

Competition Tribunal



Tribunal de la concurrence

Reference: *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 18

File No.: CT-2016-015

Registry Document No.: 158

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*, RSC 1985, c C-34 as amended;

AND IN THE MATTER OF a case management conference and a motion by Vancouver Airport Authority seeking orders allowing it to conduct examination for discovery and amending the timetable of the application.

BETWEEN:

The Commissioner of Competition
(applicant)

and

Vancouver Airport Authority
(respondent)



Date of case management conference: November 30, 2017

Before Judicial Member: D. Gascon J. (Chairperson)

Date of Order and Reasons for Order: December 6, 2017

**ORDER AND REASONS FOR ORDER GRANTING IN PART RESPONDENT'S
MOTION TO CONDUCT EXAMINATION FOR DISCOVERY AND TO AMEND THE
SCHEDULING ORDER**

I. OVERVIEW

[1] This order deals with a debate that keeps arising before the Tribunal in many applications brought by the Commissioner of Competition (“**Commissioner**”), namely the continuous tension between the public interest privilege claimed by the Commissioner to protect against the compulsory disclosure of documents obtained or prepared by the Commissioner in the course of his investigations, and the adverse impact that the use and application of this privilege can have on the fairness of the Tribunal’s proceedings and on a respondent’s right and ability to make a full answer and defence in response to the Commissioner’s case.

[2] On November 22, 2017, the Vancouver Airport Authority (“**VAA**”) requested a Case Management Conference (“**CMC**”) to discuss the Commissioner’s alleged non-compliance with his disclosure obligations pursuant to the scheduling and confidentiality orders issued by the Tribunal in this matter. The Tribunal held a CMC on November 23, 2017, followed by a second one on November 30, 2017. In the meantime, further to a Direction issued by the Tribunal on November 24, 2017 (“**November Direction**”), VAA opted to file a formal motion before the Tribunal, seeking *inter alia* an order compelling the Commissioner to produce his representative for a further examination for discovery and amending the scheduling order currently in place in this matter (“**Motion**”).

[3] In essence, VAA argues that, in light of the documents over which the Commissioner has now waived his claim of public interest privilege and which he has only provided to VAA on November 24, 2017 (“**Waived Documents**”), VAA is entitled to examine for discovery the Commissioner’s representative on those Waived Documents. VAA further asks that the timetable for the disposition of this matter be amended and extended in order to give it sufficient time to conduct such examination, to review the Waived Documents and to prepare its case in response. On both fronts, VAA claims that considerations of fairness and VAA’s right to be able to make a full answer and defence against the Commissioner’s case dictate that the reliefs be granted. VAA brought its requests and the Motion in the context of the application made against VAA by the Commissioner under the abuse of dominance provisions of the *Competition Act*, RSC 1985, c C-34 (“**Application**”).

[4] VAA’s requests and Motion raise two issues. First, whether VAA has a right, in the present circumstances and at this stage of the proceedings, to conduct a further examination for discovery of the Commissioner’s representative on the Waived Documents. Second, whether VAA is entitled to have additional time to review the Waived Documents and prepare its case in response, including its documents relied upon, witness statements and expert reports.

[5] For the reasons that follow, VAA’s requests and Motion will be granted in part, in terms of a circumscribed right to further examine the Commissioner’s representative and of an adjustment to the timetable for the disposition of the Application. I take note of the Commissioner’s agreement to produce his representative for one additional day of examination for discovery, in relation to the Waived Documents. Upon reviewing the materials filed by VAA and the most recent correspondence from counsel for both parties, and after hearing them at the November 30, 2017 CMC, I am thus ready to order the further examination for discovery of the Commissioner’s representative, within the parameters set out in this order. In addition, I agree with VAA that, given the late disclosure of the Waived Documents by the Commissioner, coupled with the magnitude of the number of documents at stake, considerations of fairness command that VAA be given more time to review and digest the information in order to be able

to adequately prepare its case in response. This, in my view, can be done in a fair and balanced way by adjusting the remaining pre-hearing disclosure steps in the July 21, 2017 scheduling order (“**July Scheduling Order**”) and by slightly modifying the hearing dates already set aside for this matter.

