Competition Tribunal Tribunal de la Concurrence

Reference: *Commissioner of Competition v. Air Canada*, 2002 Comp. Trib. 015
File no.: CT2001002
Registry document no.: 0094

IN THE MATTER of an application by the Commissioner of Competition under section 79 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER of the *Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service*, SOR/2000-324 made pursuant to subsection 78(2) of the *Competition Act;*

AND IN THE MATTER of certain practices of anti-competitive acts by Air Canada.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Air Canada
(respondent)

and

WestJet Airlines Ltd.
(intervenor)

Dates of pre-hearing conference: 20020219 to 20020220
Member: McKeown J. (Chairman)
Date of order: 20020314
Order signed by: McKeown J.

REASONS FOR ORDER REGARDING MOTION TO CONSTITUTE A NEW PANEL

[1] At the pre-hearing conference held on Tuesday, February 19 and Wednesday, February 20, 2002, the Tribunal heard the motion brought by the Commissioner of Competition (the "Commissioner") for: (a) an order that the hearing before the panel in the above-noted application constituted of Madame Justice Sandra J. Simpson, Dr. Lawrence P. Schwartz and Mr. Lorne Bolton, be terminated; (b) an order that a new Tribunal panel composed of Dr. Lawrence P. Schwartz, Mr. Lorne Bolton and a judicial member of the Tribunal to be named by the Chairman, be constituted to hear this application; (c) an order that the hearing before the newly constituted panel commence on April 15, 2002, in accordance with the existing Scheduling Order, or as soon after that time that the Application can be heard; and (d) if, and only if Air Canada consents, an order reading the hearing proceedings to date into the record before the newly constituted panel.

[2] On February 22, 2002, the Tribunal issued an order which dismissed the Commissioner's motion. The Tribunal ordered that the hearing of the preliminary proceeding recommence in the fall of 2002, probably during the month of September, at a date to be determined by the Tribunal. The following are the reasons for the order.

BACKGROUND

[3] The application filed by the Commissioner alleges abuse of dominant position by Air Canada pursuant to section 79 of the Competition Act, R.S.C. 1985, c. C-34 (the "Act") and the Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service, SOR/2000-324 (the "Airline Regulations"). The application alleges, among other things, that Air Canada responded to the entry of WestJet Airlines and CanJet Airlines on seven routes in central and Atlantic Canada by increasing its capacity and/or decreasing its fares in a manner that did not cover the avoidable costs of operating the flights on the affected routes, contrary to paragraphs 1(a) and 1(b) of the Airline Regulations.

[4] On May 15, 2001, the Tribunal ordered that the following preliminary issues be determined before proceeding with the balance of the application ("Phase I"): (a) between the period from April 1, 2000, to the date of the application, has Air Canada operated or increased capacity at fares that do not cover the avoidable costs of providing the service, within the meaning of paragraphs 1(a) and 1(b) of the Airline Regulations on the Toronto-Moncton/Moncton-Toronto route?; (b) between the period from July 1, 2000, to the date of the application, has Air Canada operated or increased capacity at fares that do not cover the avoidable costs of providing the service, within the meaning of paragraphs 1(a) and 1(b) of the Airline Regulations, on the Halifax-Montreal/Montreal-Halifax route?; (c) what are the appropriate unit or units of capacity to examine?; (d) what categories of costs are avoidable and when do they become avoidable?; (e) what is the appropriate time period or periods to examine?; and (f) what, if any, recognition should be given to "beyond contribution"?

[5] Phase I of the hearing started on August 29, 2001, before a panel constituted of Madame Justice Sandra J. Simpson, Dr. Lawrence P. Schwartz and Mr. Lorne Bolton. To date, the hearing has taken six and one half days. The Tribunal heard two and one half days of opening statements by counsel, the incomplete testimony of the Commissioner's expert, Dr. West, who testified for two and one half days and one and one half days on a motion regarding the

admissibility of expert reports. Madame Justice Simpson has made important rulings on admissibility of evidence and an earlier motion regarding the adjournment of the hearing.

[6] Since September 2001, the hearing has been adjourned on two occasions: (a) on September 11, 2001, due to terrorist attacks on the United States; and (b) on October 15, 2001, on motion of Air Canada and over the objection of the Commissioner, on the grounds that the events of September 11, 2001, had changed matters relevant to the issue of avoidable costs and that the respondent required additional time to assess the effects of such changes.

[7] On October 26, 2001, the Tribunal ordered the hearing to recommence on April 15, 2002. However, Madame Justice Simpson is not able to preside at the recommencement of the hearing of this matter set for April 15, 2002. However, it is expected that Madame Justice Simpson will be available in September for the hearing.

[8] In this context, the Commissioner moves for an order providing that the panel should be reconstituted with another judicial member to ensure that this case be heard expeditiously. Counsel submits that the resolution of the issues in Phase I will provide clarity to the parties and to the Canadian airline industry as a whole. Therefore, counsel stresses the importance not to delay the hearing any further.

