CT-88/1

COMPETITION TRIBUNAL **TRIBUNAL DE LA CONCURRENCE**

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. 1985, c. C-34 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

Intervenors

RESPONSE OF AIR CANADA
TO THE NOTICE OF APPLICATION

A. STATEMENT OF GROUNDS ON WHICH APPLICATION IS OPPOSED

1. Air Canada opposes the application made by the Director of Investigation and Research (the "Director") to vary the consent order of the Competition Tribunal (the "Tribunal") dated July 7, 1989 (the "Consent Order") on the following grounds:

(a) The circumstances that led to the Consent Order have not changed;

(b) The changes in circumstances pleaded and relied upon by the Director in seeking the variation order do not relate to the grounds upon which the Director's original Application was based;

(c) The Gemini Hosting Contract, dated 30 June 1989, the terms of which the Director seeks to vary, did not exist at the time the Director's original application was launched; nor was it the subject of consideration in the Consent Order Impact Statement filed by the Director on 13 April 1989, nor in the Agreed Statement of Facts filed by the parties on 19 April 1989;

(d) The terms of the Gemini Hosting Agreement were not the subject of any terms of the Consent Order. In the absence of the consent of all

parties, it is not the proper subject matter of an application under section 106 of the Competition Act to vary the Consent Order. In the alternatives, the Gemini Hosting Agreement is not a merger within the meaning of Section 91 of the Competition Act, and the Tribunal has no jurisdiction over it;

(e) The Consent Order has been and continues to be effective to achieve its object of eliminating the substantial lessening of competition which the Director alleged would result from the merger;

(f) The financial positions of PWA Corporation ("PWA") and Canadian Airlines International Ltd. ("CAIL") were not considered by the Tribunal in granting the Consent Order because they were not relevant to the Consent Order and changes in their financial positions are not the proper basis for variation of the Consent Order;

(g) In the event the Tribunal has jurisdiction to vary the Consent Order under the provisions of Section 106 this is not an appropriate case for the exercise of the Tribunal's discretion in that the relief sought by the Director would lead to

(i) the likely demise of Gemini;

(ii) a substantial lessening of competition in most if not all Canadian CRS markets, creating a virtual monopoly in the hands of Sabre; and

(iii) the elimination of jobs in Canada, and the elimination of opportunities for Canadians to participate in the international CRS and airline markets.

(h) The changes sought in the Consent Order go far beyond variation. In addition, the Tribunal has no jurisdiction under Section 106 to dissolve the Gemini Group Partnership. Following the issue of a Consent Order under Section 105, and absent the consent of all parties, the Tribunal's powers are limited to rescinding or varying the order, and then only if the provisions of subsections 105 (a) or (b) apply; and

(i) The Tribunal has no jurisdiction under Section 92 to dissolve the Gemini Group Partnership, the merger in question having been substantially completed more than three years before the Director's current Application.

Additional Material Facts on Which Air Canada Relies

2. The merger dealt with in the Consent Order was the merger of the CRSs of Air Canada and CAIL's predecessor. This merger was effected on 1st June 1987 and substantially completed more than three years prior to the current Application.

3. The Gemini Hosting Contract is not referred to, directly or indirectly, in the Consent Order because the terms of that contract were not relevant to the behavioral restraints imposed upon the respondents relating to the purposes to which the Consent Order were directed.

4. The behavioral restraints imposed upon the respondents by the Consent Order have been effective tools in fostering competition in Canadian CRS markets, which has intensified since the Order. Sabre's market position and share, which was of concern to the Director in his original application, has improved substantially, to the cost of Gemini's.

5. The financial viability of PWA (or Air Canada) was not at issue before the Tribunal because the Consent Order did not deal with an airline merger. As it related to the airline industry, the object of the Consent Order was to prohibit the CRS merger being used by Air Canada and CAIL as a vehicle to disadvantage their air carrier competitors in the manner described in the Consent Order Impact Statement and to foster the competition between Air Canada and CAIL. Rather than preserving or ensuring the future financial viability of PWA and Air Canada, the Consent Order was designed to - and has been effective in achieving its intended purpose - foster competition between CAIL, Air Canada and others with competition's anticipated result that certain competitors may not succeed. The Consent Order was never intended as a vehicle for the general regulation of the Canadian airline market, but only to address the Director's then concerns therewith.

6. As part of the Consent Order, the parties agreed to the Reservation System Rules (the "CRS Rules") annexed thereto. In the purpose clause to the CRS Rules (Rule 2(a)), it is specifically stated that "These Rules shall not apply to agreements or arrangements between hosted carriers and system vendors for non-system related services". If the terms of the Gemini Hosting Contract (a contract between Air Canada and CAIL, as hosted carriers, and Gemini, as system vendor) were relevant to making the Consent Order, the contract would not have been excluded from the ambit of the CRS Rules.

7. In his 1988 Application, the Director alleged that remedial action was required because actual or potential abuse by system vendors of the Canadian CRS industry was not regulated or curtailed through CRS rules such as those devised by the United States Civil Aeronautics Board in 1984. In its reasons for judgment, the Tribunal noted that the CRS Rules were based in part on the United States Civil Aeronautics Board CRS rules. The United States Civil Aeronautics Board CRS rules did not then, nor do they now, require that CRS hosting contracts be terminable on short notice.