II. BACKGROUND

[6] The relevant procedural background can be summarized as follows.

[7] The Commissioner filed his Notice of Application on September 29, 2016, seeking relief against VAA under section 79 of the Act. In accordance with the initial scheduling order issued by the Tribunal in this matter, the Commissioner served VAA with his affidavit of documents and supplemental affidavits of documents (collectively “**AODs**”), listing all records relevant to this Application which were in the Commissioner’s possession, power or control. The Commissioner’s AODs divided these records into three schedules: (i) Schedule A for records that do not contain confidential information; (ii) Schedule B for records that, according to the Commissioner, contain confidential information and for which no privilege is claimed or the Commissioner has waived privilege for the purpose of the Application; and (iii) Schedule C for records that the Commissioner asserts contain confidential information and for which at least one privilege (i.e., solicitor-client, litigation or public interest) is being claimed.

[8] The Commissioner has stated that, through the productions contained in his AODs, he has provided to VAA all relevant, non-privileged documents in his possession, power or control (“**Documentary Productions**”).

[9] In March 2017, VAA challenged the Commissioner’s claim of public interest privilege over documents contained in Schedule C of the AODs. This resulted in a Tribunal’s decision dated April 24, 2017 (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 6 (“**VAA Privilege Decision**”). In the VAA Privilege Decision, I upheld the Commissioner’s claim of public interest privilege over approximately 1,185 documents. According to VAA, these documents included over 475 affidavits, emails, interview notes, letters, memos, notebooks and presentations. VAA has appealed the VAA Privilege Decision, and the Federal Court of Appeal currently has the matter under reserve.

[10] As part of the proceedings, the Commissioner produced to VAA summaries of the facts obtained by him from third-party sources during his investigation and contained in the Schedule C records for which the Commissioner claimed public interest privilege (“**Summaries**”). The first version of the Summaries was produced on April 13, 2017. As it was not satisfied with the level of detail provided in the Summaries, VAA brought a motion challenging the adequacy and accuracy of the Summaries. Prior to the hearing of that motion, on June 6, 2017, the Commissioner delivered revised and reordered Summaries to VAA, which totalled some 200 pages.

[11] On July 4, 2017, the Tribunal released its decision on VAA’s summaries motion (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 8 (“**VAA Summaries Decision**”). In his decision, Mr. Justice Phelan dismissed VAA’s motion and concluded that VAA had not made the case for further and better disclosure in the Summaries, even in a limited form or under limited access.

[12] On July 21, 2017, further to the representations made by the parties, the Tribunal issued

the July Scheduling Order reflecting the agreement of the parties on the remaining discovery and pre-hearing disclosure steps, and moving the commencement of the hearing from mid-November 2017 to January 29, 2018.

[13] On August 23 and 24, 2017, the Commissioner's representative, Mr. Rushton, was examined for discovery by VAA for two full days, on the basis of the information and materials disclosed in the Documentary Productions and in the Summaries.

[14] In September 2017, VAA brought another motion before the Tribunal, seeking to compel the Commissioner to answer several questions that were refused during the examination for discovery of the Commissioner's representative. On October 26, 2017, the Tribunal released its decision on VAA's refusals motion (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 ("**VAA Refusals Decision**"), granting it in part and ordering some questions to be answered by the Commissioner's representative along the lines developed in that decision. The Tribunal was recently informed that, further to the additional responses provided by the Commissioner following the VAA Refusals Decision, VAA elected not to conduct a further examination for discovery of the Commissioner's representative, initially planned for early November 2017.

[15] On November 15, 2017, in accordance with the July Scheduling Order, the Commissioner served VAA with eight witness statements, one expert report and his documents relied upon. The total number of documents attached to the Commissioner's witness statements added up to approximately 100. However, in terms of documents for which the Commissioner was waiving the public interest privilege, the Commissioner solely provided those *documents he intended to rely upon*. In other words, the Commissioner initially did not provide VAA with all relevant documents from a particular witness but only the subset of relevant documents that he chose to rely on.

