Competition Tribunal | Tribunal de la Concurrence

576

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.

B E T W E E N :

The Director of Investigation and Research

Applicant

- and -

Air Canada
Air Canada Services Inc.
PWA Corporation
Canadian Airlines International Ltd.
Pacific Western Airlines Ltd.
Canadian Pacific Air Lines, Limited
154793 Canada Ltd.
153333 Canada Limited Partnership
The Gemini Group Automated Distribution Systems Inc.

Respondents

- and -

Consumers' Association of Canada
American Airlines, Inc.
Attorney General of Manitoba
Alliance of Canadian Travel Associations
Bios Computing Corporation
Air Atonabee Limited

Intervenors

REASONS FOR CONSENT ORDER DATED JULY 7, 1989

Dates of Hearing:

April 24 - 28, 1989

Presiding Member:

The Honourable Madame Justice Barbara J. Reed

Judge:

The Honourable Mr. Justice Barry L. Strayer

Lay Member:

Dr. Frank Roseman

Counsel for the Applicant:

Director of Investigation and Research

John F. Rook, Q.C.
Sandra J. Simpson
Randal T. Hughes
Trevor S. Whiffen
Philip H. Horgan

Counsel for the Respondents:

(a) **Air Canada**

Marshall E. Rothstein, Q.C.
Marc M. Monnin

(b) **PWA Corporation**
Canadian Airlines International Ltd.
(including Pacific Western Airlines Ltd., and Canadian Pacific Air Lines, Limited)

Jo'Anne Strekaf

(c) **Air Canada Services Inc.**
154793 Canada Ltd.
153333 Canada Limited Partnership
The Gemini Group Automated Distribution Systems Inc.

Marshall E. Rothstein, Q.C.
Marc M. Monnin
Jo'Anne Strekaf

Counsel for the Intervenors:

(a) **Consumers' Association of Canada**

Janet Yale

(b) **American Airlines, Inc.**

Colin L. Campbell, Q.C.
Lorne P. Salzman

(c) **Attorney General of Manitoba**

Neville D. Shende, Q.C.

(d) **Alliance of Canadian Travel Associations**

Douglas Crozier

(e) **Air Atonabee Limited**

Donald Kubesh

Representative for Intervenor:

Bios Computing Corporation

Ernst von Bezold

COMPETITION TRIBUNAL

REASONS FOR CONSENT ORDER DATED JULY 7, 1989

The Director of Investigation and Research

v.

Air Canada et al.

The Director filed, on March 3, 1988, an application pursuant to what was then section 64 (now section 92) of the *Competition Act,* R.S.C. 1985, c. C-34, seeking an order to dissolve Gemini. Gemini is the entity resulting from a merger of two computer reservation systems, the computer reservation system Reservec II operated by Air Canada and the computer reservation system Pegasus 2000 operated by Canadian Pacific Airlines, Limited.[1]

---

[1] The Agreed Statement of Facts filed by the Director and the respondents describes the merger in the following terms:

> ... **(A) The Merger**
>
> 2. Air Canada ("AC") is a Corporation continued under the Canada Business Corporations Act pursuant to the Air Canada Public Participation Act, 35-36-37 Elizabeth II, C. 44.
>
> 3. AC is one of the largest Canadian air carriers in Canada and serves a network of domestic, transborder and international routes. Prior to June 1, 1987, AC operated a computer reservations system ("CRS") under the trade name Reservec II ("Reservec"). As of May 1, 1987, AC transferred certain assets of Reservec to a wholly owned subsidiary Air Canada Services Inc. (now 160092 Canada Inc.) in exchange for shares of Air Canada Services Inc.

That merger was effected on June 1, 1987. Canadian Pacific Airlines, Limited is a predecessor corporation to Canadian Airlines International Limited (hereinafter Canadian). Canadian is wholly owned by PWA Corporation.

---

4. PWA Corporation ("PWAC") is a company incorporated under the laws of Alberta on February 22, 1956 and continued under the Business Corporations Act, S.A. 1981, c. B-15, as amended, on January 27, 1983. PWAC is the sole owner of Canadian Airlines International Ltd. ("CDN") which is the successor to the former Pacific Western Airlines Ltd. ("PWAL") and Canadian Pacific Air Lines, Limited ("CPAL") by virtue of an amalgamation effective January 1, 1988. CDN is one of the largest Canadian air carriers in Canada and serves a network of domestic, transborder and international routes. Prior to June 1, 1987, CPAL owned and operated a CRS called Pegasus 2000 ("Pegasus"). As of May 31, 1987, certain assets of Pegasus were transferred from CPAL to 154793 Canada Ltd. ("154793") in return for shares of 154793.

5. As of June 1, 1987, AC and PWAC merged Reservec and Pegasus to form a single CRS known as Gemini. AC and PWAC initially formed 153333 Canada Limited Partnership (now The Gemini Group Limited Partnership), ("Limited Partnership") and transferred the shares of Air Canada Services Inc. and 154793 and the assets of Reservec and Pegasus, not previously transferred to Air Canada Services Inc. and 154793 to the Limited Partnership. 153333 Canada Inc. (now The Gemini Group Automated Distribution Systems Inc.), ("the General Partner") was appointed to manage the business and affairs of the Limited Partnership. AC and PWAC each own 50% of both the Limited Partnership and the General Partner (collectively "Gemini").

6. Gemini is headquartered in Toronto where its system development activities are based. The computer mainframes are located in Winnipeg. Gemini employs 638 individuals throughout Canada.

Air Canada and PWA Corporation entered into a Memorandum of Understanding, dated March 15, 1989, with the Covia Partnership which contemplates that Covia will become a one-third owner of Gemini. The Covia Partnership includes entities such as United Airlines, US Air, British Airways, KLM, SwissAir and Alitalia. Covia owns Apollo which is a computer reservation system operating in the United States and it is a founding member of Galileo, a European computer reservation system consortium.

An application, dated April 24, 1989, is now brought by the Director and the respondents, pursuant to section 105 (formerly section 77) of the *Competition Act.* That application seeks a consent order imposing certain behavioural requirements on the respondents. The respondents are willing to accept such behavioural constraints in order that the formation, by way of merger, of the Gemini Group Automated Distribution System Inc. be free from challenge by the Director.

Background Facts

Air Canada and Canadian are computer reservation system vendors (CRS vendors) operating the Reservec II and Pegasus 2000 systems respectively. CRS vendors distribute information on airline schedules, fares, rules and seat availability to travel agents and provide computerized booking services with respect to airline

reservations. CRS vendors also provide information and booking services with respect to other travel facilities such as hotel accommodation, car rentals, tours, theatre tickets. The information and booking services are supplied to travel agents as is the equipment, such as computer reservation terminals (known as CRTs) which are used to access the computer reservation system.

Travel agents pay subscriber fees to the CRS vendors for the services and related equipment. Subscriber fees are not a CRS vendor's main source of revenue however. This comes from the booking fees which are paid by the travel service supplier to the vendor for each service which a travel agent books through that vendor's computer reservation system. Thus, in the case of airline reservations in North America, the airlines at present pay a CRS vendor $1.85 (U.S.) for each flight segment booked by a travel agent through that vendor's facilities. When a more sophisticated type of computer link is used, as sometimes happens in the United States, $2.10 (U.S.) per flight segment is charged. A flight segment constitutes travel on a direct flight which may have intermediate stops but which requires no connections (no change of aircraft). The relative unimportance of subscriber fees as a source of revenue for CRS vendors is reflected in the fact that vendors often provide CRS services and equipment to travel agents free of charge or below cost.

Approximately seventy percent of the airline tickets for scheduled services provided in Canada are sold through travel

agencies and approximately ninety-seven percent of these tickets are sold through travel agencies equipped with a CRS. The other thirty percent of the tickets sold in Canada are sold by the airlines directly to the travelling public. Also, it should be noted that a travel agent's main source of revenue is the commission received from the airline or other travel service supplier and not from the customer of the travel agent directly. Travel agents are paid eight to ten percent commission by an airline on the tickets they sell for that airline.

CRSs, in Canada as well as elsewhere in the world, evolved out of the internal reservation systems of the major air carriers. The airlines developed computer reservation systems for their own internal use and then found that by extending this automated system to travel agents the whole process of reserving and issuing tickets could be made more efficient. As noted, the two major Canadian air carriers, Air Canada and Canadian (as Canadian Pacific Airlines, Limited) each developed its own CRS (Reservec II and Pegasus 2000 respectively). Each CRS has a particular relationship with its respective airline owner. This particular relationship arose out of the historic roots of each system and the related technological limitations. Each airline, Air Canada and Canadian, is "hosted" in the CRS which it owns. Each airline "participates" in CRSs owned by others. A CRS which hosts a carrier has more complete access to that carrier's seat inventory and thus can give travel agents who subscribe to that CRS better service,

particularly in the form of what is referred to as last seat availability.[2]

---

[2] The Agreed Statement of Facts describes the situation as follows:

> 24. An airline can be represented in a CRS, either as a "hosted carrier" or a "participating carrier". If it is hosted, it stores its complete airline inventory in the CRS. In this case, the CRS provides the carrier with both an internal reservation and a management system to manage its inventory and an external reservation system to distribute its product to travel agents and, ultimately, consumers. An airline can only host on one system. AC and CDN and their affiliates are now hosted with Gemini on Reservec and Pegasus respectively.
>
> 25. If the airline is a "participating carrier", the CRS provides the carrier with an external reservation system to distribute its product to travel agents, but does not provide that carrier with its internal reservation and management system. AC and CDN and their respective affiliates who use common designator codes currently participate in Sabre, Apollo, Datas II, PARS and System One. AC and CDN (and its predecessor CPAL) have participated without interruption in these CRS's since 1978 and 1984 respectively. AC and CDN's affiliates have participated in these CRS's since they began using the "AC" and "CP" designator codes.
>
> 26. The CRS lists the information on fares, schedules and seat availability which the carriers supply directly or which the CRS obtains from carrier supported central agencies such as Air Tariff Publishing Company ("ATP") and Official Airline Guide ("OAG"). ATP collects information on airline fares and OAG gathers information on airlines schedules. AC and CDN provide information regarding their schedules, fares and fare rules and that of their affiliates who utilize common designator codes to OAG and ATP.
>
> 27. Seat availability information is determined by the participating carrier. When the number of seats sold reaches a certain level, the internal reservation computer of the participating carrier will send a "closed for sale" message. If, for example, a flight has 100 seats for sale, a participating airline may close off further sale of seats through CRS systems in which it is not hosted at the 95th seat. This inventory buffer is required because the

While originally only a CRS which "hosted" an airline had last seat availability with respect to that airline, advances in technology led to the development of direct access links. These are described in the Agreed Statement of Facts as being of two general types, "look but not book" and "look and book".[3] A direct access

---

> communication messages that request a seat and confirm the reservation are ordinarily transmitted through a teletype switching system operated by Aeronautical Radio Inc. ("ARINC"). Delays in receipt of messages can be substantial and therefore an inventory buffer is required to prevent overselling a flight. If a carrier is hosted, no inventory buffer is required and its full inventory is normally displayed on the primary display.
>
> 28. The ability to make and confirm bookings on the last few seats of a flight (referred to as "last seat availability") allows travel agents to provide better service, particularly to the business market which desires seats on heavily booked flights. In order to have last seat availability, the travel agent must use a CRS on which that airline is hosted or use another CRS that has an electronic direct access link to the airline's database.

