Court of Appeal. This view has not been challenged by any of the respondents. The Director took the position that any one of the four would successfully prevent the merger from leading to a likely substantial lessening of competition in the airline market and that the Tribunal should choose the least intrusive option, in his submission, Remedy 4.

C. Positions of the Other Parties

PWA and Canadian favour the two proposals that preserve Gemini (Remedy 4 and Remedy 1, in that order of preference) but agree that any one of the four will accomplish the essential purpose of permitting Canadian to transfer its hosting to Sabre. If either Remedy 4 or Remedy 1 were to be adopted by the Tribunal, PWA would endorse a number of additional terms requiring it to pay several million dollars to cover the costs of the transfer and cash costs that Gemini now incurs associated with hosting Canadian and which would take some time for Gemini to eliminate in the event that Gemini continued after Canadian was dehosted.[19] If Gemini continues, PWA also supports a requirement that PWA give up its ownership interest to its partners and affirms its undertaking to surrender voluntarily its interest if the Tribunal were reluctant or unable to include such a term in its order.[20] PWA's offer to transfer its ownership interest is, however, withdrawn in the event that Gemini is dissolved.

Gemini took no position in final argument on the alternative remedies. Air Canada and Covia oppose the granting of any remedy but both, for different reasons, would prefer to see the limited partnership wound up in the event that Canadian is permitted to shift its hosting to Sabre.

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[19] In argument, counsel for PWA referred to one-time downsizing costs and redundant cash costs incurred over a six-month period after dissolution plus a final lump-sum payment towards any continuing costs.

[20] Based on the evidence of Wayne B. Rudson, an expert appearing on behalf of Gemini, the value of this interest depends on the way that the principal asset of Gemini, its contracts with its subscribers, is evaluated. These contracts are of greatest value to Sabre and Covia. If Sabre were precluded from bidding in order to prevent it from gaining a too strong position, the absence of significant competition in the bidding might permit Covia to acquire the contracts for perhaps a tenth of the amount it would otherwise have to pay.

In Air Canada's view, the transfer would make Gemini extremely costly to it as the only remaining hosted partner and, ultimately, would make Gemini no longer viable. Air Canada proposes that PWA (and/or American Airlines, Inc. ("American")) be required to make "full compensation" for the harm caused by Canadian's dehosting. It submits that PWA should be held responsible for reimbursing to the other partners their current investment in Gemini, for paying the costs of the winding up and any shortfall after the disposal of Gemini's assets including payments to employees, suppliers and partners (for loans to Gemini), and for paying the costs incurred by Air Canada in setting up a new hosting arrangement. Air Canada suggests that any order of the Tribunal should be conditional on PWA and/or American agreeing to make compensation as set out above.

Covia also proposes that the limited partnership be wound up and requests that winding up proceed in accordance with the partnership agreement, with responsibility for doing so therefore residing with the general partner. Under its proposal Canadian would pay the costs of its dehosting and all costs of dissolution and would remain a partner until the winding up was complete. At that time any shortfall or surplus would be shared equally by the partners, as set out in their partnership agreement.

The basic thrust of Covia's position is that Covia is the best, and probably the only, hope for continued competition in the CRS industry in Canada and that, in its estimation, it will best be able to provide that competition if the partnership is dissolved, with certain additional conditions attached. Given that the dissolution of the partnership would be known almost a year before it

actually occurred, Covia submits that it is critical for the continued presence of a strong competitor to Sabre that steps be taken almost immediately to establish and commence the transition to a successor organization and CRS system. To this end, Covia asks that the Tribunal override the partnership agreement to the extent of providing that the general partner be empowered to assign the contracts between Gemini and its subscriber travel agents to a successor entity related to Covia and that Covia be freed from the non-competition clause which would otherwise prevent it from competing with the business of the partnership.