[16] On November 21, 2017, the Commissioner advised VAA that, "upon further consideration of the particular circumstances of this case, and in the interests of expeditiously bringing this matter to trial in accordance with the Scheduling Order", the Commissioner would be waiving his public interest privilege on *all relevant documents relating to the testimony of the various witnesses*, even if some of this information had not been "relied on" by the Commissioner.

[17] On November 24, 2017, the Commissioner thus provided to VAA's counsel a USB key containing the Waived Documents, consisting of 1,011 records that were in the Commissioner's power or control as of August 31, 2017, over which the Commissioner had initially claimed public interest privilege and for which that privilege was now being been waived. The Commissioner also provided the confidentiality designation (i.e., Confidential Level A or Confidential Level B) of the Waived Documents on November 29, 2017. The Commissioner further confirmed that, as of November 15, 2017, he had produced to VAA, as attachments to the Commissioner's witness statements, 104 records that were produced to the Commissioner after August 31, 2017, over which the Commissioner had claimed public interest privilege and for which that privilege has now been waived.

[18] The Tribunal understands that, by providing the Waived Documents, the Commissioner has now effectively waived his public interest privilege on all relevant information provided by the witnesses appearing on his behalf, both helpful and unhelpful to the Commissioner, including information not relied on by the Commissioner.

[19] In correspondence dated December 4, 2017 received from both counsel to VAA and counsel to the Commissioner, as per the Tribunal's directions, the parties set out the areas of agreement and disagreement between them with respect to the issues raised by VAA in the Motion and discussed at the November 30, 2017 CMC. The parties were able to agree in respect of the alternative relief sought by VAA in the Motion, namely a revised schedule for the remaining pre-hearing disclosure steps in this matter and for the hearing, but areas of disagreement remain with respect to the further examination for discovery of the Commissioner's representative and the rulings to be issued by the Tribunal on the different reliefs sought by VAA in its Motion.

III. ANALYSIS

A. VAA's Right to Conduct Further Examination for Discovery

[20] VAA first claims that considerations of fairness entitle it to examine for discovery the Commissioner's representative on the Waived Documents. VAA argues that a further examination is warranted given that the Commissioner has waived his right to public interest privilege regarding a significant number of documents relevant for the trial. VAA posits that it deserves the right to resume the discovery process and to have additional time to prepare its response, given the amount of documents for which privilege was revoked, and the proximity of trial.

[21] While he is of the view that a further examination for discovery of his representative is not warranted or appropriate, the Commissioner is however prepared, in the interests of expeditiously advancing this matter, to produce his representative for one day of additional discovery in December. The Commissioner submits that such further examination should be restricted to matters that do not arise from the Commissioner's witness statements or expert report and on which VAA could not have previously examined the Commissioner. In addition, the Commissioner takes the position that any consequential steps from such discovery (e.g., a refusals motion) shall also be dealt with on an expeditious basis so as to preserve the revised schedule and the hearing of this matter within the five-week period provided for in the July Scheduling Order.

[22] Before turning to the limited further examination for discovery agreed to by the Commissioner, the following remarks are in order.

[23] In the VAA Privilege Decision, I confirmed that the Commissioner's public interest privilege is a class-based privilege. While this decision is currently being appealed by VAA, this Application has proceeded on the basis of the Commissioner's recognized public interest privilege. In both the VAA Privilege Decision and the VAA Refusals Decision, I discussed the "unique way" in which the Commissioner's public interest privilege has developed, and I referred to the three "safeguard mechanisms" put in place by the Tribunal and affirmed by the Courts to temper the adverse impact of the limited disclosure, as well as to the high threshold (e.g., compelling circumstances or compelling competing interest) required to authorize lifting the privilege (*VAA Privilege Decision* at para 81; *VAA Refusals Decision* at para 79). Through these safeguard mechanisms, the Tribunal and the Courts have developed a "disclosure regime designed to balance public interest privilege with fairness" (*VAA Summaries Decision* at para 15).