[3] They are described in the Agreed Statement of Facts as follows:

> 29. Direct access links are basically of two types, "look-but-not-book" and "look and book". "Look-but-not-book" links allow the travel agent subscriber to switch from the integrated display of the CRS and look at the seat availability shown by the internal reservation system of the participating airline. For example, the travel agent may see zero seats or a closed for sale message on the integrated display but by going into the direct access mode, may discover that there are in fact 5 seats available for sale. The agent then sends a teletype booking message from the CRS to the internal reservation system computer. It is standard practice in the United States that this booking message will have a special designator code that means that the participating airline will honour the reservation.
>
> 30. "Look and book" links have recently been developed to allow the CRS subscriber to look at the inventory of the participating airline and then instantaneously "book" and decrement the inventory. "Look and book" links

link allows another CRS besides the one in which an airline is hosted to have last seat availability with respect to reservations for that airline.

There are five CRS vendors presently operating in Canada: Gemini, Sabre, Apollo, PARS and System One. As of mid-1988 Apollo, PARS and System One held insignificant shares of the market. Sabre, which is owned by American Airlines, had almost 20 per cent of the market. Gemini as a result of the merger accounted for roughly 80 per cent of the market measured by either the number of CRTs or the number of flight segments booked (the latter is made up, approximately, of Reservec II's 69 per cent and Pegasus 2000's 11 per cent). A less useful measure of market size, travel agency locations, was also referred to in the evidence. It is less reliable than the foregoing measures because of the considerable disparity in the size of agencies.

---

provide participating carriers with CRS service comparable to that provided to the hosted carrier.

31. All of the CRS vendors in the United States have direct access "look-but-not-book" type links with the major U.S. carriers. Two CRS vendors (Pars and Apollo) have "look and book" links and two others (Sabre and System One) have indicated that they are under development. At the present time, only a few participating carriers in the United States are in fact using "look and book" links. There are presently no "look and book" links in operation in Canada. There are "look-but-not-book" links in place from AC to Pegasus, CDN to Reservec, Wardair to Reservec and Wardair to Sabre.

The term "market" is used somewhat loosely here and elsewhere for reasons of exposition and because nothing turns on the precision of definitions in the present context. In the case of CRSs, markets are more usefully viewed as local; airline markets can be viewed as consisting of city pairs. Greater precision is introduced, as required, into the later discussion of CRS markets.

Initially each CRS was associated with a single airline; the large CRSs operating in the United States developed in this way. In recent years four consortia have been formed outside the United States, two in Europe and two in the Asia/Pacific region.[4]

---

[4] The Agreed Statement of Facts, paragraphs 36 to 39 and Tables 1 and 2, discloses the following:

> 36. There are 5 CRS vendors presently operating in the United States, all of which are owned individually or jointly by air carriers ... .

According to Table 1, they are as follows, with their owning air carriers in parentheses: Sabre (American Airlines); Apollo (United Airlines, US Air, British Airways, KLM, SwissAir, Alitalia); System One (Continental Airlines, Eastern Airlines); PARS (TWA, Northwest Airlines); Datas II (Delta Airlines).

> 37. On January 27, 1989, American Airlines and Delta Airlines announced their intention to merge Sabre and Datas II, ...

> 38. There are several CRS vendors presently operating in Europe owned by the national airlines of the European countries. Many of the European air carriers have now joined one of two consortia ... in order to acquire the enhanced functionality offered by U.S. systems. (System One in the case of Amadeus and Apollo in the case of Galileo).

According to Table 2, the two European CRSs are Amadeus (Lufthansa, Iberia, Air France, Air Inter, SAS, JAT, Finnair, Braathens, Icelandair, Adria, UTA) and Galileo (British Airways, Alitalia, SwissAir, Olympic Airways, KLM, Sabena, TAP, Aer Lingus, Austrian Airlines).

Air Canada and Canadian (with Wardair) dominate the Canadian domestic airline market. They are less dominant in the transborder and international passenger market. According to the Agreed Statement of Facts their market share in that market amounts to less than 50 per cent.[5] Because of the dominance of Air Canada and Canadian in the domestic market a CRS operating in Canada must have access to the reservation systems of those airlines in order to have wide appeal to Canadian travel agents.[6] Given that Sabre lacks

---

> 39. One CRS has already been established in Asia/Pacific (Abacus) and another is under negotiation (Fantasia). Abacus currently is jointly owned by a consortia of carriers, Singapore International Airlines and Cathay Pacific.

[5] Paragraph 15.

[6] The Agreed Statement of Facts describes the airline industry in the following terms:

> 7. Prior to 1984 the Canadian airline industry was the subject of significant economic regulation and federal government policy.
>
> 8. From 1937, when AC was incorporated, to 1959, federal government policy provided for one national air carrier. Commencing in 1959, federal government policy recognized CPAL as a national carrier, but with limited operating authority. The Regional Air Carrier Policy of 1966 provided for five regional carriers in specified areas and in the north; Pacific Western Airlines in B.C. and Alberta, Transair on the Prairies, Nordair in Central Canada, Quebec Air in Quebec and Eastern Provincial Airways in the Maritimes.
>
> 9. Entry into the airline industry and fares charged by airlines were subject to government policy limiting the roles of CPAL and the regional carriers and extensive regulation by the Canadian Transport Commission,

this access, it is clear that Sabre's inroads into the Canadian market have occurred only because of its superior functionality.[7] The term functionality is used in the evidence and in these reasons to refer to

---

predecessor of the National Transportation Agency.

10. In May 1984, federal government policy was revised to remove the role distinctions between national and regional carriers. Restrictions on operating authorities of CPAL and the regional carriers were eliminated. Between 1984 and 1987 entry and fare regulation was relaxed and with the enactment of the National Transportation Act, 1987, the industry was largely deregulated in southern Canada (in the north entry and fares continued to be the subject of regulation).

11. Commencing in 1984, CPAL expanded its national presence by acquiring Eastern Provincial Airways and Nordair. In December 1986, PWAC acquired CPAL and formed CDN. In March 1989, PWAC made an offer to acquire Wardair Inc., the parent of Wardair Canada Inc. which had entered the scheduled domestic passenger airline industry in 1985.

12. In 1987, AC represented 52.7 percent, CDN 40.7 percent and Wardair 6.6 percent of the domestic revenue passenger miles flown by those three carriers.

[7] Paragraph 10 of the written Outline of Evidence of Richard S. Kunz, Managing Director of Sabre Canada, filed by American Airlines on April 20, 1989, states:

> Most of SABRE's customers were larger agencies, that is those with BSP revenues in excess of $2 million per year. Typically, these agencies would have a heavy concentration of corporate travel. The prime reason why agencies of this type were attracted to SABRE is that these agencies tended to be ones that could best appreciate the value of the superior functionality of SABRE as compared to Canadian CRS offerings. These agents were also able to afford the cost of retaining a Reservec terminal for last seat availability on Air Canada flights and their affiliates.

the service features and the size of the data base which a CRS vendor can provide to its subscribers through the CRS system.[8]

Draft Order Sought

While the Director originally sought an order dissolving the Reservec II - Pegasus 2000 merger, he has determined that the imposition of terms and conditions on Air Canada, Canadian and Gemini would create a situation in which the merger could be allowed to stand and no substantial lessening of competition would arise therefrom.

The order is divided into two severable parts. The first part contains obligations affecting primarily Air Canada and Canadian and, through them, their affiliated airlines. The second part consists

---

[8] Paragraph 11 of the Outline of Mr. Kunz's evidence describes the functionality of Sabre as follows:

> The functional superiority of SABRE is manifest in a number of ways, including: more comprehensive scheduling and pricing information; the STARS facility that allows a travel agent to store and retrieve client profiles for instant passenger record creation and reference; Bargain Finder programs that search out lowest fares; Shoppers Fare Quote which provides a travel agent with all standard and promotional fares between two destinations with prices listed from lowest to highest; Corporate Travel Policy which tracks and audits portions of a traveller's itinerary for compliance with pre-stated guidelines; pre-reserved seating and boarding pass printing for a number of airlines; and many others. These features enable travel agents to provide better service to their customers and to be more productive in doing so. ...

of "Computer Reservation System Rules" (CRS Rules) governing the conduct of Gemini and its owning airlines. (Sabre and other CRSs, and their respective owning airlines, will be bound by the Rules, as a matter of contractual obligation, in the event that they enter into direct link agreements with Air Canada and Canadian.) The obligations on the owning airlines in the CRS Rules are largely repeated in the first part of the order, since it is anticipated that the Rules could be dropped from the order, or modified, in the event that regulation of CRSs should be introduced in Canada, as has occurred and is occurring in other countries.

Terms and Conditions - Gemini - CRS Rules.

The terms and conditions to be imposed on Gemini in its operations are found, by and large, in the CRS Rules. These Rules set out a code of conduct for the operation of CRSs in order to "prevent unfair, deceptive, predatory and anti-competitive practices in air transportation and in the provision to subscribers of systems and services through such systems" (Rule 2(a)).

The CRS Rules address primarily the display of information by Gemini to its travel agent subscribers, the relationship between Gemini and its participating carriers and between Gemini and its subscribers, and the furnishing of service

enhancements, such as pre-reserved seating capability, to subscribers through the system.