Covia also proposes that: Canadian be required to set up and pay for a direct link between Canadian and the successor entity; there be reciprocal access between the "back office systems" used in the management of travel agencies so that subscribers to Sabre and subscribers to the CRS of the successor entity would not be restricted in choosing a back office system by the CRS used; and Canadian be prohibited from marketing Sabre. Both Canadian and American support an order prohibiting Canadian and Air Canada from marketing the CRS with which each is associated. Counsel for Air Canada did not have instructions as to whether Air Canada would be prepared to give an undertaking that it would not market CRS services in the event that Canadian committed to forego this activity.

D. Positions of the Intervenors

The intervenors who supported the Director's position and made final argument on remedies expressed a preference for divestiture of assets over dissolution of the partnership. The Attorney General of Alberta, American and the Alliance of Canadian Travel Associations ("ACTA") are of the view that this is the least intrusive remedy. ACTA expressed great concern that an order for dissolution could result in any successor entity to Gemini suffering a significant loss of market share compared to Gemini's current position. An additional reason cited by ACTA was that while divestiture would leave the CRS rules in place, they would be of no force on dissolution. The Council of Canadian Airlines Employees adopts the position of PWA and Canadian without further comment.

The intervenors IBM Canada Ltd. ("IBM") and Unisys Canada Inc. ("Unisys") supported the respondents in opposing the granting of any remedy. On the question of choice of remedy, Unisys prefers divestiture to dissolution in order to protect better third parties with contracts with Gemini while IBM favours a remedy (unspecified) that would ensure the "orderly transition of the business of Gemini."

The Consumers' Association of Canada, VIA Rail Canada Inc. and the Attorney General of Manitoba did not participate in argument at the reconsideration.

E. Remedy Chosen by the Tribunal

As the Tribunal has concluded that the Canadian hosting contract will now likely result in a substantial lessening of airline competition, our decision on remedy revolves around whether to order a disposal of shares and assets of the limited partnership (Remedy 1 or 4) or to order its dissolution (Remedy 2 or 3). The direction of the Federal Court of Appeal limits us to a choice of the remedies available without consent under section 92. In our April 22, 1993 decision, we indicated that we did not believe that we had the authority to award compensation for loss of future benefits that would have arisen under the hosting contract.[21] This belief was not contradicted by the Federal Court of Appeal; in fact, it was explicitly affirmed by both Hugessen and MacGuigan JJ.A.[22] In fashioning a remedy we have proceeded in light of such limitations on our authority.

Both Covia and Air Canada have made clear through their submissions in argument and through the evidence of Michael Foliot, a Senior Vice-President with Covia's parent, Galileo International, and David Burden, Senior Director of Information Services for Air Canada, that, if the Tribunal allows Canadian to dehost, they are not prepared to continue as partners in Gemini and want the limited partnership dissolved. As set out above, Covia has indicated that it, or a related

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[21] *Supra* note 1 at 64-65.

[22] *Supra* note 3 at 14 (Reasons of Hugessen J.A.), 29 (Reasons of MacGuigan J.A.). Hugessen J.A. appeared to take an even more limited view of our powers, indicating that we could not order compensation as "indemnification for the injury" caused by a variation of the consent order, a concept probably broad enough to preclude an order for "downsizing" or "unsheddable" costs, terms which are explained *infra* note 23.

company, would be interested in obtaining the customer base of Gemini with the intent of commencing a more efficient and economic CRS business in Canada.

As set out in our order of November 24, 1993, the Tribunal has decided to require the dissolution of the limited partnership. That order is similar to, although not identical to, Remedy 2 proposed by the Director. While we recognize that dissolution could be considered the most intrusive and disruptive option available to us, we have selected this option in light of the fact that none of its three partners has supported the continued existence of Gemini. The Tribunal is reluctant to force the partners to remain in a business arrangement that they submit will no longer be beneficial or useful to them once Canadian dehosts from Gemini. We are of the opinion that we must give considerable weight to the preference of the one partner that has expressed an intention of continuing in the CRS business. We defer to Covia's view that its continued presence in the CRS business in Canada will be facilitated if Gemini is no longer in existence.