[24] In this Application, documentary and oral discovery has already taken place, in line with the particular regime developed by the Tribunal and the Courts. The Summaries prepared by the Commissioner were found to be adequate by the Tribunal in the VAA Summaries Decision, that decision has not been appealed by VAA, and VAA has indeed proceeded to the examination for discovery of the Commissioner's representative on the basis of the Documentary Productions and the Summaries, over a period of two days.

[25] When the Commissioner served his documents relied upon and his witness statements on November 15, 2017 (as mandated by the July Scheduling Order), the so-called third safeguard mechanism required the Commissioner to waive his public interest privilege on documents and communications from witnesses providing will-say statements, if he wanted to rely on that information at trial (*VAA Refusals Motion* at para 86). This is what the Commissioner did. As I indicated in the VAA Refusals Decision, the Commissioner could also be required, depending on the circumstances, to waive his public interest privilege on *all relevant information* provided by a witness appearing on his behalf, both helpful and unhelpful to the Commissioner and including information not relied on by the Commissioner, if circumstances and considerations of fairness dictated it (*VAA Refusals Motion* at para 87; November Direction at 3). This is what the Commissioner elected to do when he provided the Waived Documents to VAA.

[26] In acting as he did, the Commissioner therefore waived his privilege at the stage where, according to the regime developed by the Tribunal and affirmed by the Courts, the Commissioner was directed and entitled to do so.

[27] I am satisfied that the special safeguard mechanisms put in place by the Tribunal to address the concerns for the right to a fair hearing raised by the limit imposed by the Commissioner's public interest privilege on the full disclosure of relevant documents and communications have worked properly in this case. I note that, in its Motion, VAA has not adduced evidence to the contrary.

[28] The fact that the Commissioner has now waived his public interest privilege in accordance with the safeguard mechanisms developed by the Tribunal does not, in my view, imply that the discovery process already completed can automatically be re-opened at this late stage of the proceedings. If that was the case, it would in fact tend to render meaningless both the Commissioner's public interest privilege and the process developed by the Tribunal to ensure an adequate balance between the protection of such privilege and a respondent's right to a fair hearing. The current state of the law sets that the Commissioner's public interest privilege has been recognized, and that the Commissioner does not have to disclose, until the time he files his witness statements, the documents over which the privilege is asserted. This entails that he does not have to make the privileged documents available for discovery, though he is required to provide adequate and accurate summaries about their contents. The rationale being that, in order to properly protect the identity of the sources of information covered by the privilege, the waiver is only granted at the later stage of the proceedings, close to the trial date.

[29] In that context, I agree with the Commissioner that the Waived Documents cannot be considered as constituting "new information" as such. Instead, they contain information covered in the Summaries which were found to be adequate for purposes of discovery by the Tribunal. The Commissioner's representative was indeed examined for discovery for two days on the basis of the Documentary Productions and the Summaries.

[30] I accept and acknowledge that there could be situations where a respondent could satisfy the Tribunal that a further examination for discovery of the Commissioner's representative is required or necessary following the waiver of public interest privilege by the Commissioner, even at the late stage of filing his witness statements. This would be the case, for example, where the production of the actual documents shows that the underlying summaries were inadequate or inaccurate. However, in order for the Tribunal to come to such a conclusion and to re-open the examination for discovery process already completed, it takes more than a general statement about a potential breach of procedural fairness. The Tribunal needs to be persuaded by appropriate and adequate evidence.

[31] In other words, evidence would be required in order for me to conclude that the failure to conduct a further examination for discovery on the Waived Documents would be procedurally unfair and prejudicial to VAA's ability to make a full answer and defence in response to the Commissioner's underlying Application. This is especially the case in a context where, like here, a motion challenging the adequacy of the Summaries has been filed and dismissed by the Tribunal. I indeed note that counsel for VAA has been unable to direct me to any precedent supporting a general right to conduct a further examination for discovery of the Commissioner's representative in circumstances where the Commissioner has waived his public interest privilege at the time his witness statements are served and where adequate Summaries have been provided in accordance with the safeguard mechanisms developed by the Tribunal and affirmed by the Courts.

