Date: 20070201

Docket: T-1427-06

Citation: 2007FC114

Toronto, Ontario, February 1, 2007

PRESENT: Madam Prothonotary Milczynski

BETWEEN:

JAZZ AIR LP

Applicant

and

TORONTO PORT AUTHORITY

Respondent

and

CITY CENTRE AVIATION LTD., REGCO HOLDINGS INC., PORTER AIRLINES INC. and ROBERT J. DELUCE

Interveners

REASONS FOR ORDER AND ORDER

Overview

[1] The Applicant, Jazz Air LP ("Jazz") commenced an application for judicial review in Court File: T-431-06, on March 9, 2006 (Application #1). Following a number of procedural motions, it was ordered that Application #1 be converted into an action. This order was upheld on appeal, but

instead of appealing or converting Application #1 into an action, on August 8, 2006 Jazz discontinued Application #1 and commenced this proceeding, Application #2.

[2] The Respondent, Toronto Port Authority (the "TPA") and the Interveners, City Centre Aviation Ltd., Regco Holdings Inc., Porter Airlines Inc., and Robert J. Deluce (the "Porter Parties") have each brought a motion for an order striking the notice of application in Application #2 and dismissing the application as an abuse of process. The TPA and Porter Parties further submit in the alternative, that the application should be dismissed on the grounds that it is time-barred.

[3] I agree that the application ought to be dismissed. While a party may discontinue a proceeding and commence a new one that involves the same subject-matter where there has been no prior determination of the previous proceeding, it may be prevented from doing so where a court finds such actions constitute abuse. In that respect, I find that Jazz proceeded on the course of action it did because it did not like the procedural rulings that were made in Application #1, which would have required it to proceed for a determination of the merits by way of action rather than application. All of the issues raised by Application #2 could have and would have been determined through the disposition of Application #1, which the Court determined best suited for trial, but Jazz wanted to avoid the process afforded by a trial.

[4] In this, Jazz made a strategic decision and took a calculated risk in discontinuing Application #1 and commencing Application #2. Application #2 is simply a pared down version of Application #1. It is worded without the allegations of a criminal conspiracy or breaches of the *Competition Act*, but far from being simplified or being appropriate for determination by way of

application, Application #2 contains the same allegations that, as in Application #1, describes the same commercial dispute between Jazz and the TPA regarding the TCCA, and puts in issue the long historical relationship between the TPA and Jazz, and the more recent dealings between the TPA and the Porter Parties. Jazz could have simply pared down its allegations in its statement of claim in the conversion of Application #1 to an action.

[5] The issues raised in Application #2 are the same as, and are subsumed by those raised in Application #1. There is no new decision that is the subject of Application #2, only a reiteration of earlier decisions that were the subject of Application #1, perhaps with more factual detail provided to Jazz through the passage of time and ongoing discussions or disclosure. This new detail is said to comprise a "new decision" dated July 26, 2006 relied upon by Jazz for the purposes of commencing Application #2. Yet the July 26 "decision" is one of a number or series of confirmations of the TPA's position that has been consistent all along.

[6] At best, the July 26, 2006 correspondence could be said to have additionally provided a response to the provocation on the part of Jazz to unilaterally and rather brazenly announce its resumption of flights from the Toronto City Centre Airport ("TCCA") without a Commercial Carrier Operating Agreement ("CCOA") notwithstanding that Jazz knew, since February of 2006, that it needed to enter into a new CCOA with the TPA before it could secure leased premises, resume any flights or operate any scheduled passenger airline service at the TCCA.

[7] Jazz asks that it not be barred from the seat of judgment and submits that to grant the TPA's and the Porter Parties' motions would be to deprive Jazz of any ability to seek judicial review of the

TPA's actions and obtain a determination of whether the TPA exceeded its statutory authority. Jazz argues that to grant the motions would have the effect of knocking Jazz out of the judicial box. This may be so, but it is the consequence of Jazz's own actions – not that of a hapless or unsophisticated litigant but a considered strategic decision - with the result that Jazz knocked itself out of the box.

