



Reference: *Commissioner of Competition v. Air Canada*, 2001 Comp. Trib. 4
File no.: CT2001002
Registry document no.: 008

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.
(applicant for leave to intervene)



Date of pre-hearing conference: 20010411
Member: McKeown J. (Chairman)
Date of reasons and order: 20010420
Reasons and order signed by: McKeown J.

REASONS AND ORDER GRANTING REQUEST FOR LEAVE TO INTERVENE

[1] On March 5, 2001, the Commissioner of Competition (the "Commissioner") filed an application pursuant to section 79 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act") for an order prohibiting Air Canada from engaging in anti-competitive practices directed against low cost carriers such as WestJet Airlines Ltd. ("WestJet"). In particular, the Commissioner's application seeks to obtain an order from the Tribunal prohibiting Air Canada from operating flights on routes in Eastern Canada at fares that do not cover its "avoidable cost" of providing the service.

[2] A request for leave to intervene was filed by WestJet on April 4, 2001. This request was heard in Toronto on April 11, 2001. WestJet alleges in its request for leave to intervene that it has been directly affected by Air Canada's practices on the Air Canada Moncton Area routes as it has been unable to achieve a profitable fare mix on the Hamilton-Moncton route. WestJet also alleges that its revenues and over-all yields for the Hamilton-Moncton route have been undermined and that it may be forced to withdraw from that route. However, WestJet submits that while, the immediate financial effects on WestJet relate to competition on the Moncton Area routes, it is directly affected by Air Canada's anti-competitive conduct generally and may have to rethink its expansion strategy in Atlantic Canada and hence, should be allowed, as an intervenor, to participate generally in that regard.

[3] Air Canada opposes in part the request for leave to intervene made by WestJet. While Air Canada does not dispute that WestJet may be "directly affected" by the results of these proceedings, it submits that WestJet's request to intervene is too broad. Air Canada's opposition relates to both the scope of intervention and the level of participation proposed by WestJet.

[4] With respect to the scope of intervention, Air Canada submits that WestJet has not articulated the issues in respect of which it seeks leave to intervene and has filed, instead, a general request to intervene. Air Canada points out that the affidavit of Mark Hill dated April 3, 2001, provided in support of the request, implies that WestJet seeks only to intervene with respect to two issues: (1) the determination of Air Canada's avoidable costs, and (2) the issue of whether Air Canada's alleged conduct has led to a substantial lessening of competition.

[5] Further, Air Canada submits that WestJet has not provided any evidence to support the position that it has a unique perspective such that it can assist the Tribunal with all aspects of the hearing. Air Canada argues that in the event that WestJet's request is limited to the two issues stated above in paragraph 4, WestJet's intervention should be limited to the issue of substantial lessening of or prevention of competition as it is alleged to affect WestJet but not to the issue of substantial lessening of competition in general as WestJet is in no special position to address the effects. Finally, Air Canada submits that WestJet has failed to show that it satisfies the intervention test as it relates to the determination of Air Canada's avoidable costs. It is the determination of Air Canada's avoidable costs that is in issue, not the concept of avoidable costs in general.

[6] On the basis of these submissions, Air Canada argues that WestJet's role in the proceeding should be limited to the issue of substantial lessening or prevention of competition as it is alleged to affect WestJet and that its participation in the proceeding should be as follows:

- (a) the submission of legal argument at the hearing;
- (b) the filing of expert evidence, if required;
- (c) the access to discovery documents, to the extent that they are relevant to the issue(s) for which leave is granted and subject to any confidentiality orders made;
- (d) the access to portions of discovery transcripts relevant to the issue(s) for which leave is granted and subject to any confidentiality orders made;
- (e) the right to request leave of the Tribunal hearing the application to adduce factual evidence at the hearing on the following conditions: the evidence is relevant to the issue(s) for which leave is granted and relates to a matter directly affecting WestJet; the Commissioner has been asked to adduce the evidence and the request has been refused; the evidence is non-repetitive; and WestJet has provided documentary and oral discovery to Air Canada on the issues to which the evidence relates.