[32] I find that, in this case, VAA has not put forward evidence on the existence of special circumstances which would support the issuance of an order that the Commissioner's representative re-attend an examination for discovery to answer questions with respect to the Waived Documents. In a situation where VAA has already conducted oral discovery on the basis of Summaries found to be fair and adequate by the Tribunal, it was VAA's burden to demonstrate the necessity to have a further examination for discovery of the Commissioner's representative and why a further examination for discovery on the Waived Documents would be justified. VAA has not satisfied that burden. No evidence has been provided to show how and where the Summaries were inadequate or inaccurate, nor to support VAA's claim that the production of the Waived Documents at this stage of the proceedings undermines VAA's ability to prepare its responding case and renders the proceeding fundamentally unfair. In my view, even if the Waived Documents are large in volume and are arguably significant, probative and highly material, VAA did not point to some specific facts nor demonstrated how and in what respect it would suffer prejudice by the absence of a further examination for discovery on the Waived Documents.

[33] Moreover, I underline that, even outside a process as unique as this one where public interest privilege is involved and special safeguard mechanisms exist, re-opening discovery on the eve of a scheduled trial is exceptional. Once a case is set for trial and the trial date has been assigned, "the pre-trial proceedings are not to be reopened in the absence of an applicant establishing that a significant and unexpected change in circumstance has occurred, or that a manifest injustice is likely to occur if the pre-trial proceedings are not reopened" (*Vigoren v Nystuen*, 2006 SKCA 47 at paras 41-42; *Dufour v Saskatoon StarPhoenix Group Inc*, 2007 SKQB 293 at paras 21-22).

[34] In Federal Court proceedings, the general rule is that discovery is "not a never ending process that knows no boundaries" (*John Labatt Ltd v Molson Breweries, A Partnership* (1996),

69 CPR (3d) 126 (FCTD) (“*John Labatt*”) at para 8). Discovery is rather a tool enabling a party to better prepare for trial but, like any other tool, it has to be properly used to give the best results, and the Court should not allow it to unduly delay an action (*John Labatt* at para 8). When deciding to re-open the discovery process, the courts are called on to consider whether there has been delay in bringing the request or motion, whether extensive discovery has already taken place and whether new issues are raised (*Taylor v R*, [1992] 1 FC 316 (FCTD) (“*Taylor*”) at para 22). As such, re-opening the discovery phase is an “exceptional remedy” that should be justified by “special reasons” in order to better serve the “ends of justice” (*Taylor* at para 22). Nothing in the case law submitted by VAA in support of its Motion contradicts these principles.

[35] I would add that, by waiving his privilege over the Waived Documents only at the time of service of his witness statements, the Commissioner cannot be said to have used the privilege to gain a tactical advantage in the litigation or in a way that would be fundamentally incompatible with the role of the Commissioner to act in accordance with the public interest. The Commissioner was in fact following the safeguard mechanisms process put in place by the Tribunal and affirmed by the Courts. There is no evidence to support an allegation that the Commissioner’s actions in the run-up to trial be qualified as being “motivated by tactical considerations” or amounting to trial by ambush (*R v Gordon*, [1999] OJ No 1425 (On CJ) at paras 35-37).

[36] That being said, in view of the Commissioner’s specific agreement, I agree that a further examination for discovery of the Commissioner’s representative may be ordered in the circumstances of this case, on the following terms. Since VAA has already examined the Commissioner’s representative for discovery over two full days, and considering that the number of Waived Documents, while not insignificant, nonetheless represents only a fraction of the Documentary Productions made by the Commissioner in this matter, I am satisfied that one additional day of further discovery of the Commissioner’s representative is sufficient and reasonable to cover issues raised in the Waived Documents.

[37] In addition, since examinations for discovery are meant to be completed before a party has the benefit of the other side’s witness statements or expert reports, I also agree that the further examination for discovery of the Commissioner’s representative shall not deal with matters arising from the Commissioner’s witness statements or expert report. I underline that only information that is within the Commissioner’s possession and control may be sought on discovery, as opposed to asking the Commissioner’s representative to speculate as to what a particular third party may have meant to state during an interview with the Bureau.