[8] For the reasons set out further below, I find that Jazz's strategy in discontinuing Application #1 and commencing Application #2 was to circumvent the orders of this Court made in Application #1 regarding the process to be followed for the determination of the matters in issue in this Court. As such, its actions constitute an abuse undermining the integrity of the administration of justice, a waste of judicial resources, and a burden on the TPA and Porter Parties that together warrant the dismissal of the Application at this stage of the proceeding.

Jazz Initiated Proceedings

[9] Application #2 is in fact, the third in the series of proceedings that have been brought by Jazz against the TPA in relation to whether and/or on what terms Jazz can operate a scheduled passenger airline service out of the TCCA. On February 23, 2006, the first of these proceedings was commenced as an action in the Ontario Superior Court of Justice. In that action, which remains ongoing, Jazz seeks damages from the TPA and the Porter Parties for the alleged harm arising out of the termination of its lease at the TCCA, the alleged conspiracy between the TPA and the Porter Parties and breach of the *Competition Act*, and the TPA's insistence that Jazz enter into a new CCOA as a requirement for its continued operations at the TCCA, a CCOA that Jazz alleges is overly restrictive.

[10] In the Ontario action, Jazz brought a motion for an injunction to prohibit one of the Porter Parties (City Centre Aviation Ltd.), from terminating its lease with Jazz at the TCCA, and to enjoin all Porter Parties from entering into or acting pursuant to agreements with the TPA that Jazz alleged were contrary to the *Competition Act*.

[11] The motion was brought before Mr. Justice Spence on February 27, 2006 on an urgent basis and was dismissed summarily, with costs.

[12] Shortly thereafter, on March 9, 2007, Jazz commenced Application #1 in Federal Court seeking judicial review of certain actions and decisions of the TPA relating to the operation of the TCCA, the CCOA proposed by the TPA to Jazz and the TPA arrangements with the Porter Parties. A number of interlocutory motions and case management attendances ensued regarding a variety of procedural issues, including the intervention of the Porter Parties, whether or not the hearing of the application ought to expedited, the state of the TPA "record" for the purposes of Rules 317 and 318 of the *Federal Courts Rules*, and finally, the motion brought by the Porter Parties to convert the application into an action – granted on June 6, 2006, (the "Order to Convert"), upheld on appeal on July 20, 2006.

[13] The Order to Convert required Jazz to file its Statement of Claim within twenty days of the Order. Although counsel to Jazz undertook to provide the pleading expeditiously following the dismissal of the appeal, it was neither served nor filed. Rather, on August 8, 2006, Jazz discontinued Application #1 and on the same day, commenced Application #2, naming only the TPA as a party.

[14] Jazz commenced Application #2 in a form similar to a draft notice of application it had proposed be accepted for filing as Amended Application #1, as an alternative to converting Application #1 into an action when it argued its appeal. Justice Rouleau declined to consider the amended application on appeal, as it was not part of the motion to convert.

[15] In any event, not surprisingly, as in Application #1, the Porter Parties immediately brought a motion in Application #2 for an order to be added as interveners. The motion was vigorously opposed by Jazz, but granted on September 6, 2006.

Substance of Applications

[16] Application #2 seeks judicial review of the TPA's decisions:

(i) requiring Jazz to abide by the terms of an allegedly "arbitrary, discriminatory and exceptionally restrictive" CCOA;

(ii) purporting to terminate Jazz's existing CCOA as of August 31, 2006; and

(iii) refusing to provide its consent to a sub-lease Jazz negotiated with Stolport Corporation ("Stolport").

[17] Jazz argues that Application #2 puts in issue the jurisdiction of the TPA under the *Canada Marine Act* and whether it "tied its hands" or contracted out of its obligations under the *Act* by entering into its arrangements for the TCCA with and on terms favourable to the Porter Parties, with the effect of restricting Jazz's access or ability to operate at the TCCA, in respect of the number of take-off and landing slots, and destination routes flown to and from the TCCA.

