IN THE MATTER OF
THE SECURITIES ACT
R.S.O. 1990, c. S. 5, AS AMENDED

AND

IN THE MATTER OF
AIR CANADA

Hearing:	July 27, 2001		
Panel:	Paul M. Moore, Q.C.	-	Vice-Chair (Chair of the Panel)
	H. Lorne Morphy, Q.C.	-	Commissioner
	R. Stephen Paddon, Q.C.	-	Commissioner Quebec
Panel:	Guy Lemoine	-	Vice-Chair
	Viateur Gagnon	-	Commissioner
Counsel:	Kathryn J. Daniels	-	For the Staff of the Ontario
	Benjamin Eggers	-	Securities Commission
	Edward Waitzer	-	For Air Canada
	Katherine Kay		
	John Baker		

EXCERPT FROM THE SETTLEMENT HEARING
CONTAINING THE ORAL REASONS FOR DECISION

The following statement has been prepared for purposes of publication in the Ontario Securities Commission Bulletin and is based on the transcript of the oral hearing, including oral reasons delivered at the hearing, in the matter of Air Canada.

While this statement has been approved by the Chair of the panel for the purpose of providing notice of the panel's decision in the matter, only the certified transcript should be relied on as a true record of the proceedings.

CHAIR: This is a hearing of the Ontario Securities Commission pursuant to section 127(1) of the Securities Act and section 127.1 of the Securities Act in the matter of Air Canada pursuant to a notice of hearing issued on July 25, 2001.

This will be a joint hearing with the Quebec Securities Commission...

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We will confer with our Quebec colleagues, but come to separate decisions. In other words, in Ontario we will decide what is appropriate and in Quebec they will decide what is appropriate, so that it is a simultaneous, separate hearing being held jointly...

….

MS. DANIELS:I have provided to the panel yesterday and to my colleague, Mr. Waitzer, brief written submissions of the Staff of the Ontario Securities Commission in support of this application. If you have had an opportunity to review these submissions, you will note that at paragraphs 4 through 8 is a brief description of the facts. At this time, I would like to review those facts, certainly the salient points, in support of our application for you to approve the settlement.

The first important point to note is that Air Canada is a listed company on the Toronto Stock Exchange and has executed a listing agreement with that exchange requiring it to comply with all TSE requirements for listed companies.

The second important point to note is that Air Canada has in place and had in place in 1998 a public disclosure policy. This policy included a quiet period which would prohibit the dissemination of financial information at the close of a quarter until the official general disclosure of that quarter's results. On October 5th, 2000, which fell within this quiet period, two employees of Air Canada prepared a script and read that script into the voice mail of 13 analysts that review Air Canada's performance and issue research on Air Canada common shares. That script contained information relating directly to the third quarter earnings per share results and also contained a revised forecast for the next quarter. At the time of the script and at the time that it was read into the analysts' voice mail, that information -- that is, the quarterly earnings and the near future forecast -- were not generally disclosed.

Overnight the shares opened at a dollar below their closing price on October 5, and just after the market opened, ten minutes after the market opened, TSE staff contacted Air Canada to inquire into the trading activity, to inquire into the drop in price and to inquire into certain media accounts of the analyst call the previous evening.

Just before four o'clock that day, Air Canada issued a general press release which attempted to explain the market activity and, directed the public to the fact, in Air Canada's submission, that at the time that information had been generally disclosed and predicted a return to normal activity.

The press release issued on October 6th did not contain the same figures -- that is, the actual quantitative figures -- relating to the earnings per share for the third quarter nor did it contain a prediction for the fourth quarter and overall did not mirror the script that had been read to the analysts the previous evening.

It is important to note that Air Canada has admitted in the settlement agreement that the information contained in the script to the analysts which was read to analysts was a material fact, and Air Canada has further admitted that that material fact is not generally disclosed at the time, on October 5, when the script was read to the analysts.

Air Canada has also admitted that the press release released 24 hours later just before the market closed on the 6th did not contain the same information that had been contained in the script read to the analysts.

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MR. MORPHY: Ms. Daniels, on the facts, I note there is nothing as to whether the actions of Mr. Peterson and Ms. Peck were an oversight having regard to their obligations or whether it was a knowing infringement. Is that material to our considerations here?

….

MS. DANIELS: In response to Commissioner Morphy's question, I touched on Section 76(2) of the Securities Act which is the cornerstone, in Staff's submission, of the public disclosure tipping regime in Ontario.

