



Reference: *Commissioner of Competition v. Air Canada*, 2001 Comp. Trib. 36

File no.: CT2001002

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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)



Date of hearing: 20011015

Member: Simpson J. (presiding)

Date of reasons: 20011022

Reasons signed by: Simpson J.

REASONS AND ORDER

[1] The Commissioner has moved to compel the re-attendance of a representative of Air Canada at an oral examination for discovery. This motion is made in the context of a hearing (the “Hearing”) in which all the participants intend to lead evidence and make submissions directed to assisting the Tribunal in its development of a definition for the term “avoidable costs” as it is used in the regulations described in the style of cause.

[2] The motion relates to questions of the following types:

- a) questions arising from documents produced by Air Canada in answer to undertakings given on the examinations for discovery of four representatives of Air Canada which were held on June 6, 7, 8 and 18, 2001;
- b) questions arising from any other documents or information provided by Air Canada since the conclusion of Air Canada’s examinations for discovery on June 18, 2001; and
- c) questions which were not answered by Air Canada’s representatives during their oral examinations in June 2001, and which were ordered answered by Nadon J. in his order of July 13, 2001.

[3] The difficulty with this motion is that, in part, it has already been considered. Mr. Justice Nadon made a decision on July 13, 2001 (the “Nadon Order”), in which, among other things, he ordered a representative of Air Canada to re-attend to:

- i) answer all questions arising from documents produced further to undertakings given during its representatives’ oral examinations for discovery; and
- ii) answer questions 3 and 4 which were not answered on Air Canada’s examination for discovery.

[4] At the time of the Nadon Order, Air Canada had produced two sets of documents which answered approximately one half of the undertakings which had been given during the examinations for discovery of its four representatives in June 2001. Those documents were produced on June 27 and July 12, 2001. But, the Commissioner did not take advantage of the Nadon Order by seeking the re-attendance of an Air Canada witness before the Hearing which began on August 29, 2001. Counsel for the Commissioner did not ask for a re-attendance pursuant to the Nadon Order until September 14, 2001. By that date, the Hearing had been in progress for seven days. Opening statements had been made by all participants and the Commissioner’s first expert witness, Dr. West, had completed his examination in chief. Unfortunately, Dr. West’s cross-examination was interrupted because the Tribunal adjourned on September 11, 2001, as a result of the terrorist attacks in the United States. At the time of that adjournment, the Hearing was scheduled to resume on October 23, 2001. However, on October 15, 2001, due to the unforeseen changes in the operations of Air Canada since September 11, 2001, the Hearing was further adjourned to a date in April 2002.

[5] The affidavit material for this motion did not explain the Commissioner’s failure to compel Air Canada’s re-attendance in the period between the Nadon Order (of July 13) and the beginning of the Hearing on August 29, 2001. However, counsel advised that one of Air Canada’s representatives (Mr. Piché) was out of the country for some of the time and also indicated that counsel’s time was occupied with the preparation of the Commissioner’s experts’ reports which were due on August 3, 2001.

[6] Air Canada submits that, since the Commissioner was able to file both his primary and rebuttal experts' reports without seeking the further discovery contemplated by the Nadon Order, he should not now be permitted to use discovery to bolster the evidence given by Dr. West at the hearing. This argument arises because Dr. West testified that, on some topics, he did not have all the evidence he would like to have had when he prepared his primary expert report.

[7] In my view, the Nadon Order was interlocutory and it therefore expired when the Hearing opened. For this reason it falls to me to determine whether there should be any further oral examination for discovery. Unfortunately, I am not satisfied with the Commissioner's explanations for not proceeding with discovery pursuant to the Nadon Order. It seems to me that, even if another lawyer had to be added to the Commissioner's counsel team, the Commissioner should have taken advantage of the Nadon Order by promptly requiring the re-attendance of someone from Air Canada. Had he done so he might have been able to provide his experts with information for their reports of August 3, 2001. I have concluded that it was unreasonable for the Commissioner to do nothing to require a re-attendance and expect the Nadon Order to be enforced after the Hearing began. In my view, due to his failure to take advantage of the Nadon Order in a timely way, the Commissioner has lost his opportunity to conduct examinations for discovery on the two questions which the Nadon Order said should be answered by Air Canada and on the documents produced by Air Canada on June 27 and July 12, 2001.

[8] However, Air Canada continued to answer its undertakings after the date of the Nadon Order. It answered 1 or 2 additional undertakings and provided information on its General Ledger on July 20 and August 2, 2001. On July 24, 2001, it provided a third set of documents and the fourth set of documents did not arrive until August 8, 2001. This was after the experts' reports were due. Finally, further documents were provided even after the Hearing began. They were the 300 Manual and related appendices which were given to the Commissioner on August 30 and October 1, 2001. Air Canada has conceded that the Commissioner should be entitled to discovery relating to these two documents.

[9] In my view, due to Air Canada's delay in answering its undertakings, the Commissioner could not reasonably have conducted an examination for discovery on the documents described in the preceding paragraph pursuant to the Nadon Order in time to provide any relevant information to his experts. While there is no doubt that oral examination for discovery is normally used to prepare for a hearing and is ordinarily completed long before a hearing begins, there is no rule in the Competition Tribunal Rules or in those of the Federal Court which precludes ongoing discovery in special circumstances.

[10] I have therefore concluded that the Commissioner is entitled to compel the re-attendance of a representative of Air Canada for oral examination for discovery on all documents and information provided to the Commissioner by Air Canada in the period from July 20, 2001, to and including October 1, 2001.

DATED at Ottawa, this 22nd day of October, 2001.

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

(s) Sandra J. Simpson

APPEARANCES:

For the applicant:

The Commissioner of Competition

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Suzanne Legault

For the respondent:

Air Canada

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For the intervenor:

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