[18] Application #1, however, similarly made reference to whether the TPA exceeded its jurisdiction under the *Canada Marine Act*, and sought review of:

> (i) the requirement that Jazz abide by the terms of an allegedly "extremely arbitrary and exceptionally restrictive" and "discriminatory" CCOA proposed to Jazz by the TPA;
>
> (ii) the termination of Jazz's access to the TCCA effective as of August 31, 2006 unless Jazz agrees to the proposed CCOA;
>
> (iii) the refusal by the TPA to lease or make available to Jazz, any passenger aircraft facilities;
>
> (iv) the refusal by the TPA to approve any sub-lease arranged by Jazz with Stolport without Jazz's agreement to the proposed CCOA; and
>
> (v) the agreements between the TPA and the Porter Parties for the TCCA on terms favourable to the Porter Parties, which agreements allegedly have the effect of restricting Jazz's access to the TCCA and ability to operate, in respect of both slots and destinations or routes.

[19] In Application #2, Jazz seeks review of the TPA's decision to terminate Jazz's existing CCOA, effective August 31, 2006. Application #1 was worded slightly differently. Jazz sought review of the TPA's decision threatening to terminate Jazz's access to the TCCA as of August 31, 2006. In each of Application #1 and #2, Jazz relies on the letter of Lisa Raitt dated February 28, 2006, in which she advised:

> We wish to notify you that any and all agreements and other arrangements which may exist between the TPA and New Jazz (or any of its predecessors) will terminate on August 31, 2006 (or such earlier date on which they may conclude) unless a

mutually agreeable CCOA has been entered into between New Jazz and TPA on or before that date.

[20] The same CCOA is the subject of both Application #1 and #2, and the complaints are the same – the number of slots, the limitations on routes that may be flown and whether to insist on the terms exceeds the authority of the TPA under the *Canada Marine Act*. This CCOA was first provided to Jazz in February of 2006, and the TPA's position was simply reiterated in its correspondence of July 26, 2006. Whatever conciliatory gesture or offer the TPA made that deviated from the terms of the proposed CCOA was simply a without prejudice offer to permit Jazz some access to the TCCA, pending the judicial determination of Application #1. The TPA was prepared to allow Jazz to fly from the TCCA post August 31, 2006, but only if it agreed to be bound by the terms of the proposed new CCOA in the interim and until such time as a new CCOA was agreed to and executed. This was communicated to Jazz in May and in June, 2006.

[21] With respect to the sub-lease negotiated by Jazz with Stolport, it is clear that in Application #1 and #2, the complaint is that the TPA would improperly withhold its consent to any sub-lease arranged by Jazz on the grounds that a prerequisite for its consent was that a CCOA be executed by Jazz. As noted in the Order to Convert, Stolport was aware of this condition and refused to deal with Jazz unless it had entered into a CCOA with the TPA. Jazz was aware of this requirement since February 2006 – that it had until August 31, 2006 to enter into a new CCOA, failing which it would be prevented from operating at the TCCA, and that the TPA's consent to any sublease negotiated by Jazz was contingent upon Jazz entering into a new CCOA.

[22] Nonetheless, notwithstanding the above and under notice that its existing CCOA terminated on August 31st and within days of the Order to Convert, Jazz issued a press release on July 6, 2006

and held a press conference in which it announced that it was resuming flights from the TCCA effective August 28, 2006. It sold tickets to the public for those flights, (and continued to sell tickets until ordered to stop by the Competition Bureau for misleading advertising).

[23] The TPA immediately wrote to Jazz on July 6th:

> We have made it clear to you that we will not permit Jazz to make use of the TCCA or its facilities without Jazz first entering into a Commercial Carrier Operating Agreement with TPA…In February 2006, TPA offered use of the TCCA and its facilities to Jazz on terms which TPA considers necessary to fulfill its mandate to operate the TCCA as a financially viable and self-sustaining airport. Jazz refused our offer and we have been negotiating with Jazz in good faith since that time. Notwithstanding that, Jazz commenced a lawsuit in the Ontario Superior Court and the Federal Court of Canada against TPA and others challenging, among other things, the propriety of the proposed terms offered to Jazz for the utilization of the TCCA.