8. As impliedly admitted by the Director in this application, Gemini, the Gemini Partnership and Air Canada have complied in all material respects with the Consent Order and CRS Rules incorporated therein.

9. As further impliedly admitted by the Director in this application, there has been no substantial lessening of competition in the CRS industry as the result of the Consent Order.

B. RESPONSE TO THE MATERIAL FACTS RELIED UPON BY THE DIRECTOR

Parties

10. Air Canada admits the facts in paragraph 1 of the Statement of Material Facts (the "Statement") with the following qualifications:

(a) the proper name of Time Air Corporation is Time Air Inc.;

(b) the proper name of Inter-Canadian Inc. is Inter-Canadian (1991) Inc.;

(c) PWA Corporation indirectly holds a 45% interest in Calm Air International Ltd. through Canadian Regional Airlines Ltd.; and

(d) Air Canada's knowledge of the corporate structure of PWA Corporation is limited to facts as they existed on November 3, 1992.

11. Air Canada admits the facts in paragraphs 2, 3 and 4 of the Statement.

Consent Order of July 7, 1989

12. While Air Canada accepts generally the accuracy of the summary of the Consent Order as described in paragraphs 5 through 11 of the Statement, Air Canada relies upon the actual terms of the Consent Order for its full meaning, true purport and effect.

13. In response to paragraph 6 of the Statement, the Director did not allege in his application to the Tribunal on March 3, 1988 (the "1988 Application") that the Gemini Partnership created a dominant firm that would be able to maintain its dominant position because it was vertically integrated with Air Canada and CAIL and because it would have the most complete, timely and accurate information on these carriers as a result of hosting these carriers. The Director stated, in the context of addressing barriers to market entry, as follows:

> **AC and CAIL dominate the airline passenger market in Canada. This dominance, coupled with the vertical integration of Gemini with AC and CAIL, will ensure that Gemini alone will be able to provide the most complete, accurate and timely information, including last seat availability, on virtually all Canadian carriers of interest to Canadian travel agents because AC, CAIL and their affiliated and aligned carriers are hosted only on Gemini and there are no direct access links between these carriers and other CRSs.**
>
> [1988 Application, paragraph 29 (emphasis added)]

14. Further in response to paragraph 6 of the Statement, the Director did not allege in the 1988 Application that the merger raised competition concerns in airline markets because Air Canada and CAIL had the ability and incentive to exclude, deter or raise the cost of entry for airline competitors of Air Canada and CAIL by operating Gemini in an anti-competitive fashion. In the 1988 Application, the Director alleged in this regard as follows:

(a) that the merger of Reservec and Pegasus would likely entrench the dominant position of Air Canada and CAIL in the airline

industry at the expense of Wardair and potential new entrants (1988 Application, paragraph 46);

(b) as a result of the merger, Air Canada and CAIL would be able to disadvantage their competitors by denying or delaying access to the CRS; loading the participating airlines' information in an incomplete, inaccurate or untimely fashion; bias the display of flights so that a competitor's flights would appear lower in the display or on other screens; or charge competitors very high booking fees for use of the CRS (1988 Application, paragraph 47);

(c) that the ability of Gemini to exclude, deter or raise the cost of entry for airline competitors of the partners of Gemini would be increased as a result of Gemini's greater market power in the CRS market and that, if that market power were exercised, the result would likely be a reduction in competition in the Canadian airline markets and higher prices for air transportation (1988 Application, paragraph 49; emphasis added); and

(d) that the merger would eliminate one element of competition (the use of a CRS) between Air Canada and CAIL (1988 Application, paragraph 50).

Changed Circumstances

15. Air Canada accepts the admission of the Director in paragraph 12 of the Statement that the financial viability of PWA was not relevant to the issues before the Tribunal at the time the Consent Order was issued. It also accepts the general accuracy of the allegations in paragraph 12 as to PWA's financial condition.

16. Air Canada admits, as alleged in paragraph 13 of the Statement, that PWA has been seeking an airline investor for some time, but is unaware of whether Air Canada and AMR are the only airlines to have expressed an interest.

17. Air Canada admits, as alleged in paragraph 15 of the Statement, that AMR and PWA have had discussions, but denies AMR's interest was limited to a strategic alliance. It has always been AMR's intention to achieve de facto control over PWA/CAIL with a view to dominating the Canadian airline and CRS markets.

18. The possibility of an objection by Air Canada to a transaction which might have been negotiated between PWA and AMR Corporation ("AMR") which may in turn have been submitted to the National Transportation Agency is not a changed circumstance that supports an application to vary the Consent Order and is not the proper subject matter of inquiry by the Tribunal. Air Canada disputes the Director's reliance upon the material facts set forth in paragraph 16 of the Statement.