[38] Finally, considering the remaining pre-hearing disclosure steps to be completed and the revised timetable ordered below, I determine that this further one-day examination for discovery of the Commissioner’s representative shall be held before December 15, 2017, and that any motions arising from such additional discovery shall be filed by December 18 at the latest and heard by the Tribunal before December 21. I am persuaded that, with good faith efforts by the parties, convenient dates can be agreed to by counsel to meet these tight deadlines.

[39] It is well-accepted that the Tribunal resides very close to, if not at, the “judicial end of the spectrum”, where the functions and processes more closely resemble courts and attract the highest level of procedural fairness. And the right to a fair hearing means the right to know the case against it and the right to a meaningful opportunity to present evidence supporting its own case (*The Commissioner of Competition v Direct Energy Marketing Limited*, 2014 Comp Trib 17

at para 16; *VAA Privilege Decision* at para 169). In addition, the nature and extent of the duty of procedural fairness will vary with the specific context and the different factual situations dealt with by the Tribunal, as well as the nature of the disputes it must resolve (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 25-26; *VAA Privilege Decision* at paras 165-170; *VAA Refusals Decision* at para 44).

[40] I am satisfied that, with the discovery already conducted and by providing for this additional day of further examination for discovery of the Commissioner's representative on the Waived Documents, as well as additional time to prepare its response, VAA's right to a fair hearing and to a full and complete defense will be amply met and that no breach of procedural fairness will result from the delayed production of the Waived Documents by the Commissioner. Furthermore, VAA will have the opportunity, at trial, to cross-examine the Commissioner's witnesses on the contents of the Waived Documents.

B. Adjustments to the Scheduling Order

[41] I now turn to VAA's request for an extension of time to prepare its response and for an amendment to the July Scheduling Order.

[42] I agree with VAA that, in the circumstances of this case, the rules of procedural fairness and the interests of justice require that VAA be given a reasonable amount of time to review the Waived Documents and to prepare its case in response. This dictates that the deadline for VAA to serve its list of documents relied upon and witness statements and to serve and file expert reports be extended in order to allow VAA (including not only VAA's counsel, but also VAA's representatives and any experts that may have been retained by it) to review the documents and consider the manner in which their contents may affect VAA's case and its broader trial strategy.

[43] The Commissioner served his witness statements accompanied by all documents relied upon by him on November 15, 2017, but he only decided to waive his public interest privilege over more than 1,000 documents in the following week, produced the Waived Documents nine days later and determined the confidentiality designation on November 29, 2017, thus causing delays for VAA in the pre-hearing disclosure process and in the receipt of information relevant to the preparation of its case. Given the issues that VAA had raised in its refusals motion, and in particular VAA's Request 117, and in light of the VAA Refusals Decision, I am of the view that the Commissioner should have known or anticipated that VAA would be asking for *all relevant information* coming from the Commissioner's witnesses. Furthermore, in my opinion, the Commissioner should have known that it would have to identify in a timely manner the Level A or Level B confidential designation of any documents over which his public interest privilege would be waived.

[44] I recognize that the Commissioner eventually decided to voluntarily waive his public interest privilege over all relevant documents and thus did not require VAA to seek an order of the Tribunal to obtain such relief. However, the fact remains that, because of the Commissioner's delayed response, VAA only got a late access to the waived information. This calls for an extension of time to serve its case in response.

[45] I am also persuaded that this additional time is also justified in this case by the volume and nature of the Waived Documents at stake.

[46] I do not dispute that, when the Commissioner served his witness statements to VAA on November 15, 2017, he was only required to provide all documents *he intended to rely upon* and to waive his public interest privilege on such documents, if any (November Direction at 3). This is what he did. But the Commissioner was aware that he *could* also be required, depending on the circumstances, to waive his public interest privilege on *all relevant information* provided by a witness appearing on his behalf, both helpful and unhelpful to the Commissioner. It was up to VAA to raise this issue with the Commissioner and the Tribunal if it believed that the Commissioner did not comply with his obligations when he served his materials, which VAA did through correspondence with the Commissioner and through its requests to the Tribunal.