Briefly, no reporting issuer or no person in a special relationship with a reporting issuer shall inform, other than in the necessary course of business, another person or company of a material fact with respect to that reporting issuer before it has been generally disclosed. So the Act, in staff's submission, requires the reporting issuer and employees to ensure that general disclosure takes place in advance of any private conversations as it relates to a material fact.

You will have in your brief of authorities which are attached to my written submissions the Commission's decision in the matter of Gary George. That case was heard under section 76(2) as well. The respondent in Gary George was actually the tippee or purported to be, and it dealt with whether or not he was aware in effect whether or not it was a tip. In coming to the decision, however, the Commission had some remarks about Section 76(2) in general and the obligations of a reportingissuer or people who are employees of a reporting issuers not to tip.

And I should have highlighted on the side of page 16 of this case, which is found at tab 4 of your brief, the authority which Ontario Staff relies on, the proposition that this Commission takes very seriously the issue of tipping and takes seriously and considers it to have been tipping in the event a company is providing information to analysts in advance of the general public. The key phrase is simply that:

"We would like to make it absolutely clear that such conduct is both illegal and improper."

And in this case they were dealing with the actual employees.

“If proceedings were commenced against an officer of an issuer or an analyst, if such conduct were proved we would regard it most seriously.”

In this case, it is Staff’s submission that Air Canada, as the reporting issuer, stands in the shoes of the person or entity who is doing the tipping and it is appropriate in a situation to consider Air Canada’s conduct as one which is quite serious and worthy of the appropriate sanction.

In addition to the obligations contained in the Ontario Securities Act, the TSE company manual, which Air Canada has contractually signed, contains in sections 408 and 411 obligations which relate to disclosure and prohibitions against selective disclosure, in particular, of financial information.

….

So the TSE company manual and the Ontario Securities Act combined and separately, in Staff’s view, proscribe the behaviour engaged in by Air Canada in this case, and accordingly it is Staff’s submission that their conduct is worthy of sanction under each of sections 127 and 127.1 of the Act.

Before moving on to the proposed sanctions, I simply want to highlight the admissions that have been made by Air Canada in the settlement agreement. In particular, Air Canada has admitted that in the disclosure of various information, it engaged in conduct contrary to the public interest. And in the disclosure of the information and not following up with the same information the next day in the press release, it has also breached its listing agreement with the Toronto Stock Exchange and therefore has acted contrary to the public interest.

Finally, in mitigation in favour of Air Canada, there are two points. One, by entering into the settlement agreement, Air Canada has obviously eliminated the need for a more expensive hearing process and has brought to a speedy conclusion this matter. The second point is that in addition to the corporate disclosure policy that was in place from 1998 forward, Air Canada has taken several steps since October 6th to improve their public disclosure regime, including web casting, public notice of calls with analysts and allowing the general public to dial in to their analysts’ calls just to improve the quality of their information going out to the public at large.

….

You will have had an opportunity to review the proposed settlement, which really contains four particular sanctions. The first is a contribution by Air Canada in Ontario in the amount of $500,000, which will be designated by the Commission to such third party as it sees fit for the benefit of investors in Ontario. This $500,000 is matched by a similar amount in Quebec for a total of $1 million that Air Canada is paying to each province, or half and half.

The second sanction is a quarterly review, for a period of one year, by Air Canada’s auditors to ensure that Air Canada is complying with its obligations under securities law, the TSE company manual and its own corporate disclosure policies and meeting its selected disclosure obligations to ensure that this does not happen again in the next year. That report to be provided on a quarterly basis to each of Air Canada and the Securities Commission will thereafter be publicly available as well.

The third sanction is a reprimand that Air Canada has consented to by the Ontario Securities Commission, and the fourth is payment of Ontario’s costs of investigating this matter in the amountof $80,000.

Contained in the written submissions is a decision of the Commission in Belteco Holdings, and that decision sets out a number of factors the Commission had regard to when considering whether or not agreed upon sanctions are appropriate in the circumstance. They include, and I summarize them on page 7 of my written submissions, six different factors which should be considered, in our view, in this case.

The first and perhaps most obvious is the seriousness of the allegations. It is the submission of Ontario Staff that the allegation in this case is quite serious. It is submitted that the breach was an obvious breach during the quiet period that Air Canada had in place, and that it in fact was not -- Air Canada was not assisted by the actions the following day in issuing a press release that did not contain the same information.

The second factor to consider is the respondent’s experience in the marketplace, and in Staff’s submission Air Canada is quite obviously a leading Canadian company, a major reporting issuer or listed company on the Toronto Stock Exchange and has a wealth of experience in corporate governance matters and in securities matters, which is reflected by their own corporate disclosure policy and which would have prohibited the activity in question.