One group of third parties that will be affected in the event that Gemini is dissolved are the companies (other than the partners) that are hosted on Gemini. Principal among these is VIA Rail Canada Inc. ("VIA"). Based on the evidence of Mr. Burden of Air Canada to the effect that there are a number of alternate suppliers capable of performing hosting functions for Air Canada, we have no reason to believe that other transportation companies with much more limited requirements would have any difficulty in finding an alternate supplier. Although VIA has intervenor status in these proceedings, it did not participate in the November hearing in this matter.

(1) Participation in Dissolution

In contrast to the proposals of the Director, the dissolution remedy adopted by the Tribunal requires that PWA retain its interest in Gemini. The dissolution of the partnership will take place in accordance with the procedure set out by the partners in their partnership agreement. Since PWA retains its interest, it will have the rights and obligations determined by the partners themselves with respect to the dissolution. In particular, all three partners will share in the costs and returns from the dissolution in accordance with their agreement. This seems appropriate since none of the partners wishes to continue in the partnership if Canadian's hosting is removed. In light of this consideration, it is not necessary for us to consider whether we would have had jurisdiction to order a transfer of PWA's interest in the absence of any competitive concerns arising from its ownership position in Gemini.

The principal asset of Gemini is its subscriber contracts. Covia has requested that we empower the general partner to assign these contracts to it (apparently at no cost) as a means of ensuring continued competition in CRS services in Canada. Given the interest of the partners, we do not see the necessity of this drastic step. Since all partners share in the costs and returns from dissolution in accordance with their partnership agreement, they have a common interest in winding up Gemini in the least costly way and with as little damage as possible to its main asset, its customer base. If the customer goodwill is destroyed by partner disputes and delays over assignment of the contracts, then all three will suffer in the winding up process. In addition, it is difficult to see what

any of the three partners would gain from such actions. It is not in the airlines' interest, as primary users of CRSs to sell their product, to hinder CRS competition in Canada. Covia, by acquiring the Gemini customer base, stands to expand significantly its worldwide sales at attractive margins.

(2) Date of Transfer of Hosting

The evidence and argument of PWA and Canadian identified the time period between November 1 and November 15, 1994 as the preferred time for the transfer of hosting, with November 5, 1994 as the ideal target date. These dates are based on the progress of preparations at Sabre and the need for a window of slower activity that would free the ticket agents at Canadian for intensive training on the new system. The other respondents did not identify any reason why, if the Tribunal were disposed to order the transfer, some other reasonable date would be preferable to them or impose less of a burden on them.

(3) Costs

In our decision of April 22, 1993, we concluded that if we had the power to modify the hosting contract as then requested by the Director, involving the dehosting of Canadian and continuance of business by Gemini, we would have required Canadian to reimburse Gemini for the costs arising from the transfer of its hosting from Gemini to Sabre ("migration" costs), cash

"downsizing" costs and cash "unsheddable" costs.[23] In the present dissolution scenario, we have ordered that Canadian pay "migration" or direct costs of the hosting transfer only. According to the evidence of Mr. Lupton of Canadian, the anticipated costs would be of the order of $700,000 but the exact sum payable will have to be determined by the parties. Since the winding up of Gemini will commence immediately upon dissolution, the question of the identification and magnitude of the costs that will be borne by Gemini in downsizing and in continuing operations without Canadian's hosting becomes irrelevant. All costs will be absorbed by Gemini and will affect the net balance to be shared by the three partners upon completion of the winding up.

Considerable accounting evidence was presented to the Tribunal regarding the effect on Gemini of Canadian moving its hosting. While some of this evidence was more relevant to the issue of compensation for loss of future benefits, some of it was applicable to the issue of cash downsizing and cash unsheddable costs. We need not consider this evidence further. The first issue was never within our jurisdiction to determine and the second has become moot, as explained above, because of the preference for dissolution expressed by Air Canada and Covia.

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[23] *Supra* note 1 at 65-66. "Downsizing" costs are one-time costs of shrinking Gemini's operations while "unsheddable" costs are those redundant cash costs that cannot immediately be eliminated and must be borne for some period by the business that continues.