Under the terms of the Rules, Gemini is required to display information to travel agents, via the computer terminals, in an unbiased, timely and accurate manner. Gemini is required to enter into contracts with all airline carriers, who wish to participate in its system, on a non-discriminatory basis and without conditioning such participation on the purchase of any other goods or services. Gemini's contracts with its travel agent subscribers are required to have no longer term than three years and to contain no roll-over provision. The contracts also are required to contain no liquidated damages provisions relating to booking fees or airline revenues, both of which have been the source of large liquidated damages claims in the United States. Gemini is required to make available to all subscribers all enhancements which are made available to it by its participating airlines.

These operational rules are similar to those which were imposed on CRS vendors in the United States, in 1984, by the Civil Aeronautics Board (CAB) and which have been administered by the Department of Transportation since the demise of the CAB. In Europe, the European Civil Aviation Conference (ECAC) began work, in mid-1987, to establish a code of conduct which is now published as a guiding set of principles. The Transport Directorate of the European Commission has also proposed a draft CRS regulation which,

if adopted by the Council of Ministers, will be legally enforceable in the European Economic Community.

The Tribunal was given to understand that the imposition of rules on Gemini by the Tribunal is seen as an interim measure. It is contemplated that the CRS industry in Canada will eventually be regulated by appropriate legislation.

Gemini is presently not able to comply with the CRS Rules regarding display, loading and enhancements due to technological limitations that exist in the Reservec and Pegasus systems. This arises because of the design and structure of those systems. For example, the existing Reservec display algorithm tends to advantage the flights of hosted carriers in Reservec over those of participating carriers. The Director and the respondents take the position that it would not be possible to rectify these problems without an overall redesign of the present system. It is contemplated that compliance with CRS Rules requiring unbiased displays could more quickly be accomplished by the acquisition of what is referred to in the evidence as successor software. The acquisition of such software will also enable Gemini to provide state of the art functionality comparable to that which is now provided by Sabre and the other United States CRSs. It is expected that Gemini will work with Covia to develop software based upon that utilized by Apollo in the United States. It is anticipated that the conversion of Gemini travel agents to the new system will commence in mid-1990.

Terms and Conditions - Air Canada and Canadian - Direct Links.

The consent order requires Air Canada and Canadian to provide to all CRSs operating in Canada a direct access link to each of their reservation systems respectively, provided that the owning carriers of the other CRSs offer reciprocal access to Gemini. Such links must be consistently operational and reservations made over them honoured in accordance with industry practice.

Direct access links of a "look but not book" type, are technologically possible now and, in fact, since the merger one has been in place between Reservec and Canadian and another between Pegasus and Air Canada. All CRS vendors in the United States have direct access links to the major US carriers regardless of whether or not the carrier is an owner of the CRS. If there had in the past been more competition in the Canadian airline market, the direct access links would probably exist as a result of market forces as happened in the United States.

The order does not oblige Air Canada and Canadian to provide direct access links to other CRSs operating in Canada until January 31, 1990. There is no reason for requiring this delay except to allow Gemini time to obtain functionality comparable to that of Sabre before requiring Air Canada and Canadian to provide direct

access links to that CRS. The order requires that when the more sophisticated "look and book" links eventually become available, Air Canada and Canadian will be required to provide those types of links to all CRSs operating in Canada, if such links are made available to Gemini by the owning carriers of the other CRS.

Terms and Conditions - Air Canada and Canadian - Other.

The other terms and conditions imposed on Air Canada and Canadian require them immediately and unconditionally to provide complete, timely and accurate information concerning their airlines schedules, fares and seat availability by class to all CRSs operating in Canada on the same basis and at the same time as such information is provided to Gemini. Air Canada and Canadian are also under an absolute obligation to participate in all other CRSs operating in Canada on commercially reasonable terms. Air Canada and Canadian are further required to offer, to all such CRSs, features such as advance seat selection and boarding pass capabilities on the same terms and conditions as these are provided to Gemini if the owning carriers of the other CRSs offer such facilities to Gemini with respect to their airlines.

As owners of Gemini, Air Canada and Canadian are also involved in the operation of Gemini and for that reason, certain of the CRS Rules also apply specifically to them. These particular Rules

would require that the owning airlines not attempt to influence subscribers to use Gemini by applying pressure related to airline commissions or other incentives or by arbitrarily refusing to issue their tickets through other systems in which they participate.

Enforcement Mechanism

The respondents will be bound by the terms of the order, including the CRS Rules, from the date the order takes effect, subject only to the exemptions given to Gemini where it is, as yet, technologically unable to comply. Further, PWA Corporation has agreed to cause Wardair, which it now owns, to comply with the order to the same extent as Canadian must.

A breach of any of the terms and conditions of the order by any of the parties thereto could give rise to contempt proceedings brought by any party interested in enforcing the order and possibly by any third party who is a beneficiary of the order. Section 74 (formerly section 46.1) of the *Competition Act* provides that failure to comply with an order of the Tribunal is punishable by fine or imprisonment.

Private enforcement is also contemplated in this order. In order to ensure that other, otherwise unregulated, CRSs operating in Canada do not gain an advantage over the respondents by virtue of

the constraints imposed on the respondents by the order, the provision of direct access links by Air Canada and Canadian is conditional on the recipient not only offering reciprocal capability, but also on the recipient agreeing to enter into a contract incorporating the terms and conditions for operating the links that are set out in the order and the CRS Rules in their entirety. This not only provides a "level playing field" within the industry, it also opens up at least the possibility of parties to the link contracts enforcing these obligations by suing for injunctive relief or for damages.

Positions of the Intervenors

None of the intervenors, except the Consumers' Association of Canada, opposes the order. The Consumers' Association's opposition is based on several grounds. Those emphasized in oral argument were: the settlement does not adequately deal with the lessening of competition in the CRS market which will occur as a result of the merger, particularly in smaller centres; the settlement does not limit in any way the respondents' market power but merely seeks to restrain it and in this case a behavioural solution is not adequate to solve a structural problem; the settlement does not adequately deal with the fact that the merger creates an increased potential for collusion between the two dominant airline carriers in Canada.

American Airlines does not oppose the general thrust of the order but seeks some modifications thereto. American takes the position that there are numerous changes which should be made to improve the order as an effective instrument to create a post-merger competitive environment. It is argued that these improvements could be adopted with no demonstrable injury to the respondents.

Air Atonabee Limited (City Express) does not oppose the consent order sought. Indeed, it strongly supports the settlement and urges the Tribunal to issue the order. While Air Atonabee's original position was one of opposition to the merger, counsel for Air Atonabee indicated at the hearing that an agreement had been entered into between Air Atonabee and Gemini, on April 20, 1989. This agreement alleviated Air Atonabee's main concern, which was the Gemini, previously Reservec, display. That system does not display to a travel agent, seeking information respecting flights to and from Toronto, the availability of flights to and from Toronto Island Airport in the same way as it displays those arriving at and leaving from Toronto's Pearson International Airport. Toronto Island Airport is a location from which Air Canada does not fly but City Express does. A similar problem exists with respect to flights to and from New York via Newark Airport. At the hearing counsel for City Express advised the Tribunal that:

> ... the general display availability transaction Reservec for Toronto [*sic*], when using the three-letter code, YYZ, and for New York, when using the three-letter code, NYC, have excluded the Toronto Island Airport and Newark Airport respectively.
>
> As a result, City Express has suffered a significant competitive disadvantage with respect to its flights to and from Toronto and Newark.
>
> In our client's view, this disadvantage might have been perpetuated if the merger had proceeded unconditionally. However, on April 20th, 1989, Gemini and City Express entered into an agreement whereby Gemini has committed itself to modify Reservec displays to provide for an integrated display for a city with multiple airports by using a single city code designator, and integrated display for multiple airports will continue to be available following the implementation of successor hardware.
>
> These modifications to Reservec directly address and remedy the problems experienced by City Express in the existing Reservec displays. Therefore, the source of City Express' current disadvantage resulting from Reservec displays will be removed, and its competitive position will thereby be enhanced.
>
> The April 20th agreement between Gemini and City Express is conditional upon the Tribunal issuing the consent order in the form proposed or in any other form satisfactory to the Respondents.[9]

The Alliance of Canadian Travel Associations also supports the consent order. Indeed, that organization, even in the absence of any rules or behavioural constraints being imposed on the respondents, did not oppose the merger. The Alliance does not share the concerns of the Consumers' Association, nor those articulated by others, with respect to the significant anticompetitive impact which the merger may have in smaller centres, nor does it share concerns

---

[9] See pages 918-19 of the transcript.

that the merger may facilitate collusion between the two main Canadian airlines and foster tying practices. The Alliance's support both for the merger and now for the consent order is based on a concern that a Canadian-oriented travel CRS survive. It is concerned that in the absence of the merger Pegasus would fail. In that case travel agents in smaller centres would be left, in any event, with only one CRS vendor, that is Reservec. Alternatively, the Alliance is of the view that Reservec and Pegasus would independently coalesce with two of the larger international CRSs and thereby lose their Canadian perspective.

A likely scenario in the absence of the merger would have been for both Reservec and Pegasus to become affiliated with one or other of the larger international CRS groups. In fact, there were advanced negotiations between Pegasus and Sabre prior to the negotiations that led to the formation of Gemini. The functionality of both Reservec and Pegasus lags behind what is available elsewhere and both were being pushed to seek increased functionality by virtue of the competition from Sabre.

Two other airlines were for a time intervenors in these proceedings: Wardair and British Airways. Wardair initially opposed the merger. After the announcement that Wardair had been purchased by PWA Corporation, Wardair took a neutral position with respect to the merger. On April 24, 1989, after it was announced

that the Director had approved the acquisition of Wardair by PWA Corporation, Wardair withdrew its intervention.

British Airways applied on April 24, 1989 to be added as an intervenor. Counsel for British Airways took the position that his client was concerned that the CRS Rules which form part of the consent order would impact on international travel and that they are not fair and reasonable nor preservative of competition in the market. It is the Tribunal's understanding that the concerns of British Airways relate to the fact that the CRS Rules which the Director seeks to have imposed on the respondents correspond to the United States CRS rules (the CAB Rules) rather than to those soon to be introduced in Europe. The different display criteria mandated by the two sets of rules have led to considerable international controversy. The Tribunal granted British Airways leave to intervene and make argument but because of the lateness of the intervention was not prepared to accord it any right to adduce evidence. On April 25, 1989 British Airways applied to withdraw as an intervenor. Counsel indicated that his client was confident that the Canadian government had taken note of its concerns and that British Airways would pursue its representations with respect to the content of new CRS rules before the appropriate body when the time came to make such representations.