A third factor to consider is whether or not the respondent has recognized the seriousness of the impropriety, and in Staff's submission Air Canada has recognized the seriousness. Overall, Air Canada has cooperated with the investigation. The financial sanction, the $1 million, is a figure that Air Canada views as quite a serious figure in its current situation, and it has agreed to ongoing public monitoring of this company for the next year in order to ensure that it stays on track and to provide a bellwether, if you will, for other reporting issuers and listed companies in Canada to sort of bring everybody up to standard in the issue relating to selective disclosure.

The fourth consideration is whether or not the sanctions imposed would deter like-minded people or companies from engaging in similar conduct. In Staff's submission, that is particularly apt in this situation. Air Canada will recognize that the cost of compliance is less than the cost of non-compliance, and in Staff's submission the company public at large, if you will, will also recognize that.

The other fact is that it will provide guidance to the reporting issuer public that calls to analysts, even when the facts may suggest that you could have taken this piece of information from some description of oil prices and this piece of information and add it all up to a specific number, is not appropriate behaviour, and will hopefully provide guidance to those companies and some deterrence factor.

The fifth consideration is mitigating factors. I've highlighted the two that, in Staff's submission, are appropriate to consider in this case. One is the admissions made by Air Canada in reaching this settlement, and, two, the improvements to their corporate disclosure policy since settlement has been reached.

Finally costs award ties directly into the investigation branch here, their cost of investigation in this matter. While Air Canada did cooperate, the investigation incurred costs along the way, both in reviewing the matter and interviewing the necessary various parties, and in reaching the settlement, it is appropriate for Air Canada to bear the costs of that investigation, and they have agreed to do so.

So for those reasons, Staff of Ontario submit that the settlement is appropriate in the circumstances and we ask that the Commission approve same.

….

MR. WAITZER: Air Canada understands the seriousness with which the two Commissions take this matter. As a major issuer, with a significant stake in the quality and integrity of Canada's capital markets, Air Canada takes the matter quite seriously as well. It has entered into the settlement agreement that is before you today on that basis.

While the obiter in the cases that counsel for Ontario Commission's Staff has referred you to in terms of sanctions, it may well be relevant. I would submit that the contextual circumstances of those cases are quite a bit different than the matter that you have before you. This may go to the question that was raised by Mr. Morphy to Ms. Daniels.

As is noted in the settlement agreement, there is no suggestion that there was any culture of non-compliance at Air Canada. This was an isolated incident. It is also noted in the settlement agreement that sensitivity to the issue of selective disclosure has heightened in recent years.

I think it is fair to say that the standards that are being applied with respect to selective disclosure in both Canada and the United States -- and Air Canada is a registrant in the United States listed on Nasdaq as well -- are the subject of continuing debate and are evolving. To put it into context, Regulation FD, which is the SEC's regulation with respect to selective disclosure, was implemented shortly after the circumstances that gave rise to this settlement agreement.

Air Canada, too, was facing what might be viewed as unique circumstances at the time. It was in the middle of a difficult integration effort with a financially distressed airline, Canadian Airlines. It was a highly sensitive environment for a variety of reasons. There was a lot going on.

Ms. Daniels pointed out that the information that was conveyed to the analysts in the 13 phone calls was not generally disclosed, and you will note that in the settlement agreement we talked about the information not being generally disclosed as such. I don't put a lot of weight on that other than to point out to you that there is not necessarily agreement between Staff and Air Canada with respect to whether that information was substantially disclosed in the public domain ahead of the analysts' call. That might have been the subject for a hearing, had we gone to a hearing. Air Canada has acknowledged and acknowledges to you today that there was a clear public interest harm that was occasioned by

those communications.

I suppose the proof of materiality is always in the pudding. With the benefit of knowing how the analysts and the market reacted to the information that was communicated to the analysts on the evening of October 5th, it is clear that those calls, without the issuance of a contemporaneous press release, was an error in judgment and was damaging both to Air Canada and to the public interest.

I would point out that there is no suggestion of any personal or corporate gain, and again I'm contrasting these circumstances to those in some of the cases that Ms. Daniels has referred you to. There is clearly confusion that arose in the marketplace and an informational imbalance in the marketplace that resulted, and the notoriety of these proceedings have clearly harmed Air Canada.

Let me be clear that Air Canada takes full responsibility for its actions and regrets and is submitting to these panels because it regrets the events which occurred. Air Canada took immediate action to ensure that such events would not recur. Its corporate disclosure policy at the time was in keeping with standards that one would expect of a senior issuer. It has noted in the settlement agreement it has upgraded its own policies and practices subsequent to October to ensure that its own practices and policies reflect best current practices in the marketplace. And as Ms. Daniels pointed out, Air Canada cooperated with the Commissions' Staffs in this investigation.