[24] By letter dated July 26, 2006, the TPA reiterated the same position it had communicated in February of 2006:

> We have repeatedly told you that we will not permit Jazz to operate to or from the TCCA until you have entered into a contract with us…Without such an agreement with TPA, Jazz will not be permitted to access the TCCA or use any of its facilities.

[25] Far from being a new decision or fresh exercise of discretion, the July 26, 2006 correspondence shows that the TPA's position had not changed from that communicated in February, 2006, and that the subject matter of Application #1 and Application #2 is the same.

Abuse of Process

[26] The issue on this motion is whether it is an abuse of process for Jazz to have commenced Application #2 instead of converting Application #1 into an action, and if so, whether the Court should dismiss the application on those grounds.

[27] Whether the actions of a party constitute an abuse of process depends upon the facts and surrounding circumstances, and must be approached on a case-by-case basis. Further, even if an abuse is found, the Court has discretion to allow the matter to proceed. The Federal Court has applied the doctrine of abuse of process:

- to prevent misuse of the Court's procedure in a way which, although not inconsistent with the literal application of its procedural rules, would be manifestly unfair to a party or otherwise bring the administration of justice into disrepute;
- for failure to comply with Court orders, including case management orders, or to prevent the use of the Court process for an improper purpose;
- to ensure the finality of litigation and avoid repetitive proceedings, potentially inconsistent results and inconclusive proceedings;
- to prevent repeated attempts to litigate essentially the same dispute by naming slightly different parties, applying in different capacities and relying on slightly different statutory provisions when earlier attempts have failed;
- to prevent seeking to re-litigate on a different legal basis an action or proceeding based on the same facts as in a previously determined proceeding;
- to prevent a waste of time and resources both for the adverse party and for the administration of justice; and
- to prevent a litigant from repeatedly changing litigation tactics.

(See: *Sauvé v. Canada*, [2002] F.CJ. No. 1001 (T.D); *Bernath v. Canada*, [2005] F.C.J. No. 1496 (T.D.); *Black v. NSC Diesel Power Inc.*, [2000] F.C.J. No. 725 (T.D.) aff'd [2003] F.C.J. 1071 (C.A.); *Shilling v. MNR* (2004), 248 D.L.R. (4th) 1 (F.C.A.))

[28] In *Toronto (City) v. Canadian Union of Public Employees (CUPE), Local 79*, [2003] S.C.J. No. 64, 2003 SCC 63, Madam Justice Arbour set out the principles underlying the doctrine of abuse of process:

> …Canadian Courts have applied the doctrine of abuse of process to preclude re-litigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.
>
> ***
>
> In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays…or whether it prevents the civil parties from using the courts for an improper purpose…the focus is less on the interests of parties and more on the integrity of judicial decision-making as the branch of the administration of justice.

[29] In this case, Jazz was ordered to convert Application #1 to an action. Instead, Jazz discontinued Application #1 and commenced a second application for judicial review that was essentially the same. Jazz did so, advising the Court that it was a strategic decision, but with cap somewhat in hand, submitted at the hearing of this motion that it was in effect, attempting to comply with or live up to the spirit of the previous interlocutory decisions to simplify or focus the application. This attempt was, however, already tried before Justice Rouleau on the appeal from the Order to Convert when Jazz proposed to file a revised Application #1, and it disregards the basis for the Order to Convert.

[30] In *Sauvé*, the plaintiff failed to comply with a case management order. The case was dismissed for delay and the dismissal was affirmed on appeal. When the plaintiff sought to re-file a mirror action, Justice Lemieux dismissed the action as an abuse of process, stating at paras. 22-23:

> I agree with counsel for the respondent, in the circumstances of this particular case, to allow the plaintiff to proceed with a second action which is simply a mirror of his first action would make a mockery of the Case Management Rules.
>
> Case management judges make a multitude of orders for the purpose of ensuring the orderly progress of an action. To allow a plaintiff to disregard such orders leaving a plaintiff at liberty to simply re-file a new mirror action would be contrary to the very purposes of those Rules.