The Attorney General of Manitoba throughout has supported the merger. He supported the merger in the absence of

any consent agreement imposing constraints on the respondents and he supports the consent order. The Attorney General is influenced by the fact that the Reservec/Gemini mainframe is located in Winnipeg. Counsel for the Attorney General stressed that Manitoba was concerned that Gemini personnel presently employed in Winnipeg remain there. Also, it seemed to be his impression that Sabre was not interested in tailoring its product to meet the particular needs of the Canadian market. There is of course no evidence on the record which supports the Attorney General's assumption that Sabre is not interested in tailoring its product for the Canadian market. Nor is there any evidence to support the position that Gemini, with its new relationship to Apollo, is more likely to retain employees in Winnipeg than would be the case if Reservec and Pegasus were linked to different but larger and more functionally sophisticated CRSs.

Representations Concerning Effects on Competition

There was almost no evidence placed before the Tribunal to demonstrate that the merger as conditioned by the terms of the consent order would result in a situation where there is likely to be a substantial lessening of competition. The Tribunal has evidence that the merger without the terms and conditions set out in the consent order would lead to a substantial lessening of competition:

expert evidence of Dr. Gary Dorman, filed by American Airlines;[10] expert evidence of Ms. Margaret Guerin-Calvert adduced on cross-examination.[11] The Tribunal has before it the supplemental affidavit of Dr. Gary Dorman which attests to the fact that numerous changes could be made to the terms of the order which would improve its effectiveness in creating a competitive situation. While giving oral evidence, however, Dr. Dorman went further and took the position that a substantial lessening of competition could only be avoided through dissolution of the merger. This conclusion is not the same as that urged by American Airlines, on whose behalf Dr. Dorman testified.[12] The Tribunal also has before it the expert evidence led by the Director to the effect that the merger, if conditioned by the terms of the consent order, would not result in a situation where there is likely to be a substantial lessening of competition.[13]

Market Concentration

The evidence and argument concerning market concentration focused particularly on the situation that will exist in

---

[10] Affidavit of Gary J. Dorman, dated March 9, 1989, at paragraphs 68-73.

[11] See pages 284-85 of the transcript.

[12] Supplemental Testimony of Gary J. Dorman, dated April 20, 1989; see also pages 624-26 of the transcript.

[13] Affidavit of Margaret E. Guerin-Calvert, dated April 21, 1989.

smaller centres as a result of the merger. Gemini will be the only CRS vendor in most of the smaller centres.

In the frequent references by witnesses and in argument by counsel to "non-urban" and "smaller" centres the terms were left undefined and it is doubtful that there was consistency of usage. In the material prepared by Ms. Guerin-Calvert and filed by the Director as Appendix II to the Agreed Statement of Facts there are breakdowns that could serve as a statistical dividing point between larger and smaller centres. In one compilation, data are shown for every population centre with more than five travel agency outlets. Those with five or fewer outlets are grouped into "other" for each province and territory and might, according to this breakdown, be considered the "smaller centres". A second breakdown is between Census Metropolitan Areas, presumably the "larger centres", and other population centres. While the larger cities in most provinces are included in the 23 Census Metropolitan Areas, there are some important exceptions -- Winnipeg, Halifax/Dartmouth and Charlottetown do not have Census Metropolitan Area status. With these additions, agencies in Census Metropolitan Areas account for approximately 74 per cent of CRTs.

Sabre, the only real competitor to Gemini, does not have widespread market presence in the smaller centres and there is some evidence that it is less likely to be able to move successfully into those areas because it has no airline presence outside of a few

metropolitan areas. There is no reason to believe that Sabre's competitive thrust will cover all Census Metropolitan Areas or will exclude population centres that do not have this designation. Sabre's ability to market its system in French-speaking areas is presently limited by its lack of French-language capability. Its presence in Quebec is currently restricted to Montreal. Sabre is working to develop French-language capability which it is expected will be available in the near future. A perusal of Sabre's presence by population centre shows that while, as expected, it is represented in the very largest cities, beyond these there is no obvious correlation between its presence and the size of the centre.

There is nothing in the agreement which requires non-differential pricing as between travel agents located in the large cities and those located in the smaller centres. This leaves open the possibility that monopoly prices can be charged to travel agents in smaller centres, particularly to those who are not affiliated with a large chain.[14]

---

[14] Dr. Dorman gave evidence at pages 737-39 of the transcript:

> Without debating at this point the extent to which Sabre or any other CRS vendor will be able to penetrate in a substantial way into the smaller communities in Canada, my concern is that most travel agencies in the smaller communities tend to be smaller agencies -- they have a limited amount of resources and a limited amount of commission income and, by increasing, in effect, the fixed costs that they have to sustain in order to remain in business, you will in some sense be reducing either the number or size of travel agencies relative to what would have existed at a lower CRS price. That will, I

The expert witness called by the Director, Ms. Guerin-Calvert, conceded that agents in large cities have more bargaining power than those in the smaller centres. She noted that there are always price differentials between agents and that, in general, larger agencies have more bargaining leverage than smaller ones. It was her opinion that the opportunities for entry into the market created by the direct access links, together with some of the required terms of the travel agent subscriber contracts (no term longer than three years; no roll-over provisions or certain kinds of liquidated damages clauses) created enough potential for competitors to enter the market so that one could not consider the post merger situation to be monopolistic. It was her evidence that "the settlement takes care of the anticompetitive problems with pricing to a significant extent and, therefore, eliminates ... the substantial lessening of competition from the merger".[15] This is consistent with the Director's position that although the settlement does not create competition for Gemini in each local CRS market in Canada, it does eliminate barriers to entry which previously existed because of the absence of direct access links

---

> think, ultimately work against consumers. ...
>
> ... we do not have non-discrimination rules with respect to pricing to travel agents. And what you may well find as a result of this is that the only travel agents that are able to strike a deal and remain competitive in this post-merger post-settlement world are those which are affiliated with large travel agency chains in the major cities, so that smaller independent agencies may find themselves simply unable to compete in that kind of environment, because they cannot get the same kinds of deals.

15 See pages 381-82 of the transcript.

and that therefore the merger, as conditioned by the terms of the consent order, cannot be said to be likely to lead to a "substantial lessening of competition".

Tying

Witnesses called by American Airlines and the Director stated that tying had been a practice engaged in in the United States. The extent of the practice and its effect on CRS competition, however, are unknown. While the CAB Rules expressly contain provisions prohibiting such activity, the problem has been one of effectively detecting the activity and enforcing its prohibition. This is so because there is likely to be a coincidence of interest between the airline imposing the tie (e.g. in the form of an additional commission) and the agent.

Sabre gave evidence through Mr Kunz, the managing director of its Canadian operations, that Sabre could be driven out of the Canadian market by tying practices.[16] Sabre considers tying to be as great a threat to its ability to compete effectively as the denial of last seat availability on Air Canada and Canadian. American Airlines, Sabre's owning carrier, does not operate domestic flights in Canada. Canadian regulatory rules require that domestic flights be

---

16 See pages 507-8 of the transcript.

serviced by domestic airlines. American operates transborder flights. Because of the lack of airline presence in most communities, Mr. Kunz indicated that it was impossible for Sabre or American Airlines to offer ties of the kind which Air Canada and Canadian, the owning carriers of Gemini, could offer.

The Alliance of Canadian Travel Associations is of the view that tying will not be a problem. There is no evidence that tying practices have been used, so far, by airlines in Canada. Counsel for the Alliance states that tying is being mooted as a potential problem in these proceedings because the expert witnesses come from the United States and because the most active intervention in the hearing comes from a major American airline. In addition, he notes that the travel agency industry is a very open one; it would be difficult to keep tying practices secret. He concludes "as is traditional, Canada is more than a step or two behind the U.S. developmentally ... . We have, effectively, missed that stage".[17]

The argument that Canada has "missed that stage" is based on the fact that Gemini is jointly owned by two airlines and is likely, shortly, to have a third owner, Covia. There is evidence that tying practices are less likely to be used when a CRS is owned jointly by several carriers, rather than by one carrier only. In the case of joint ownerships the benefit resulting from a tie offered by

---

[17] See pages 940-43 of the transcript.

one carrier has to be shared by that carrier with the other owners of the CRS rather than being recouped totally by the owner carrier. Obviously, the extent to which joint ownership reduces the incentive for tying is dependent on the percentage of ownership individually held by the airlines who might profit from a tie.

The CAB Rules provide:

> **255.6 Contracts with subscribers.**
>
> (a) No subscriber contracts shall have a term in excess of five years.
>
> (b) No system vendor shall directly or indirectly prohibit a subscriber from obtaining or using any other system.
>
> (c) No system vendor shall require use of its system, by the subscriber in any sale of its air transportation services.
>
> (d) No system vendor shall require that a travel agent use its system as a condition for the receipt of any commission for the sale of its air transportation services.
>
> (e) No system vendor shall charge prices to subscribers conditioned in whole or in part on the identity of carriers whose flights are sold by the subscriber.

The consent order Rules provide:

> 6. Contracts with Subscribers
>
> (a) No new or renewed subscriber contract shall have a term in excess of three years. As at the date these Rules become applicable to the system vendor, the system vendor shall not enforce an unexpired term in excess of three years in its existing subscriber contracts.

(b) Neither the system vendor nor its owning carrier(s) shall directly or indirectly prohibit a subscriber from obtaining or using any other system.

(c) No carrier shall require use of any system by the subscriber in any sale of its air transportation services.

(d) The owning carrier(s) shall not directly or indirectly require a subscriber or potential subscriber to use the system in which it has an ownership interest as a condition for the receipt of any commission or other incentive for the sale of or access to air transportation services of it or of its carrier affiliates.

(e) The system vendor shall not charge prices to subscribers conditioned in whole or in part on the identity of carriers whose flights are sold by the subscriber.