I want to be clear for the panel what has been agreed to in the settlement, which is that Air Canada's actions resulted in harm to the public interest. That is the section on which the Commission will be exercising its jurisdiction, if it accepts this. There is no allegation -- no direct allegation -- and no admission of a statutory breach in the settlement agreement. That is, there is no admission of a breach of Section 76(2) which Ms. Daniels referred to.

THE CHAIR: No direct allegation.

MR. WAITZER: No direct allegation, and no admission of a statutory breach. Air Canada has agreed to the sanctions. It accepts, as I say, full responsibility for the conduct. It has taken this matter very seriously. It wants to put this matter behind it. I think by its actions it has demonstrated a resolve to ensure that it not occur again. It was an isolated error that was a significant error. Air Canada would like to be able to move on to face other challenges ahead of it for the benefit of its shareholders. I would be happy to answer any questions for either the panel in Montreal or Toronto.

MR. MORPHY: Mr. Waitzer, Ms. Daniels in her submissions said, as I understood, that this was an obvious breach. I think those were her words. Do you concur with an admission -- it's paragraph 13, that it breached its listing agreement? You say it is not a straight admission, referring to the statute. Do you agree that this is an obvious breach of the listing agreement?

MR. WAITZER: Air Canada has agreed that it breached the listing agreement.

MR. MORPHY:I used the word "obvious" as she did.

MR. WAITZER:I would not use the word "obvious". I think there is considerable uncertainly still in the application of the TSE listing agreement and the specific provisions, but for purposes in these circumstances, Air Canada had admitted a breach of the listing agreement.

MR. MORPHY: But you are not saying obvious. Thank you.

THE CHAIR:I have a couple of questions, Mr. Waitzer. You say there is no direct allegation of breach of statutory provisions, but Ms. Daniels, as it has already been observed by Mr. Morphy, it is quite clear that in her view there was a breach of the Act. I believe the statute in Ontario, which is longstanding, is quite different from that in the United States and mandates disclosure and also has anti-tipping provisions.

You referred to the disclosure in the United States, but the case that was referred to by Ms. Daniels, Re George, which came out in January of 1999 before this conduct and before any Regulation FD in the United States, makes it quite clear, as Ms. Daniels said: "We would like to make it absolutely clear that such conduct", referring to disclosure to analysts, "is both illegal and improper and that if, in proceedings commenced against an officer of an issuer or an analyst, such conduct was proved, we would regard it most seriously."

My question to you is this - I am a little troubled - you almost seem to be saying there was not anything improper here. I take it, and I want your comments on this, that if we approve this settlement, Air Canada should be reprimanded for its

conduct and that its conduct was unacceptable and that this should be a clarion call to the street that they should take seriously the existing laws that we have in Ontario.

Now, am I going too far in interpreting what our approving of this settlement agreement would mean?

MR. WAITZER:I do not disagree with anything that you have just said.

THE CHAIR: That's fine, because I think as part of the reprimand I would like to state that.

MR. WAITZER:I did not mean to suggest, Mr. Chair, that there was nothing improper in Air Canada's conduct. If that was the case, we would not be before you here today. I think what I suggested was materiality decisions made in real time in complex circumstances are difficult – are often difficult. This was a difficult one. Knowing how everybody reacted, it is clear in hindsight that the information was material. There was an error in judgment, and Air Canada accepts full responsibility for that and I think takes it as seriously as you have just suggested in your remarks, and that is why they are submitting to this settlement.

….

MS. DANIELS: Just in response to comments made by Mr. Waitzer and considering some of the questions that have come from the panel, -- what is obvious, and we submit is obvious to Staff in Ontario and has been admitted to by Air Canada is a simple two-step process: a) Air Canada admits that any information that was disclosed was a material fact; and b) Air Canada admits that that information was not generally disclosed.

In Staff's view, that is the obvious problem here and it is conduct which is contrary to the public interest.

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--- **Recess at 10:30 a.m.**

--- **Resuming at 10:45 a.m.**

(DECISION AND ORAL REASONS)

THE CHAIR: We are reconvening. We have come to our respective decisions, and the Ontario Securities Commission has decided to approve the settlement as being in the public interest.

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We have had presented to us a settlement agreement that has been entered into by the staff of the Ontario Securities Commission and Air Canada, and in Quebec a similar, if not identical, agreement has been entered into between the Staff of the Commission des valeurs mobiliäres du QuÇbec and Air Canada.