[9] The respondent, Air Canada, opposes the motion made by the Commissioner for an order that the hearing before Madame Justice Simpson, Dr. Lawrence P. Schwartz and Mr. Lorne Bolton (the "Seized Panel") be terminated, and that a new panel of the Tribunal be constituted to hear the application. Air Canada's position is that the motion is inappropriate and premature based on all the circumstances of the case.

JURISDICTION TO ORDER THE RECOMMENCEMENT OF THE HEARING WITH A NEWLY CONSTITUTED PANEL

[10] Counsel for the Commissioner submits that subsection 8(2)of the Competition Tribunal Act (the "Tribunal Act"), R.S.C. 1985, c. 19 (2nd Supp.) provides the Tribunal with the power to make any necessary orders related to its own proceedings and that the Chairman of the Tribunal has the authority to appoint panels of the Tribunal to hear applications. Subsection 10(2) of the Tribunal Act expressly provides that the Chairman shall designate a judicial member to preside at the hearing of applications.

[11] Further, counsel relies on subsection 9(2) of the Tribunal Act which directs that all proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit. Counsel relies on subsection 72(1) of the Competition Tribunal Rules, SOR/94-290 and Rule 39 of the Federal Court Rules, SOR/98-106, and submits that where a member of the Tribunal panel is for any reason unable to continue in a proceeding, the Chairman may order that the proceeding be reheard on such terms as he considers just. In counsel's view, the words "able to continue" stated at Rule 39 need to be interpreted in the context of the case and the importance of having the case heard with expedition.

[12] Counsel for the Commissioner also refers to Canada (Commissioner of Competition) v. Superior Propane Inc. [1999] C.C.T.D. No. 20, additional reasons [1999] C.C.T.D. No. 21 (Comp. Trib.) ("Superior Propane") in which the Tribunal ordered that a hearing already in progress continue with a newly constituted panel where one of the panel members was unable to continue due to illness. In that case, the hearing had proceeded for six weeks. Counsel submits that in light of the inability of Justice Simpson to continue the hearing for an indeterminate period of time, the discretion of the Chairman to order a recommencement of the hearing before a newly constituted panel ought to be exercised in order to ensure the expeditious hearing of this case.

[13] Counsel for Air Canada argues that Rule 39 of the Federal Court Rules dealing with whether a judge is "unable to continue" means that the threshold can only be met when it is clear that the judicial member would be unable to continue.

[14] It is my view that "unable to continue" means that if the person is unable to continue within the foreseeable future or ever, then the Chairman can appoint a new panel. However, this case is not one where the person is unable to continue in that sense, Madame Justice Simpson is simply unable to continue on a certain date. As for the reference to the Superior Propane case, an important difference was it continued with a new panel on consent of both parties. Counsel for the parties agreed to constitute a new panel and to include in the record the six weeks of evidence already presented before the previous panel.

IMPLICATION OF FURTHER DELAY AND NEWLY CONSTITUTED PANEL

[15] Counsel for the Commissioner submits that the ongoing operations of Air Canada as a whole are relevant to the proceedings. Air Canada has produced and continues to produce voluminous documents and has attended multiple examinations for discovery about its operations. Counsel argues that further delay of this hearing will necessitate additional discovery and production of voluminous documentation, further complicating an already complex hearing.

[16] Air Canada disagrees with this assertion. Counsel for the respondent argues that the factual underpinning of the hearing relates to Air Canada's past conduct (April 2000 to March 2001) on two of its routes. This historical context will not change with the passage of time.

[17] Counsel for the Commissioner submits that the hearing of Phase I in this matter has only just begun and that the inconvenience of having to recommence the hearing before a newly constituted panel would not be significant. Counsel submits that the need for an expeditious hearing in this important case outweighs this inconvenience.

[18] Counsel for Air Canada submits that Madame Justice Simpson and the other Tribunal members are clearly seized of this matter. The Seized Panel has heard significant submissions and evidence relating to the complicated issues arising in this application. Moreover, as the seized judicial member, Justice Simpson has made complex and detailed evidentiary rulings regarding the expert reports submitted on behalf of the Commissioner, and has dealt with numerous other matters relating to the proceeding and the complicated issues therein.

[19] Furthermore, counsel for Air Canada submits that it would be prejudiced if the Commissioner's motion was granted. Counsel refers to the amount of time and resources that the parties and the Tribunal have invested in the proceedings to date and submits that to rehear this application, would prejudice Air Canada and would not be an efficient use of the Tribunal's resources. Counsel also submits that separate from those aforementioned "real costs", is the question of losing the Seized Panel that has dealt extensively with and become very familiar with the difficult issues in this case.

[20] While Air Canada recognizes that a timely determination of the issues being heard before the Seized Panel is desirable, counsel submits that Air Canada's right to a fair hearing, the efficient use of the parties' and the Tribunal's resources, and the need to protect the principles of judicial independence clearly outweigh the need for a "quick resolution" of these issues.

[21] In these circumstances, Air Canada is of the view that the interests of fairness require that the hearing schedule be adjusted to accommodate the anticipated return of Madame Justice Simpson. Counsel submits that replacing a judge that is seized of a matter, to avoid a delay of a few months, is prejudicial to Air Canada, threatens the appearance of judicial independence, is an inefficient use of time and resources and is an extraordinary result which is simply not necessary in the circumstances.