(f) The system vendor shall not include as part of its contracts with subscribers any rollover provisions, including any provision that by its terms requires the automatic extension of the contract beyond the stated date of termination because of the addition or deletion of equipment.

(g) The system vendor shall not include liquidated damage clauses based on segment bookings or airline revenues as part of its new or renewed subscriber contracts. As of the date these Rules become applicable to the system vendor, the system vendor shall not enforce such liquidated damage clauses in its existing subscriber contracts.

While the provisions in the order are based on the CAB provisions, modifications have been made thereto for the purpose of creating stronger prohibitions. In addition, the CRS Rules require that the owning carriers of CRSs notify all travel agents who sell their products, at least once a year, that airline incentives "are not conditional upon the use of a particular CRS system" (Rule 14). In this manner it is hoped that travel agents will realize that whatever benefits they might hope to obtain by virtue of a preferred tie can

be obtained without the tie. The Rules also require Gemini, Air Canada and Canadian and other CRSs and their owning carriers who become contractually bound to the Rules to report to the Director every year indicating compliance with those Rules (Rule 15).

Tying is, of course, a reviewable practice independently of any order the Tribunal might make. Section 77 (formerly section 49) of the *Competition Act* defines tied selling as:

> (a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to
>
> (i) acquire any other product from the supplier or his nominee, or
>
> (ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or his nominee, and
>
> (b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to him on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

As with most other reviewable practices in the *Act*, tying may only be the subject of an order under circumstances where it is determined that it results in a substantial lessening of competition. The fact that tying is prohibited outright under the Rules reflects the concern that a strong market position in airline markets can be used to reduce competition in the CRS market.

American Airlines suggested two changes to the order to strengthen the provisions prohibiting tying. One is a clause

requiring that all inducements offered by airlines to travel agent subscribers be in writing.[18] The other is a requirement that certain structural changes be imposed on Gemini to make it operate as a truly independent entity.[19]

---

[18] The suggested clause reads:

> Any promotional offer above standard commissions made by either AC or CDN to a travel agent must be in writing and include a warning that the offer is available regardless of which CRS the agent uses or proposes to use.

See Changes to Draft Order and Rules, as proposed by American Airlines, Inc. and Supplemental Submission, dated May 11, 1989, at paragraph 10.

[19] The suggested clause reads:

> Gemini shall be maintained at arm's length from AC, CDN and their respective airline affiliates, which relationship shall include the following structural features:
>
> (a) at least one third of the directors of Gemini should be independent of the Respondents or any of their affiliates;
>
> (b) Gemini shall publicly release its audited, annual financial statements within 30 days of their issuance;
>
> (c) Not later than the second anniversary of the date of this Order, ten percent or more of the equity in Gemini shall be sold to interests that are not directly or indirectly owned or controlled by any of the Respondents;
>
> (d) The Respondents shall take all reasonable steps to require that the employees of Gemini are separated from the employees of AC, CDN and their airline affiliates including without limitation the provision of separate offices in separate buildings;
>
> (e) exchanges, or transfers of employees as between Gemini, on the one hand and AC, CDN and their respective airline affiliates on the other hand, are prohibited after January 1, 1990;

With respect to the first suggestion, the respondents and the Director consider that it is unduly burdensome as a commercial business practice. With respect to the second, it is the Director's position that such structural modifications are not required in order to guard against the danger of tying.

The Tribunal expressed the view that a stronger guarantee would exist if a requirement was imposed on Gemini to divest itself of at least 25 per cent of its ownership and control within one year of the Tribunal's disposition of this application. Underlying much of the argument made to the Tribunal was the assumption that the Covia agreement would eventually become final. It was in the light of that assumption that the Tribunal raised the question as to whether or not there should be some positive obligation placed on Gemini by the order to require it to divest itself of a percentage ownership, either through the Covia agreement, or otherwise. The Director took the position that he did not seek such an obligation as part of the order.

It is the Tribunal's view that if Gemini does not in the near future acquire a third owner, given that this expectation formed the basis of so much of the argument before the Tribunal, it would be open to the Director to seek a modification of the Tribunal's

---

(f) AC and CDN shall require that their employees do not promote Gemini to any degree greater than they promote any other CRS.

See paragraph 12 of the document referred to above.

order pursuant to section 106 (formerly section 78) of the *Competition Act* on the ground that the circumstances in existence at the time of the making of the order had changed.

Collusion

It is generally accepted that where there are only two major competitors in a market there is increased opportunity to engage in collusive behaviour.[20] While the Gemini merger does not increase the incentives for Air Canada and Canadian to collude, with respect to the airline market, the existence of Gemini does allow for exchanges of data which make collusion easier to engage in and more difficult to detect.

---

[20] Part of the evidence which was read into the record by counsel for the Consumers' Association when cross-examining Ms. Guerin-Calvert is as follows:

> "Thus, the Gemini merger would coexist with a duopoly in airline markets. Where they [*sic*] are only two firms and entry is unlikely, barring other mitigating factors, the prospects for collusion in airline markets are high. The Gemini merger increases the chances that Air Canada and CAIL could exchange data on market share, prices, and price changes through the CRS. Such exchanges in an environment where there are clear gains to collusion on airline markets route, or [*sic*] prices are very likely to result in substantial lessening of competition between what could be the only two remaining airlines in Canada."

See pages 399-400 of the transcript. The passage is taken from page 37 of the March 2, 1989 affidavit of Ms. Guerin-Calvert.

The consent order attempts to address this problem. The order as originally drafted and filed on April 13, 1989, contained a clause which read:

> 11. AND IT IS FURTHER ORDERED that the respondents and each and every one of their respective directors, officers, managers, servants, employees, agents, or any of them, shall not share or exchange commercially sensitive information through the operations of Gemini for the purpose of facilitating or engaging in anti-competitive acts or collusive behaviour contrary to the provisions of the *Competition Act*.

Ms. Guerin-Calvert took the position that this provision of the draft order effectively dealt with the problem of possible collusion:

> But it is my view that the restriction, the prohibition on exchange of information goes to the heart of the major problem concerning ability to collude that is raised by a CRS merger, namely the exchange access [*sic*] to specific types of information. ...
>
> My sense is, then, ... that they [the colluders] run the risk, clearly, of having violated this prohibition, plus, I would imagine, general prohibitions in the *Competition Act* concerning price fixing.
>
> ... my understanding is at the end of every year, the corporate executives must report to the Director that they have indeed complied with the provisions of the settlement. In that respect those individuals, I would imagine, would subject themselves to prosecution for having lied, that they had not indeed complied with the settlement provisions.
>
> The second aspect is that, as in any case where you have just two competitors left in an industry, I would imagine that the Director of Investigation and Research would, more or less, keep his or her eye on the industry to see what happens and, if there is a distinct trend

toward higher prices, might well investigate.[21]

The original clause has been redrafted, in response to a number of suggestions made in the course of the hearing before the Tribunal, to read as follows:

> 16. AND IT IS FURTHER ORDERED that the respondents and each and every one of their respective directors, officers, managers, servants, employees, agents, or any of them, shall not share or exchange commercially sensitive airline information through the operations of Gemini, including, but not limited to, seat inventory information in respect of individual carriers to a greater extent than such information is accessible by Gemini subscribers, where such sharing or exchange would facilitate agreement to share markets or fix the level of prices between AC, including its affiliated airlines, on the one hand and PWAC, Wardair and CDN, including its affiliated airlines, on the other.

In addition, it was always contemplated that the order would require the officers of Air Canada, Canadian, PWA Corporation, Wardair and Gemini to report each year to the Director indicating that this provision, as well as the other CRS Rules had been complied with.

In the draft order sent to the Tribunal, dated June 2, 1989, the parties deleted from the Rules the provision corresponding to paragraph 16 of the order. No express reference was made by the parties to this deletion in the correspondence sent to the Tribunal, except that an inverted V in the draft indicated that a deletion had been made. That deletion resulted in the respondents being exempted

---

[21] See pages 407-9 of the transcript.

from the reporting requirement emphasized in much of the argument before the Tribunal as being an important enforcement mechanism. The Tribunal raised this issue with the parties and on July 6, 1989, the parties agreed to include the following additional clauses in paragraph 16 of the order:

> An officer of each of the Respondents shall provide a report to the Director on or before February 1st of each year that it has complied with this provision in the prior year.

The Agreed Statement of Facts filed by the Director and the respondents contains the following:

> 57. Gemini maintains security procedures to ensure that AC and CDN cannot access each other's commercially sensitive information which is maintained in separate data bases. Clause 3.04 of the Computer Reservation Systems Contract dated May 28, 1987 and executed by
>
> AC, PWAC and Gemini provides:
>
> > To the extent reasonably and technically feasible, the Partnership shall keep confidential data and information relating to Air Canada, Canadian or other customers separate and unavailable to others.

Collusion is of course a practice contrary to the *Competition Act* regardless of what provisions may be included in any Tribunal order. The prohibition against the exchange of seat inventory information, specifically, and other information that could facilitate agreement on prices and market shares, more generally, is undoubtedly much stricter than the conduct disallowed under section 45 (formerly section 32) of the *Competition Act.* Seat inventory was

the only category of competitively sensitive information specifically identified as requiring safeguards by the expert witnesses called by American Airlines and the Director.

Counsel for the Consumers' Association put forward a very forceful argument to the effect that a simple prohibition is totally inadequate to deal with the situation. Her arguments were: the incentives to collude are great; the prohibition does not change those incentives; reliance is placed primarily on self-enforcement by the very entities, the airlines, that have most to gain from the practice; and the practice will likely be impossible to detect. The Consumers' Association was concerned about the potential for collusion which would result from the merger when Air Canada and Canadian accounted for ninety per cent of the domestic passenger market but with the takeover of Wardair by PWA Corporation that concern has taken on new and added significance. It was noted that virtually the entire domestic airline passenger market is now controlled by the two airlines; that a significant form of competition between airlines in deregulated markets takes place through the use of discount fares and the providing of discount seats; joint ownership of Gemini by Air Canada and Canadian will make it possible for them to observe each other's discount seat inventories, thereby reducing competition; and that consumers are the big losers if there is a reduction in the availability of discount seats. It is the position of the Consumers' Association that the only effective remedy is to order dissolution of the merger.