This agreement was considered by us, and we determined that it is in the public interest to approve this agreement.

The agreement calls for a payment of $500,000 to the Ontario Securities Commission to be used for investor education.

It calls for a quarterly review for the next four quarters by the auditors of Air Canada to ensure compliance with securities laws - in particular, the selective disclosure, timely disclosure, and public disclosure policies.

It also calls for making copies of the review available to the Staff of the Ontario Securities Commission and the public.

It calls for a reprimand by the Ontario Securities Commission, which I will deliver in a moment, and calls for costs of the Ontario Securities Commission involved in this investigation to the amount of $80,000.

The Commission considered this agreement and satisfied itself that it was in the public interest to approve it for various reasons.

One, we look upon this kind of activity very seriously. Our law in Ontario has been longstanding in requiring prompt

disclosure of any material change in the affairs of an issuer. This is different than the laws in the United States.

We also have had on our statute books for many years laws against tipping, or treating investors unequally: giving selected information to some investors and not to others; and that has been on our books for many years.

In 1999, as a matter of fact it was January, there was a decision of the Ontario Securities Commission dealing with a similar situation where analysts had been given specific information that was generally not available, and although the facts were different, the statement that was made by the Commission at that time is relevant. Dealing with giving selective disclosure to analysts, the Commission said:

"We would like to make it absolutely clear that such conduct is both illegal and improper and that if, in proceedings commenced against an officer of an issuer or an analyst, such conduct was proved, we would regard it most seriously."

It is interesting to note that that statement, in reasons that were released in January 1999 and reported in the Ontario Securities Commission Bulletin, was long before this conduct that we are dealing with today, which took place in October of 2000.

It is also interesting to note that at the Ontario Securities Commission, we conducted a survey in October of '99 of several companies, and 170 companies responded, to find out what the practice was with respect to corporate disclosure policies, with respect to one-on-one meetings with analysts,and so forth. We did find at that time that the practice was not happy.

While that survey was going on, the United States Securities and Exchange Commission came out with their fair disclosure guideline, Regulation FD, dealing with communication with analysts. And I think it is important, in looking at Air Canada's activities here, that although there has been heightened awareness of the problems involved in dealing with analysts, and some debate as to what the law should be in the United States, the situation in Canada is relatively clear.

To help clarify the situation, however, as to what practices are good or not good, the CSA, the Securities Commissions across Canada, have put out proposed National Policy 51-201 as to fair disclosure standards. That policy makes it quite clear that no change in the law is suggested. It reiterates what the law in various jurisdictions of Canada is and suggests various practices that could be followed by companies to keep out of trouble.

We note that Air Canada had and does have a corporate disclosure policy. They have and have had policies in place.

It appears that there were serious errors of judgment made by the people involved in the incident at hand. While that cannot be excused, we do take some comfort from what appears to be a culture of compliance at Air Canada. Nevertheless, because of the seriousness of the infraction, because of the prior statements by the Commission as to the seriousness with which we would regard this kind of situation, and in order to give a clarion call to the street that this kind of activity will not be tolerated, we feel that the settlement agreement, with its sanctions, is appropriate in the situation.

We feel that it will help to foster confidence in the financial markets to know that the law requires, and that good corporations will comply with the requirement for, full disclosure of all material information on a timely basis as required by the securities laws and by the Toronto Stock Exchange's listing agreement and listing requirements.

Secondly, we believe it underlines the importance of the principle in securities laws of equal treatment of all investors. And where investors are not given information on an even footing, unless there are special circumstances of privilege or the law makes reasonable exceptions for confidential disclosure under adequate safeguards to ensure there is no insider trading, unless those special conditions exist, all investors should be given equal opportunity.

Communication by a corporation with analysts is not covered under some exception; so what is disclosed to analysts, if it is material and will significantly affect the market price, or reasonably may be expected to significantly affect the market price of the shares of the issuer, should not be selectively disclosed.

We note also that Air Canada has taken many steps to put safeguards in place; and we take great comfort from the fact that for the next four quarters their conduct will be reviewed, so that we are satisfied that it is reasonable to expect that this kind of conduct will not reoccur with Air Canada.

We also note that in Quebec there is also a payment of $500,000, so that the total sanction, if you will, comes to $1,000,000. We think that that is appropriate in this situation.

Now that there is a clarion call to the street to watch what happens, I do not want to predict what might come in the future.

(The reprimand is contained in the Order issued by the Commission at the conclusion of the hearing.)

August 2, 2001.

“Paul M. Moore”