19. The allegations in the Director's Statement at paragraphs 14 et seq concerning discussions which occurred about a possible merger between Air Canada and PWA are irrelevant. There is no proposed merger between Air Canada and PWA before the Tribunal for review. The references to the proposed Air Canada/PWA merger, the inquiry of the Director under section 10(1)(a) of the Competition Act, the Director's speculation on the consequences in the event such a merger were to take place, are not changed circumstances which support an application to vary the Consent Order. Air Canada submits that paragraphs 14, the reference to the Air Canada merger discussions in paragraph 21, 26, 27, the reference to the Air Canada proposal in paragraph 28, 29, 30, 32, 33, 34, 36, 37, 38, 39, 40 and 41 are not the proper subject matter of this application.

20. Discussions among the partners of the Gemini Partnership with regard to changes in relation to the ongoing operation of the Gemini Partnership are not evidence of changed circumstances that support a variation of the Consent Order. Air Canada disputes the Director's reliance upon the material facts set forth in paragraph 17 of the Statement.

21. The subject matter of civil actions by The Gemini Group Automated Systems Inc. ("Gemini") against CAIL and PWA relating to breaches by PWA and CAIL of their obligations owing to Gemini and the Gemini Partnership pending before the Ontario Court of Justice (General Division) are not the proper subject matter of inquiry by the Tribunal. The threat or conduct of a civil action by Gemini against CAIL and/or PWA is not a material fact which supports a variation of the Consent

Order and Air Canada disputes the Director's reliance on the material facts in paragraph 18 of the Statement.

22. Air Canada accepts that a complaint to the Director was made by Gemini that Sabre, the CRS owned and operated by American Airlines, Inc. ("AA"), was engaged in predatory pricing behaviour contrary to the provisions of the Competition Act. If true, the allegations support the likelihood of a substantial lessening of competition in Canadian CRS markets (by Sabre obtaining a virtual monopoly) in the event the Tribunal were to make the order requested by the Director. In any event, the complaint indicates Gemini's perception of the state of competition in Canadian CRS markets in the post Consent Order environment.

23. While Air Canada acknowledges that it entered into an alliance agreement with the United Airlines on or about August 18, 1992, Air Canada submits that this alliance provides no evidence of changed circumstances that would support a variation of the Consent Order and Air Canada disputes the Director's reliance upon the material facts set forth in paragraph 22 of the Statement.

24. Air Canada is unaware of the exact status, in late July 1992, of the proposed AMR/PWA transaction. Air Canada disputes that AMR's proposal was conditional upon CAIL being hosted on AA's Sabre CRS. Rather, newspaper reports at that time indicated that AMR sought a condition that CAIL use "best efforts" to affect such a change in its CRS hosting relationship.

25. The legal proceedings brought in Alberta by PWA against Gemini, Air Canada and Covia for a declaration that Gemini is insolvent for the purpose of terminating the Gemini Hosting Contract is not the proper subject matter of inquiry by this Tribunal and Air Canada disputes the Director's reliance thereon in paragraph 25 of the Statement.

26. Further in response to paragraph 25 of the Statement, the Alberta proceedings were stayed by order of Mr. Justice C.G. Virtue of the Court of Queen's Bench of Alberta dated November 10, 1992 and fresh proceedings have been brought by PWA before the Ontario Court of Justice (General Division) on November 25, 1992 and that action is pending.

27. While Air Canada is aware that negotiations have taken place between AMR and PWA concerning the formation of a strategic alliance, Air Canada has no specific knowledge of the matters discussed between representatives of AMR and PWA, the terms of any draft stock purchase or shareholder and service agreements for the proposed AMR/PWA transaction, the current relationship between AMR and PWA nor the future intentions of AMR and/or PWA as stated in paragraph 15, 20, 23, 35 and the first numbered paragraph 36 of the Statement. From a statement made by Transport Minister Jean Corbeil to the House of Commons on 24 November 1992 it is apparent the AMR proposal would give AMR de facto control over PWA and/or CAIL contrary to the provisions of the National Transportation Act.

28. Air Canada has no specific knowledge of the position of the Council of Canadian Airlines Employees as set forth in paragraphs 24, 28 and 35 of the Statement. However, Air Canada understands the alleged interest of AMR and the Council to acquire an interest in PWA is subject to the resolution of many more issues than the Gemini Hosting Agreement.

29. Apart from the first sentence of paragraph 42, which is admitted, Air Canada denies the Director's allegations contained in paragraphs 42 and 43 of the Statement. In the event PWA and/or CAIL do not survive on their own, new entry, and the expansion of the presence of existing participants can be expected to enhance the competitive environment in the Canadian airline market.

D. RELIEF SOUGHT

30. Air Canada requests that this application be dismissed.

E. PLACE OF HEARING

31. Air Canada requests that the hearing of this application be held in the City of Ottawa, Ontario.

F. LANGUAGE OF HEARING

32. Air Canada requests that the hearing of this application be conducted in the English language.

G. SERVICE ON AIR CANADA

33. For the purposes of the proceedings contemplated by this application, any documents to be served on Air Canada may be served as follows:

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DATED this day of December, 1992 at the City of Toronto, in the Province of Ontario.

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