American Airlines suggested that an additional provision should be added to the order to address the issue:

> Gemini shall not provide information regarding participating carriers, statistical or otherwise, (but not restricted to the identity of participating carriers and their mode of participation) except that information in aggregate or anonymous form when made available on request to any air carrier shall be offered to all participating carriers on a non-discriminatory basis but shall in no event be made available concerning specific Canadian domestic routes.[22]

The Director rejected this proposal because it would have an anticompetitive impact of its own. The Director took the position that while it is a tenable type of provision to apply in the United States market, it is not so in Canada because on many routes in Canada there are only two carriers and if one has aggregate data and one's own data, as counsel for the Director put it, "then it really does not take much work to know exactly what your competitor's position is".[23]

The respondents emphasized and the Director did not dispute that the acquisition by Covia of a one-third interest in Gemini means that Gemini personnel will be answerable to an outside party who has no interest in facilitating collusive behaviour between Air Canada and Canadian.

---

[22] Changes to Draft Order and Rules, as proposed by American Airlines, Inc. and Supplemental Submission, dated May 11, 1989, at paragraph 14.

[23] See pages 977 and 993-95 of the transcript.

Direct Access Links

As noted above, American Airlines, as the owner of Sabre, is the only intervenor in these proceedings who has a commercial interest in seeing that Air Canada and Canadian are required to provide direct access links to the other CRSs operating in Canada. American's concerns about the terms and conditions on which Air Canada and Canadian will be required to provide the direct access links can be categorized as follows: concerns about the timing of the links; concerns about the scope of the links; concerns about the costs of the links; concerns about the adequacy of the terms respecting the payment of premiums for "look and book" links.

As noted above, there is no obligation on Air Canada and Canadian to provide a direct access link until January 31, 1990. At that time, a "look and not book" link must be provided. The look and book links will not be required until June 30, 1991. It is technologically possible to put look and not book links into place immediately, allowing for a normal installation time period which appears to be about four months. The January 31, 1990 delay is built into the order to allow Gemini to obtain functionality comparable to Sabre before the links are required. American notes that in a competitive market one is not usually required to submit to an artificial constraint of waiting for a competitor to bring itself up to speed before competing. It is difficult to know whether Sabre will remain a strong competitor once Gemini obtains comparable

functionality. It is American's position that there is no good reason for delaying the link obligation. Gemini has already been benefiting from the merger for the past two years.

It is the Tribunal's understanding that the Director and the respondents take the position that it is necessary to delay the obligation to provide a look and not book link until January 31, 1990 because it is important to "keep a level playing field". As we understand the argument, it is that giving Sabre the direct link now, when it has superior functionality, would give it too much of a competitive advantage. At the same time, the requirement to provide links will not be delayed forever. There is a requirement that they be provided by the January 31, 1990 date even if Gemini has not acquired functionality comparable to Sabre by that time.

With respect to the delay in the look and book links and the requirement that there be seven month's notice given by a CRS who seeks such a link, the Director and the respondents take the position that these time frames are necessary because this type of link is not yet fully developed and it is unclear at present how long that development will take and how long it will take to install such a link when it is developed. While Sabre's present "multi-access" link is a species of look and book link, it is the Tribunal's understanding that both Sabre and the other CRSs, for example, Apollo, are developing a more sophisticated type of a look and book link and it is these which it is hoped will be available by June, 1991.

American's concerns about the scope of the links are: the language specifically identifies two types of links, "look and not book" and "look and book", and as such it is open to the interpretation that a hybrid system such as Sabre's "multi-access" falls into neither category; the wording does not cover future technology which might develop still more sophisticated links.

American therefore suggested the following two additions to the order to deal with the perceived definitional and functionality problems:

> The functionality of the direct access link offered by AC or CDN to any CRS shall not be less than that available to any other CRS operating in Canada, subject to reasonable system constraints.
>
> Multi-access functionality shall be deemed to be included as part of a look-but-not-book link.[24]

It is the Director and the respondents' position that "look and not book" and "look and book" links are very well understood in the industry; that American's multi-access link is of the look and book variety and has been so treated during the whole course of the negotiations leading up to the settlement. The Director is further of the view that phrasing the link requirement broadly would constitute an open-ended invitation to Sabre and presumably other CRSs, should they wish to compete in the Canadian market, to continually argue

---

[24] Changes to Draft Order and Rules, as proposed by American Airlines, Inc. and Supplemental Submission, dated May 11, 1989, at paragraphs 5 and 31.

with the Director and the respondents about the specifics of what is required to be provided.

American's concern about the costs of the links are: (1) it is not usual industry practice for the CRS to pay for the link;[25] (2) the maximum amount specified in the order for look but not book links ($600,000 for an Air Canada link and $300,000 for a link to Canadian) are wildly outside normal costs. There is evidence that the standard costs for establishing such links range from $5,000 (U.S.) to $31,000 (U.S.). Sabre charges a fee of $21,000 (U.S.) for an IBM-based (or PARS-based as it is sometimes referred to) system such as Pegasus and $31,000 (U.S.) for a Unisys-based system such as Reservec. American is of the view that the limits agreed to by the Director and the respondents may be large because it is Air Canada's and Canadian's intention to have American pay the developmental costs of establishing the links, from which Apollo would then be able to benefit.

The requirement to pay the cost of the link is being imposed on the requesting CRS because the requirement to provide

---

[25] See the Submissions of American Airlines, Inc. in respect of the Draft Consent Order to Approve Settlement, filed April 20, 1989, at paragraph 63.

> ... Indeed, to American Airlines' knowledge, no airline has ever been paid by any CRS for the privilege of selling that airline's services. On the contrary, under standard industry practice, it is the airline which pays CRSs for direct access links because such links enhance the airline's ability to sell its air services.

the link is being imposed on Air Canada and Canadian and because the links will add to Air Canada and Canadian's booking fees. The costs to be charged, described as the "incremental unmarked up costs", are the actual and reasonable costs incurred. It is the Tribunal's understanding that the maximum amounts specified are not designed to accommodate developmental costs. Developmental costs have already been incurred for the purpose of establishing links between Reservec and Canadian and Pegasus and Air Canada. Mr. Kunz gave evidence that while the cost provisions of the order were of some concern to him, they were not of overriding importance.[26]

American is concerned about the terms on which the obligation to provide the look and book links is being imposed. There were some changes to those provisions in the course of the hearing and the post-hearing discussion. American remains concerned because there is no requirement that the premiums payable for the look and book links be determined by binding arbitration and because there is no objective test by reference to which such premiums are to be determined. The relevant provision (paragraph 6 of the order) merely provides that

> the premiums, if any, ... shall be a matter of commercial negotiation between the parties to the link contracts, provided that, if Gemini charges a premium for bookings over any "look and book" links it has with other airlines (the "Gemini premium") the premium payable by AC and CDN for bookings made by other CRSs over such links shall not be less than the Gemini premium.

---

26 See pages 506 and 544 of the transcript.

The representations of American filed with the Tribunal on June 7, 1989 state:

> ... It [the relevant provision of the order] does not ... answer the fundamental question of how the premium is to be established in the event that negotiations are deadlocked, as they inevitably will be. ...
>
> It should be recognized that under the draft Order as it now stands the commercial negotiations on the look-and-book premiums will not be real negotiations where each party bargains with certain strengths and weaknesses, ... AC and CDN will have little if any incentive to pay such premiums to SABRE because they can calculate that with their collective airline dominance in Canada, SABRE will be forced to supply this enhanced service gratis in order to remain competitive with Gemini. ...
>
> ... As section 6 of the Order is now written, if any "commercial negotiations" on the premium ever do occur, there is a virtual requirement that all major participants in the Canadian CRS market engage in behaviour fraught with the risk of price fixing. This arises because the "commercial negotiations" will in effect see SABRE negotiating look-and-book premiums directly with AC and CDN and, indirectly through them, with Gemini and Apollo. This will occur through no fault of SABRE. ...
>
> As a final note, the Tribunal may well ask why the respondents have insisted upon an unworkable and anticompetitive mechanism to deal with look-and-book premiums when a far better alternative, one in fact proposed by the Tribunal, was available. The answer is not difficult to discern. It is in the interest of the respondents to do whatever they can to frustrate SABRE's ability to compete in Canada. ...[27]

American takes the position that the Tribunal, on May 24, 1989, made it a condition of the granting of the consent order that an arbitration provision had to be included to govern the terms of

---

[27] Further Submissions of American Airlines, Inc., filed June 7, 1989, at paragraphs 4, 7, 12 and 18.

the look and book link contracts including the terms respecting the payment of premiums. The Tribunal's position was not that categorical. The Tribunal raised a number of concerns in the course of the hearing on that date and in its memorandum of May 12, 1989. It did not however, express those concerns, or any subset thereof, as requirements which had to be included in the consent order to obtain its issuance. One factor that the Tribunal had to take into account in determining whether to issue the order was the Director's determination that the requirement of binding arbitration and the establishment of an objective test for the payment of premiums are not necessary in order to ensure an adequate competitive post-merger environment. The lack of those two elements is not automatically, in itself, a fatal flaw.

During the hearings, counsel for American Airlines raised the possibility that Sabre could find itself in a position in which Air Canada and Canadian refused to pay a premium for bookings made on a look and book link and that, by reason of the non-discrimination clause in the Rules, it would be forced to forego charging a premium to other airlines as well. It could be further disadvantaged if Gemini charged a premium for bookings made over look and book links it had with airlines. The Tribunal voiced the opinion that the latter competitive concern could be obviated if Air Canada and Canadian were required to pay at least as high a premium for bookings through the look and book links which they had with CRSs as would be

charged by Gemini for bookings over its look and book links. This requirement is part of the order (paragraph 6).

Other Concerns

Four other concerns regarding the consent order will be noted. They relate to ancillary travel services, service enhancements, maintenance of the existing Wardair/Sabre link and enforcement of the order by third parties.

With respect to ancillary travel services, American has stated that it faces additional barriers in competition with Gemini because it does not have a link to Global Accounting Services, which provides its services through Gemini, nor to Via Rail and Tilden who are hosted on Gemini. Global provides an automated accounting service to travel agents who subscribe for that service. Subscriber agents are provided with a total accounting facility, ticketing and invoicing, as well as management reports. Subscriber agents pay a percentage of total sales for this service. Global is 34 per cent owned by Air Canada. Travel agent subscribers are reluctant to change their accounting system and thus Sabre is currently not a viable competitor for many customers because it is not linked to Global. There was, however, no evidence before the Tribunal that Global had been approached for such a link and had refused to grant it. In addition, some travel suppliers other than the airlines are

hosted in Gemini, for example Via Rail, Tilden and several tour operators.