[7] Air Canada submits that the conditions set out in paragraph 6(e) of these reasons are in accordance with the following decisions of the Tribunal: *Director of Investigation and Research v. Tele-Direct (Publications) Inc.* (Reasons and Order Granting Requests for Leave to Intervene) (1995), 61 C.P.R. (3d) 528, [1995], C.C.T.D. No. 4 (QL), *Director of Investigation and Research v. Air Canada* (1992), 46 C.P.R. (3d) 184, [1992] C.C.T.D. No. 24 (QL) and, *Director of Investigation and Research v. Canadian Pacific Ltd.* (1997), 74 C.P.R. (3d) 37, [1997] C.C.T.D. No. 14 (QL).

[8] The Commissioner supports the request of WestJet for leave to intervene in these proceedings. Counsel submits that the matter that affects WestJet is *the Commissioner's application as a whole* and its three essential elements: the dominance of Air Canada, the practice of anti-competitive acts as alleged by the Commissioner and the effect of those acts on WestJet and on competition. The Commissioner submits that although WestJet has not precisely enumerated the issues it proposes to address, there is no suggestion that WestJet wishes to address issues that are not outlined in the pleadings. With respect to the issue of avoidable costs, the Commissioner argues that WestJet has a unique perspective that will assist the Tribunal as WestJet operates an air service on some of the city-pairs routes involved in the application.

[9] The Commissioner's position is that WestJet's role should be as follows:

- (a) the review of discovery transcripts and access to discovery documents of the parties to the application, subject to the appropriate confidentiality protection;
- (b) the calling of non-repetitive viva voce evidence relating to any of the issues in the application;
- (c) the non-repetitive cross-examination of witnesses at the hearing of the application;

- (d) the filing of expert evidence; and
- (e) the submission of legal argument relating to any of the issues in the application.

WestJet agreed at the hearing to limit its participation as suggested by the Commissioner.

[10] The test for granting intervenor status is set out in subsection 9(3) of the Competition Tribunal Act, R.S.C. 1985, c. 19, as amended ("CTA"):

Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the *Competition Act*, to make representations relevant to those proceedings in respect of any matter that affects that person.

[11] As stated in *The Commissioner of Competition v. Canadian Waste Services Holdings* (26 June 2000), CT2000002/20, Reasons and Order Granting Request for Leave to Intervene at paragraph 3, [2000] C.C.T.D. No. 10 (QL) (Comp. Trib.), the Tribunal must be satisfied that all of the following elements are met in order to grant the status of intervenor:

- (a) The matter alleged to affect that person seeking leave to intervene must be legitimately within the scope of the Tribunal's consideration or must be a matter sufficiently relevant to the Tribunal's mandate (see *Director of Investigation and Research v. Air Canada* (1992), 46 C.P.R. (3d) 184 at 187, [1992], C.C.T.D. No. 24 (QL)).
- (b) The person seeking leave to intervene must be directly affected. The word "affects" has been interpreted in *Air Canada*, *ibid.*, to mean "directly affects".
- (c) All representations made by a person seeking leave to intervene must be relevant to an issue specifically raised by the Commissioner (see *Tele-Direct*, cited above in § [2]).
- (d) Finally, the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it (see *Washington v. Director of Investigation and Research*, [1998] C.C.T.D. No. 4 (QL) (Comp. Trib.)).

[12] In applying the test stated above, it has been well established by the Tribunal in past decisions that the onus is on the intervenor and, to the extent that the Commissioner supports the intervenor, it is on the Commissioner as well to establish *that the test is met with respect to the issues upon which the person seeks to intervene*. For example, in *Director of Investigation and Research v. Tele-Direct (Publications) Inc.* (Reasons and Order Granting Requests for Leave to Intervene) cited above at paragraph 7 of these reasons, the five applicants, which were companies involved in or connected with the publication of telephone directories, provided a list of issues in respect of which they said they had some input. This requirement was also discussed in *Washington v. Director of Investigation and Research*, (1998) 78 C.P.R. (3d) 479 at 484-485,

[1998] C.C.T.D. No. 4 (QL) and in *Director of Investigation and Research v. Canadian Pacific Ltd.* (1997), 74 C.P.R. (3d) 37 at 43-44, [1997] C.C.T.D. No. 14 (QL).