[47] In the context of this case, considerations of fairness clearly command that more time be given to VAA to review and digest the information contained in the Waived Documents and to prepare its case, as the disclosure process has been truncated to VAA's detriment. How much time should be granted is up to the Tribunal to determine in the exercise of its discretion and in light of each set of circumstances. No magic formula exists to determine how this balancing exercise shall be conducted or to measure the impact of a late disclosure on a respondent's right to a fair hearing. But the Tribunal will typically err on the side of caution and ensure that considerations of procedural fairness are not sacrificed for the sake of trial efficiency and expeditiousness.

[48] Having reviewed the written and oral submissions made by counsel for both parties, I am satisfied that compelling reasons exist to revise the July Scheduling Order with respect to the remaining pre-hearing disclosure steps and the hearing dates fixed in this matter, and that an extension of time of four weeks until January 12, 2018 is required and reasonable in order to give VAA sufficient time to adequately prepare its response.

[49] I point out that, in July 2017, VAA had agreed to the revised timetable set out in the July Scheduling Order. At that time, the Tribunal had issued its VAA Privilege Decision upholding the Commissioner's class-based public interest privilege, and VAA had filed its appeal against that decision before the Federal Court of Appeal. VAA was aware that there were about 1,200 documents over which the Commissioner was claiming public interest privilege, and knew about the safeguard mechanisms described by the Tribunal in the VAA Privilege Decision. Indeed, the Commissioner had used the first safeguard mechanism by providing the Summaries, and VAA had used the second one by challenging the adequacy of these Summaries. Furthermore, the Tribunal had dismissed VAA's motion challenging the adequacy of the Summaries in its VAA Summaries Decision. VAA was also aware that it would benefit from the third safeguard mechanism (namely, the waiving of privilege by the Commissioner at the time the Commissioner's witness statements would be served), that it could then raise with the Tribunal any alleged failure by the Commissioner to comply with its disclosure obligations, and that it had the possibility of raising the compelling circumstances argument to challenge and override the Commissioner's claims of privilege. With that information at hand, VAA had agreed, in the July Scheduling Order, to a strict 30-day timeframe to respond to the Commissioner's case in chief. In that context, I am persuaded that granting VAA an additional period of four weeks to prepare its response following the delayed receipt of the Waived Documents is both fair and equitable.

[50] Pursuant to Rule 139 of the *Competition Tribunal Rules*, SOR/2008-141, the dates and other requirements established by case management orders like the July Scheduling Order are firm, and "compelling reasons" must exist to justify a change in such orders. This is such a situation. I am further convinced that, after balancing the opposing interests at stake, an

extension of time can be given to VAA while remaining within the five-week window currently set aside for the trial in this matter, by compressing the remaining pre-hearing disclosure steps, notably the time for reply of the Commissioner, and by slightly rearranging the hearing schedule.

[51] I make the following additional observation. Throughout the discovery process in this matter, it is not the first time that actions or positions taken by the Commissioner have translated into delays in the disclosure of information to VAA. First, further to the concerns raised by VAA and to the filing of its motion challenging the adequacy of the Summaries, the Commissioner revised and expanded his first iteration of the Summaries. This led to some delay in the provision of adequate Summaries to VAA. However, I acknowledge that any alleged breach of procedural fairness resulting from this late provision of the Summaries was cured by the extension of time for the discovery and pre-hearing disclosure steps reflected in the revised July Scheduling Order.

[52] Second, the examination for discovery of the Commissioner's representative led to VAA's motion challenging the refusals and to the Tribunal's VAA Refusals Decision finding that the Commissioner's "stock answer" was not "enough to meet the requirements of fairness, expeditiousness and efficiency of trial that should generally govern the examination for discovery process in Tribunal proceedings" (*VAA Refusals Decision* at para 48), and that further responses ought to be given by the Commissioner. The Commissioner's incomplete disclosure at the oral discovery stage thus also led to some delays for VAA's receipt of relevant information to which it was entitled.

[53] And now, there is this delayed disclosure of the Waived Documents.