American suggested that the respondents should be prohibited from attempting to influence or control any supplier of an ancillary travel service in which they have an ownership interest, including Global, with respect to making its services available through other CRSs. American also sought a provision requiring Gemini to cooperate fully with its hosted travel suppliers in implementing, at their request, access links to other CRSs.[28]

The Director's position is that the principal weakness in Sabre's competitive position has been dealt with in the consent order and that it is not necessary to respond to every perceived inequality. He considers that the difficulties with the ancillary travel suppliers are ones about which Sabre should negotiate with the ancillary travel supplier.

With respect to enhancements, American's concern is that the order does not look sufficiently to the future and to the possibility of new enhancements being developed and provided by Air Canada and Canadian through Gemini only. American suggested that a clause along the following lines should be included in the order:

---

[28] See Changes to Draft Order and Rules, as proposed by American Airlines, Inc. and Supplemental Submission, dated May 11, 1989, at paragraphs 2 and 3.

> AC and CDN shall not refuse to provide to any CRS the same facilities and enhancements relating to the sale or display of their services as that which they provide to Gemini, including without limitation itinerary pricing assistance. Charges levied by an airline or CRS in connection with the foregoing shall be in accordance with standard North American industry practice.[29]

Itinerary pricing, a further concern of American, is a service which Air Canada and Canadian now provide to Gemini customers in Canada and to CRSs operating in the United States, including Sabre, but will not provide to Sabre's Canadian customers.

The two known enhancements, boarding passes and pre-reserved seating allocation, are specifically dealt with in the order (paragraph 3). The Director and the respondents are of the view that it is appropriate to draft the order by reference to what is known at the present time. Should there be significant developments in the provision of enhancements the Director considers that this would be exactly the kind of case that would merit an application under section 106 of the *Competition Act* for a variation of the order.

Insofar as itinerary pricing is concerned, it is the Director and the respondents' position that Sabre does not need to be assured of equality in every dimension but merely a reasonable opportunity to compete. This particular issue, they argue, is "at the

---

[29] Changes to Draft Order and Rules, as proposed by American Airlines, Inc., dated May 11, 1989, at paragraph 1.

margin" and is not essential for reasonable access to the Canadian CRS market.

With respect to Wardair, as noted above, approval of PWA Corporation's purchase of Wardair occurred during the course of the proceedings before the Tribunal. Wardair presently has a direct access link to Sabre. Thus Wardair customers can obtain the services which Sabre provides as a result of its superior functionality, for example, receipt of boarding passes at the time a ticket is issued. There is reason to believe that PWA Corporation plans to have this link severed and to have Wardair become hosted in Pegasus. The Director's concerns in this regard, upon hearing the submissions of American, led to the inclusion, in the version of the consent order filed on April 28, 1989, of a provision as follows:

> 16. AND IT IS FURTHER ORDERED THAT PWA Corporation ("PWAC") shall not take steps to terminate the link currently existing from Wardair Inc. and/or Wardair Canada Inc. ("Wardair") to Sabre so long as Wardair is hosted in a CRS other than Gemini. PWAC shall cause Wardair to abide by the terms of this Order to the same extent as CDN is bound, in the event that Wardair becomes hosted in Gemini.

American rightly pointed out that this clause accomplished nothing. American suggested that there should be no diminution of the functionality of the link which presently exists between Wardair and Sabre and no abrogation of Wardair's participation in Sabre's boarding pass program. The Tribunal raised this question as one which was of concern to it. The Director and the respondents have

since filed a revised version of the above provision which is incorporated in the order (paragraph 10).

American expresses concern that there is no express right provided to travel agents to enable them to enforce the CRS Rules. Counsel for the Alliance of Canadian Travel Associations made the same point. American suggested that the following should form part of the Tribunal's order:

> A private right of action including injunctive relief, shall be available to any travel agent that suffers damage as a consequence of the violation of the terms of this Order by any Respondent.[30]

Unfortunately, however, the Tribunal has not been presented with any legal argument which would persuade it that it has jurisdiction to include such a term in its order or that such a term would have any legal effect. The Tribunal has not been persuaded that it has jurisdiction to create the type of cause of action which the suggested provision would entail.

Bios Computing Corporation - Concerns

Bios Computing Corporation is a small business owned and operated by Mr. Ernst von Bezold. The company is in the business

---

[30] See Changes to Draft Order and Rules, as proposed by American Airlines, Inc. and Supplemental Submission, dated May 11, 1989, at paragraph 11.

of selling micro-computer systems to travel agents and tour operators. The services and related equipment he provides are directed to the needs of travel agents and tour operators. Mr. von Bezold appeared before the Tribunal and voiced two concerns. He stated that it was his experience that some travel agents were not able to connect to Gemini if they used his system. The Tribunal understood that this is not necessarily a question of technological incompatibility but rather a requirement by the CRS that the travel agent purchase the requisite computer equipment from Gemini in order to avail itself of Gemini's information and reservation system services. What he seeks from the Tribunal is an order requiring the unbundling of the hardware from the information and reservation system service.[31]

---

[31] Mr. von Bezold's submissions to the Tribunal contain the following:

> Fair access to unbundled services based on non-discriminatory interconnect of networks of non-airline competitors (such as Bell Canada's Travelnet, CN/CP, or another third party vendor supplied by Bios or other companies) and on choice of terminating systems equipment and software owned or chosen by the CRS user would open up the market for sales and service of microcomputer-based airline-CRS-connectable computerized information management system tools to small and medium-sized travel agents and tour operators, and would enhance their capacity to choose and switch between CRSs using gateway products as interfaces. For both buyers and sellers of these systems, it would have the effect of helping to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers of CRS services with competitive prices and product choices.

Comments Submitted on behalf of Bios Computing Corporation with respect to the Proposed Consent Order, filed April 20, 1989, at paragraph 7.

Mr. von Bezold's second concern relates to the term of the consent order which requires Air Canada and Canadian to provide direct access links only to those CRSs operating in Canada that are classified as "commercially significant". These are defined to include the known CRSs -- Abacus, Amadeus, Apollo, Datas II, Fantasia, Galileo, Pars, Sabre and System One. He states that the order and Rules "institutionalize the inherent oligopolistic advantage of large airline CRSs as a group". In his opinion the effect of this particular term of the order is to exclude smaller potential competitors: it "give[s] those big players protections which increase the barrier to entry of other market participants who do not fit the draft definition of economically significant airline CRSs ... ."[32]

With respect to the first of Mr. von Bezold's concerns, American Airlines has indicated that at least as far as Sabre is concerned, assuming technological compatibility, that company does not require the bundling of devices and services. While no statement was made by counsel for Gemini as to that entity's practices, it is an open question whether such requirements, if imposed on travel agents, would not, in any event, constitute an infringement of section 77 of the *Competition Act*, as an exercise in tied selling. With respect to Mr. von Bezold's second concern, Air Canada and Canadian justify the restriction to commercially significant CRSs by saying that

---

[32] Comments Submitted on behalf of Bios Computing Corporation with respect to the Proposed Consent Order, filed April 20, 1989, at paragraphs 3 and 5.

they are being forced by the order to deal with other CRSs on an ongoing basis and they are entitled to know with whom they will have to deal. Moreover, the order also requires that the other CRS be able to provide certain reciprocal obligations for the concessions it receives. It is the Tribunal's understanding that the Director accepts this explanation. In any event, he has not sought the broader access link requirement which Mr. von Bezold proposes. Both the Director and the respondents take the view that the issues raised by Bios are not related to the merger. They are certainly issues which it would be appropriate to address in the development of the CRS rules which it is contemplated are to be imposed by legislation.

Applicable Test For Approving Consent Order

The argument has been put very forcefully to the Tribunal that it should not be quick to second guess the Director's view that the consent order which is sought is appropriate in the circumstances. Counsel for the Director argued: "The Director's role ... is ... more in the trenches ... . The Director assembles the facts; he assesses the problems with counsel and with experts ... ."[33] Counsel for the Alliance of Canadian Travel Associations also took a very strong position to the effect that the Tribunal should not second guess the Director. He noted that the Director is a public

---

[33] See page 766 of the transcript.

official who has a responsibility to maintain and encourage competition in Canada. It was argued that as such the Director is not subject to the pressures which often force private litigants to settle: the need to save time or money; a desire to avoid embarrassment by the public disclosure of private matters. It was argued that the Director would not be motivated by such factors but was able to keep in mind, at all times, the overriding concern of the broader public interest.

In the United States, consent decree proceedings are a very useful tool in the antitrust arena. Over 80 per cent of all cases filed by the Department of Justice in that country are settled by consent decree. It was suggested by counsel that a similar development in Canada would be helpful and that such will not occur unless parties can come to the Tribunal with some confidence that an agreement which has been reached by the Director and the respondents will not be reopened by way of extensive litigation and that the agreement will have a reasonable likelihood of being acceptable, provided that it meets certain threshold requirements.

The dynamic of the settlement process in the United States in antitrust cases is of course likely to be somewhat different from that which operates under our system. In that country, an individual or corporation which considers itself to be harmed by anticompetitive behaviour always retains the right to initiate a

private suit. Private enforcement supplements public enforcement; neither type of suit is preclusive of the other.

> A private suit terminating in a consent decree or an outright victory for the defendant does not bar a government suit. Nor would the defendant's victory in a government civil suit preclude a later private suit.[34]

In the present case, had the respondents and American Airlines been negotiating directly with each other it is likely that a somewhat different consent order might have been placed before the Tribunal. Whether this would or would not, without the involvement of the Director, have taken account of the public interest is of course another matter.

Reference was made to *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (H.C.). In that decision a public officer appointed under the *Canada Business Corporations Act*, S.C. 1974-75-76, c. 33, commenced action against the defendant Southam in respect of a share exchange agreement which it was alleged was prejudicial to the interest of the minority shareholders. The litigation was settled by the public officer. The settlement had to be approved by court order. Five of the minority shareholders applied as intervenors and contested the settlement. In reaching its decision to approve the settlement the Court said, at page 230 of the judgment:

---

[34] P. Areeda & D.F. Turner, Antitrust Law: An Analysis of Antitrust Principles and Their Application, vol. 2 (Boston: Little, Brown, 1978) at para. 323d [footnotes omitted].