[13] Further, as counsel for Air Canada points out, paragraph 27(2)(d) of the *Competition Tribunal Rules* (the "Rules") requires from the person seeking leave to intervene to provide a concise statement of the matters in issue that affect the person and the competitive consequences arising therefrom.

[14] The Tribunal is of the view that WestJet has demonstrated that its request for leave to intervene satisfies the test stated in subsection 9(3) of the CTA. Indeed, it has demonstrated that it is directly affected and, as a successful low-cost low-fare carrier, WestJet has a unique perspective on the issues which will be before the Tribunal. However, it is less clear that WestJet's request for leave to intervene meets the requirements set out in paragraphs 27(2)(c) and (d) of the Rules as applied by the Tribunal in past cases. Indeed, without a statement from WestJet of the "competitive consequences" arising from matters affecting it, the Tribunal has no legal or factual framework to grant WestJet the status of intervenor on all of the issues stated by the Commissioner in the statement of grounds and material facts. Therefore, WestJet shall only be entitled to address the issues that meet the requirements stated by both subsection 9(3) of the CTA and by section 27 of the Rules or that will assist the Tribunal in making a decision on the Commissioner's application. I have identified those issues in the order below.

[15] As to the issue of the level of participation in the proceedings by WestJet, the main area of dispute between the parties relates to the calling of non-repetitive *viva voce* evidence. While the Commissioner submits that WestJet should be entitled to call relevant and non-repetitive *viva voce* evidence on the issues that falls within the scope of WestJet's intervention, Air Canada submits that WestJet should only be entitled to adduce evidence when all the conditions stated in paragraph 6(e) of these reasons are met and that leave is granted by the Tribunal. After careful consideration, the Tribunal came to the view that, in the present case, requiring WestJet to seek leave before calling *viva voce* evidence could have the potential of unduly delaying the proceedings. Requiring WestJet to seek leave before introducing evidence may not be the most efficient way to proceed. Therefore, WestJet should, in my view, be entitled to adduce relevant and non-repetitive evidence subject to Air Canada's right to make objections.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[16] WestJet Airlines Ltd. is granted leave to intervene on the following issues:

- (a) the substantial lessening or prevention of competition as it relates to WestJet as stated in part IX of the statement of grounds and material facts except for paragraphs 130 and 131 which deal with the effects on CanJet Airlines and Royal Airlines;
- (b) the issue of avoidable costs both in general and as it relates to Air Canada's avoidable costs;

- (c) the issues of "fares, restrictions and classes of service" and of "frequencies, connections, frequent flyer points and frills" as stated in sections C and D of part V of the statement of grounds and material facts;
- (d) the issue of Air Canada's dominant position as it affects WestJet as stated in part VII of the statement of grounds and material facts;
- (e) the issue of Air Canada's anti-competitive acts as it affects WestJet as stated in part VIII of the statement of grounds and material facts.

[17] WestJet Airlines Ltd. shall be allowed to participate in the proceedings and permitted:

- (a) to review discovery transcripts and access discovery documents of the parties to the application, subject to the appropriate confidentiality protection;
- (b) to adduce factual evidence at the hearing, provided that it demonstrates to the satisfaction of the Tribunal that such evidence is relevant and within the scope of the intervention (i.e. relating to the issues identified in paragraph 16 of these reasons) and is non-repetitive, subject to Air Canada's right to make objections;
- (c) to cross-examine witnesses at the hearing of the application after the Commissioner has conducted his cross-examination, provided that the questions are relevant to its intervention and have not been asked by the Commissioner;
- (d) to introduce expert evidence which is within the scope of its intervention in accordance with the procedure set out in the Rules and case management; and
- (e) to submit legal argument at the hearing of the application that are non-repetitive in nature. On the latter, I will leave to the panel the responsibility to manage the instances of duplicative arguments.

[18] Air Canada shall be permitted to seek documentary and oral discovery of WestJet, if necessary.

DATED at Ottawa, this 20th day of April, 2001.

SIGNED on behalf of the Tribunal by the presiding judicial member

(s) W.P. McKeown

APPEARANCES:

For the applicant:

The Commissioner of Competition

Donald B. Houston
Suzanne Legault

For the respondent:

Air Canada

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For the applicant for leave to intervene:

WestJet Airlines Ltd.

Daniel J. McDonald, Q.C.