JUDICIAL INDEPENDENCE

[22] I agree with Air Canada's position that the premature removal of a judge seized of a case raises serious concerns regarding judicial independence and that such an extreme measure should only be resorted to when there are compelling circumstances and when the anticipated delay clearly outweighs the prejudice to the parties and the potential damage to the perception of judicial independence.

[23] There is no dispute that Justice Simpson and the Seized Panel are presently seized of this matter. According to Rule 39 of the Federal Court Rules, a judge that is seized of a matter is not to be removed unless the judge is "unable to continue in a proceeding or to render a judgment".

[24] I am of the opinion that the phrase "unable to continue" from the above-cited rule cannot be reasonably interpreted to include a delay in the proceeding of short duration due to an illness. Air Canada provided some authorities relevant to the issue at hand, some of which I have referred to below. Although, these decisions arose in criminal trials, I am of the view that they provide some guidance for the situation at hand. Further, counsel for the Commissioner could not provide the Tribunal with any reference to civil cases regarding this issue.

[25] As the Supreme Court of Canada (the "Supreme Court") recognized in R. v. Gallant, [1998] 3 S.C.R. 80 at paragraph 15, the parties should expect that judges will sometimes become ill during a hearing and should accept that the resulting delay from such occurrences is simply an inherent part of the judicial system:

> The occasional illness of trial judges is an inevitable and unfortunate incident of any system reliant on human endeavour. Delay related to the illness of a trial judge is part of the inherent time requirements of a case where the Crown has acted reasonably and there is no shortage of resources.

[26] I have also taken into consideration the decision of R. v. MacDougall, [1998] 3 S.C.R. 45 at paragraph 51, where the Supreme Court has warned of the importance of not removing judges from their cases prematurely. The Court states clearly that removing a seized judge before the conclusion of a hearing, where it is not certain that such action is warranted under the circumstances, raises serious concerns regarding judicial independence:

> The removal of a judge from an unconcluded case has the potential to interfere with the independence of the judiciary and the right of an accused to a fair trial. Absent compelling reasons, it would be improper for Crown counsel to apply to remove a judge seized of the case.

[27] Although counsel for the Commissioner submits that the latter decision is of no assistance to the Tribunal because it arises in the context of an illness during a criminal trial, I am of the view that the Supreme Court of Canada's observations regarding the factors to be taken into consideration in such circumstances are insightful.

[28] Further, the Supreme Court emphasizes the need to proceed with the utmost care in order to protect judicial independence and fairness and cautions of the perception that may be created when a party actively seeks to remove a judge in the absence of compelling reasons:

> To do so might create a perception that the Crown was interfering with the right of a judge to independently judge all the issues in the case. It might also create a perception of unfairness to the accused. For example, a trial judge may make comments in the course of a trial that lead the Crown to speculate that he or she is sympathetic to the accused. If the Crown were to apply to have the judge removed prior to sentence absent a compelling reason, the perception might be that the Crown did so to obtain a judge less sympathetic to the accused. Where a judge falls ill and the expectation is that he or she will return to judicial duties, the Crown must bear these considerations in mind in deciding whether it is reasonable to bring an application to have the judge removed.
>
> MacDougall, supra, at paragraph 51

[29] I have also considered the comments of Chief Justice McEachern of the British Columbia Court of Appeal in G.W.L. Properties Ltd. v. W.R. Grace & Co. Canada Ltd., (1992) [1993] 37 W.A.C. 167 at paragraph 8, wherein he expressed the view that removing a case management judge that is “up the learning curve” is an inefficient use of public resources:

> If the pretrial management judge does not continue as management judge, the value of his unique knowledge of the case resulting from the investment of time and effort which he has put into it will be entirely lost. That will prejudice the parties. Furthermore, it will damage the system and thus prejudice the public interest. Much judicial time, a scarce commodity at present, will be squandered. It must never be forgotten that the cost of providing judges, courthouses, and all the ancillary services falls upon the public.

[30] For the foregoing reasons, I am of the view that the anticipated delay that will occur by rescheduling the hearing at a later date suitable for the presiding judicial member should be considered along with the prejudice to Air Canada, the principle of judicial economy, as well as the potential damage to judicial independence that may result from the premature removal of a seized judicial member and the Commissioner's request for an expeditious hearing. In weighing all these factors, I come to the conclusion that, although the Tribunal should always strive to accomplish expeditiousness when possible, this important goal should not be achieved at the expense of the important principle of judicial independence or of its perception thereof. Further, I am of the opinion that the reconstitution of a new panel seized of a matter is an extreme measure that should only be resorted to when compelling circumstances are present. I am not satisfied that compelling circumstances are present in this case at this time.

DATED at Ottawa, this 14th day of March, 2002.

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

(s) W.P. McKeown

APPEARANCES:

For the applicant:

The Commissioner of Competition

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For the respondent:

Air Canada

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