> In deciding whether or not to approve a proposed settlement under s. 235(2) of the Act, the court must be satisfied that the proposal is fair and reasonable to all shareholders. In considering these matters, the court must recognize that settlements are by their very nature compromises, which need not and usually do not satisfy every single concern of all parties affected. Acceptable settlements may fall within a broad range of upper and lower limits.
>
> In cases such as this, it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. I would also state that it is not the function of the court to simply rubber-stamp the proposal.
>
> ...
>
> When the director under the Act proposes a settlement for approval, he is acting as a public officer authorized, as *parens patriae* under the Act not only to institute actions but also to compromise them. Settlements proposed by the director, in my view, run with a strong initial presumption that they are reasonable and fair.

The *Sparling* decision obviously does not deal with litigation under the *Competition Act*; it relates to a different type of litigation, dealing with different concerns. At the same time, the principles set out therein are not totally inappropriate to the consideration of a consent order sought by the Director from the Tribunal. The Director is a public officer with a responsibility to craft settlements which serve the public interest. He has the responsibility to ensure that mergers do not lessen or are not likely to lessen competition substantially. He will have access to many facts which are not before the Tribunal. Indeed, in the absence of evidence put forward by an intervenor, the Tribunal will have before

it only such evidence as the Director and the respondent, the parties to the consent order, adduce.

It is clear that the Tribunal's constituent legislation does not contemplate that the Tribunal will be a mere rubber stamp. The legislation, for example, does not provide for the automatic filing by the Director of settlements which he reaches with respondents so that they automatically become orders of the Tribunal. This type of procedure is found, for example, in the *Canadian Human Rights Act*; the filing of an order of a Human Rights Tribunal in the Registry of the Federal Court constitutes it an order of that court for the purpose of enforcement.[35] The Tribunal is composed of judicial members and of non-judicial members who have special expertise in areas relevant to the work of the Tribunal. It is required to sit in panels of three, even for the purpose of granting consent orders. It is clear that Parliament intended the Tribunal to exercise an independent judgment with respect to such orders.

At the same time, the legislation sends a very clear message to the Tribunal that it is not anticipated that the Tribunal should take a detailed role in the crafting of consent orders. Section 105 of the *Competition Act* provides:

> Where an application is made to the Tribunal under this Part for an order and the Director and the person in respect of whom the order is sought agree on the terms

---

35 R.S.C. 1985, c. H-6, s. 57.

> of the order, the Tribunal may make the order ... . (emphasis added)

And section 92 provides:

> Where, on application by the Director, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen competition substantially ... the Tribunal may ... order any party to the merger ...
>
> (i) to dissolve the merger ...
> (ii) to dispose of assets or shares ...
> (iii) with the consent of the person against whom the order is directed and the Director, to take any other action ... . (emphasis added)

Thus section 92 provides that apart from the remedies of dissolution and divestiture of shares or assets, the Tribunal cannot impose terms on a respondent unless both the respondent and the Director agree to those terms. Similarly, in section 105 the Tribunal may make "the" order which is sought on consent. Applications by the Director for variation of an order pursuant to section 106 are different. Under that provision the Director can seek the imposition of terms and conditions on a respondent without the respondent's consent.

The Tribunal, in its *Rules* (rule 36(2)), has indicated that it may, when it proposes to reject a consent order brought pursuant to section 105, first indicate what changes could be made to the order to make it acceptable to the Tribunal. In addition, the Tribunal considers that it has an obligation to raise with the parties concerns which it has about the appropriateness or effectiveness of orders sought. But, at the end of the day, the Tribunal has no authority to

impose terms and conditions short of dissolution or divestiture on a respondent, when an application is brought pursuant to section 92, unless those terms and conditions have been agreed to by the Director and the respondent. And, when an application is brought pursuant to section 105, as is the present application, the Tribunal's only mandate is to either accept the consent order or to reject it.

Counsel for American Airlines argues that in this case because there are significant regulatory aspects to the order, the Tribunal should adopt a test different from that which it might in other circumstances apply. It is argued that the Tribunal should ask itself whether or not there are changes to the consent order which could be made to significantly improve its effectiveness as an instrument to ensure a post-merger competitive situation. The Tribunal does not think that such an approach is within the mandate given to it by Parliament. It is true that parts of the order are regulatory in nature, particularly the CRS Rules. But, these are included in the order as a temporary measure pending the enacting of such rules by the appropriate governmental body. What is more, they are, and can only be, imposed directly by order of the Tribunal on the respondents before it and indirectly on others to the extent that they accept contractual obligations to that effect. The Tribunal has not been given a mandate to set standards for the regulation of the CRS industry.

The Tribunal accepts the Director's argument that the role of the Tribunal is not to ask whether the consent order is the optimum solution to the anticompetitive effects which it is assumed would arise as a result of the merger. The Tribunal agrees that its role is to determine whether the consent order meets a minimum test. That test is whether the merger, as conditioned by the terms of the consent order, results in a situation where the substantial lessening of competition, which it is presumed will arise from the merger, has, in all likelihood, been eliminated. In *Director of Investigation and Research v. Palm Dairies Ltd* (1986), 12 C.P.R. (3d) 540 at 548 the test was expressed:

> It is incumbent on the tribunal to satisfy itself that the order sought meets a critical threshold of effectiveness, namely, that of eliminating the likely prevention or lessening substantially of competition that gave rise to the application for the order.

The order imposes behavioural constraints on the respondents. The Tribunal is aware that there has been some discussion that its decision in *Director of Investigation and Research v. Palm Dairies* (1986), 12 C.P.R. (3d) 540, stands for the proposition that the Tribunal is not prepared to issue behavioural type orders. Such an interpretation is a misreading of that decision. What was sought from the Tribunal in *Palm Dairies* was an order requiring the existing management of Palm to purchase a 50 per cent interest in the company while allowing the co-operatives, who originally wished to purchase 100% of the company, to purchase the other 50 per cent. The Director was of the view that the purchase by the co-operatives

of 100 per cent of Palm would have resulted a substantial lessening of competition. The consent order sought would have required that:

> "the business of Palm shall at all times be run independently from and in competition with the business of each and every one of the Co-ops and ... the business of Palm shall be established, maintained or changed solely with reference to the best interests of Palm as a viable competitive enterprise and specifically without reference to the interests of the Co-ops ... ;
>
> ... the directors, officers and employees of Palm shall maximize the profits of Palm independently of those of the Co-ops and specifically without reference to the interests of the Co-ops ... ."

Exactly how such terms and conditions could be enforced was not immediately obvious to the Tribunal. Management decisions are not open to public scrutiny. There would surely be a tendency for the existing management of Palm, as 50 per cent owner, to act together with the co-operatives in anticompetitive ways if such would increase Palm's profits. In distinguishing three other consent orders the Tribunal indicated at page 552 that while

> all three are long and detailed, there are no clauses in them that impose perpetual mandatory injunctions on the parties with the vagueness and imprecision which exists in some clauses of the order now sought from the tribunal. Nor is there anything which imposes a mandatory injunction on parties to enter into a purchase and sale agreement or to make corporate management decisions by reference to vague directions respecting competitive behaviour.

The Tribunal noted in the *Palm Dairies* case that there was no compelling reason given as to why an order of dubious effectiveness

should be issued when more obvious and straightforward remedies were available.

The object of a consent order is to eliminate the substantial lessening of competition which the Director alleges will result from the merger. If the terms of such an order are vague and therefore cannot be enforced by way of contempt proceedings, or if the terms imposed are virtually impossible to monitor, then the order cannot meet the test of effectiveness necessary to eliminate the substantial lessening of competition which is required of it. The same standards of precision will not be required of every term in a consent order. But when those terms are essential to the creation of a post-merger competitive situation, as they were in *Palm Dairies*, then a significant degree of precision is required and the Tribunal must be convinced that they can be enforced effectively.

The Tribunal's mandate, in a consent order application, is to determine whether the merger as conditioned by the terms of the order agreed upon by the parties will prevent or lessen competition substantially. In doing so it must be satisfied that the consent order will be enforceable and that the overall result will most probably be consistent with the objectives of the *Competition Act*. It normally must do this without hearing all relevant evidence and without making all relevant findings of fact itself.

Conclusion

The determination of whether or not a given situation will result in a substantial lessening of competition is a speculative decision. An order such as that which the Tribunal is asked to issue is a web of interrelated provisions. Counsel for the Director referred to it as a delicate balance of trade-offs. There is no doubt that there is more than one combination of terms and conditions which could achieve the result which it is hoped the terms and conditions which are now before the Tribunal will achieve.

There have been significant modifications made to the consent order in response to concerns raised during the course of the hearing of this application and in response to suggestions made by the Tribunal. A comparison of the consent order filed on April 13, 1989 and that filed on June 2, 1989 demonstrates this.

As noted above, the Tribunal has expressed concerns that have not been met. It may very well be that had the Tribunal crafted the order itself a set of conditions would have resulted different from those which the Director and the respondents have agreed upon. There is no doubt that if some of the provisions proposed by American Airlines had been adopted into the consent order a more rigorous instrument for creating a post-merger competitive environment would have been created. But, as has already been said, the Tribunal does not consider that it has been

given a mandate to craft the best possible terms and conditions for protecting competition. Its role is limited to vetting the order before it to ensure that the proposed terms and conditions are likely to be effective in eliminating any adverse effects of the merger.

It is of considerable significance that almost all of the intervenors support the consent order, including American Airlines. It is of significance that there has been little evidence adduced that the merger as conditioned by the consent order will lead or will likely lead to a substantial lessening of competition. In addition, the Tribunal notes that the general trend is toward the formation of large, jointly-owned CRSs. It is clear that the implementation of some of the terms of the consent order will require the diligent and continual surveillance of the Director. It is clear that changed conditions or effective enforcement of the order may require a return to the Tribunal for either changes to or interpretations of the order. Taking all these considerations into account, the Tribunal concluded, on the basis of the evidence before it, that the consent order meets the test required by the legislation.

DATED at Ottawa, this 7th day of July, 1989.

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

(s.) B. Reed
B. Reed