(4) Assets to be Transferred

All of the Director's proposed remedies refer to a transfer of the "Canadian Data Base" as defined in the hosting contract, together with such other assets as are "necessary for an orderly transfer of the hosting". PWA and Canadian made no objection to the Director's wording nor did they submit any alternative to us. We have therefore incorporated the wording proposed by the Director into our order. The data base was described in evidence as consisting of passenger name records ("PNRs") for the passengers who have reservations to travel on Canadian, cargo records for people shipping cargo on Canadian and information and training libraries.[24]

In argument, counsel for PWA requested specifically that a particular asset, namely the cabling running from its agents' terminals at airports and ticket offices to concentrators, be transferred to Canadian. A more extensive description of this asset, referred to as the "Pegasus cabling plant", is provided in our order. There is a dispute between Canadian and Gemini with respect to the ownership of the cabling. In light of Mr. Lupton's uncontradicted evidence that the cabling is worthless to Gemini whereas the cost and logistical difficulties of replacing it would be very high for Canadian, we have specifically identified in our order the cabling as part of the assets to be transferred. We do not, however, thereby intend to limit the category of "assets necessary to the orderly transfer of hosting" to this one item.

[24] Transcript at 23:4213 (15 November 1993).

(5) Co-operation

If our order is to have any effect, it is clear that Canadian requires the co-operation of the general partner, Air Canada and Covia to ensure the orderly transfer of its hosting. We have therefore ordered this co-operation.

(6) Successor CRS Business

The Director asked that Air Canada, Covia and the general partner or any of them should not be prevented from continuing the business of the partnership after dissolution through a new business entity, without Canadian as a participant. Covia went further and asked that the way be cleared for it to begin the transition to a successor system as soon after our order as it sees fit. We have already described this request in the section on "Positions of the Other Parties". We have acknowledged the importance of facilitating continued CRS competition and have therefore included a term in our order, applicable also to Air Canada and the general partner, permitting any of them to operate such a business either before or after dissolution.

(7) Other

Many of the additional proposals put forward by Covia arguably fall outside the scope of the remedies available to the Tribunal under section 92 in the absence of the consent of the parties.

Covia's proposals relating to Canadian's marketing of Sabre, to reciprocal access between the back office systems of Sabre and the successor entity to Gemini and to the establishment of a direct access link from Canadian to that successor entity do go to issues that may be important to competition in CRS markets. The Tribunal was not convinced, however, that these items were essential to an effective remedy in this case, even if they were shown to be within our power to order.

CRS rules have also been referred to. There is little doubt that rules governing CRSs are desirable. When the Tribunal issued rules in association with the 1989 Consent Order, it was in anticipation that Transport Canada would subsequently introduce a set of rules that would obviate and supersede those issued by the Tribunal. According to the evidence of Valérie Dufour, Director of Domestic Air Policy at Transport Canada, this has not progressed beyond a January 1991 draft policy statement circulated to industry participants because the department has waited for a number of other events to unfold, including the revision of CRS rules in the United States. Transport Canada is now ready to complete the process and it is the view of Ms. Dufour that new rules could be enacted by regulation in less than a year.[25] The Tribunal is reassured by this evidence that dissolution is unlikely to result in a lengthy period during which the CRS industry is not governed by rules that are widely considered to be necessary for its proper functioning.

[25] Transcript at 23:4124 (15 November 1993).

(8) Opportunity for Parties to Agree on Other Modalities

The essential goal of the Tribunal in the interest of protecting competition remains the release of Canadian from the hosting contract. While we have chosen what we considered, in the light of all the evidence and argument, to be the means which meet as many of the concerns of the parties as possible, we have left an opportunity for the parties themselves to fashion a different remedy to achieve the same goal. We felt that by fixing the goal we could enable the parties to focus more narrowly and more realistically on modalities. In our view they have already had ample time for analysis of their respective positions in order to achieve an agreement by December 8, 1993. If they do not achieve unanimous agreement, the modalities prescribed by the Tribunal will become effective December 14, 1993.

DATED at Ottawa, this 1st day of December, 1993.

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

(s) B.L. Strayer
B.L. Strayer