[31] Jazz similarly disregarded the case management orders in Application #1 by commencing the same case in the form of Application #2:

(i) it is the same commercial dispute between the same parties;

(ii) Jazz commenced Application #2 without naming the Porter Parties, thereby requiring the same motion for the Porter Parties to added to be brought, with the same result;

(iii) the decisions sought to be reviewed in Application #2 are same as in Application #1;

(iv) the evidence filed in Application #2 mirrors that filed in Application #1 – the same affiants make virtually the same statements of fact and opinion;

(v) the TPA record to be filed would be the same in Application #2 as it would have been in Application #1 – involving some sixteen years of history of commercial dealings between the parties;

(vi) further court attendances and materials filed with the court in Application #1 have been or will be repeated in Application #2, including a motion to convert the application to an action; and

(vii) the same interests are at stake, issues of credibility and the same legal issues need to be determined as between Applications #1 and #2.

[32] Jazz could have advanced its case and proceeded on the merits though Application #1. Through the filing of its statement of claim pursuant to the Order to Convert, it could have narrowed and focussed the issues as it purports to do in Application #2, by removing the allegations of a criminal conspiracy and breach of the *Competition Act*. The only reasonable inference that can be drawn from Jazz having discontinued Application #1 and commencing Application #2 is that it did so for tactical reasons. Jazz did not want to proceed by way of action and trial. It sought to avoid and circumvent the Order to Convert, which found the disposition of the issues in dispute, which are the same in Application #2 as in Application #1, better suited to a trial and which process offered broader procedural benefits through each parties' productions and examinations for discovery.

[33] This course of action is improper and undermines the integrity of justice. It wastes judicial resources and the resources of the TPA and Porter Parties. Each of the TPA and the Porter Parties have expended considerable resources defending against Jazz's three proceedings and in Application #1, succeeding on the motion to convert to preserve the procedural protections and benefits of a trial. With respect to whether or not discretion should be exercised to permit the proceeding to continue, I cannot conclude that discretion should be exercised in Jazz's favour. Jazz has brought or opposed motions needlessly, and there have been duplicative interlocutory proceedings. Jazz has created circumstances requiring the other parties to respond, sometimes on an

urgent basis, and it has brought and abandoned or neglected proceedings using the court's process for other collateral purposes in its attempt to re-establish itself at the TCCA. Jazz has sought to avoid the orders of this Court regarding how the determination of this matter should best proceed as part of a thought out and considered strategy. It is appropriate in these circumstances to grant the TPA and Porter Parties' motions to strike on the grounds that such strategy ought not to be countenanced. Accordingly, it is not necessary to review whether Application #2 is time-barred.

ORDER

THIS COURT ORDERS that:

1. The Notice of Application is struck without leave to amend, and the application is dismissed.

2. In the event the parties cannot agree on costs, the matter of costs of this motion will be heard at a special sitting on a date and at a time to be fixed.

"Martha Milczynski"
Prothonotary

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1427-06
STYLE OF CAUSE:	JAZZ AIR LP v. TORONTO PORT AUTHORITY ET AL
PLACE OF HEARING:	TORONTO
DATE OF HEARING:	DECEMBER 14, 2006 and DECEMBER 15, 2006
REASONS FOR ORDER:	MILCZYNSKI, P.
DATED:	FEBRUARY 1, 2007

APPEARANCES:

Earl Cherniak Peter Jervis Brian Radnoff Gillian T. Hnatiw	FOR THE APPLICANT
David Scott Freya Kristjanson Colleen M. Shannon	FOR THE RESPONDENT
Robert Armstrong Orestes Pasparakis Susan Rothfels	FOR THE INTERVENERS

SOLICITORS OF RECORD:

Lerners LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Borden Ladner Gervais LLP Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT
Ogilvy Renault LLP Barristers and Solicitors Toronto, Ontario	FOR THE INTERVENERS