[54] Procedural fairness imposes obligations on all parties, including the Commissioner, and the expeditiousness of the Tribunal's proceedings has to be balanced against the right to fairness (*VAA Refusals Decision* at para 45). Parties should always remain mindful of that, and the Tribunal will not hesitate to intervene and revisit the schedule of its proceedings if circumstances call for it. In the current case, I am satisfied that the measures contained in this order are sufficient to protect VAA's procedural rights. But there could be situations where the accumulation of delays in the disclosure process may force the Tribunal to more materially modify the hearing schedules if it comes to the conclusion that considerations of fairness require it to give more ample time to a respondent to prepare its case in response and to have a full and complete defence.

C. Other matters

[55] In its December 4, 2017 correspondence, counsel for VAA argued that the Tribunal should hold off ruling on some issues raised in its Motion. I disagree. I instead find that it would not be in the interests of the proper and orderly administration of justice to keep any issues raised by VAA in its Motion in abeyance or to defer the Tribunal's decision on the various reliefs sought by VAA, given the imminence of the hearing on the merits in this matter and the tight schedule remaining for the final pre-hearing disclosure steps. It would therefore not be in the interests of justice and of the fair conduct of the Tribunal's proceeding to adjourn any issues raised in VAA's Motion *sine die*.

[56] The amended trial schedule proposed on consent by the parties illustrates that VAA's request for an extension of time can be accommodated within the five-week framework already set aside for the hearing of this matter.

[57] I conclude that, with the four-week extension of time provided to VAA for its response, the revised trial schedule, and the opportunity given to VAA to further examine the Commissioner's representative for discovery for one additional day within the parameters set forth in this order, a proper balance has been reached. In my opinion, this adequately responds to the concerns raised by VAA with respect to a potential breach of procedural fairness caused by the delayed disclosure of the Waived Documents, and it grants VAA sufficient time to prepare for and complete the remaining pre-hearing steps. At this juncture, there is no ground to suggest that a further adjournment of the hearing dates could likely be contemplated.

[58] Finally, I observe that, in the context of this order, I do not have to determine what relief VAA might be able to seek upon the outcome of its appeal of the VAA Privilege Decision currently pending before the Federal Court of Appeal.

IV. CONCLUSION

[59] For the reasons detailed above, VAA's requests and Motion are granted in part, in terms of a circumscribed right to further examine the Commissioner's representative and of an adjustment to the timetable for the disposition of the Application. I take note of the Commissioner's agreement to produce his representative for one additional day of examination for discovery, in relation to the Waived Documents. Upon reviewing the materials filed by VAA and the most recent correspondence from counsel for both parties, and after hearing them at the November 30, 2017 CMC, I am ready to order the further examination for discovery of the Commissioner's representative, within the parameters set out in this order. In addition, I agree with VAA that, given the late disclosure of the Waived Documents by the Commissioner, coupled with the magnitude of the number of documents at stake, considerations of fairness command that VAA be given more time to review and digest the information in order to be able to adequately prepare its case in response. This, in my view, can be done by adjusting the remaining pre-hearing disclosure steps in the July Scheduling Order and by slightly modifying the hearing dates already set aside for this matter, along the line set out in the revised timetable agreed to by the parties.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS AS FOLLOWS:

[60] VAA's Motion is granted in part.

[61] VAA is authorized to conduct a further examination for discovery of the Commissioner's representative, for a maximum duration of one additional day and within the parameters set out in this order. The parties are directed to complete this examination by December 15, 2017 at the latest.

[62] Any motions arising from such additional discovery shall be filed by 4:00 p.m. on December 18, 2017, and will be heard by the Tribunal before December 21.

[63] The July Scheduling Order is hereby amended, and the revised schedule for the remaining pre-hearing steps in this Application shall now be as follows:

January 12, 2018

Respondent to serve documents relied upon and witness statements, and to serve and file expert reports, if any

January 29, 2018	Deadline for delivering any Requests for Admissions
January 29, 2018	Applicant to serve list of reply documents and witness statements, and to serve and file reply expert reports, if any
January 31, 2018	Last day to file motions related to the evidence
January 31, 2018	Deadline to provide to the Tribunal documents for use at the hearing (e.g., Briefs of Authorities, witness statements and Agreed Books of Documents)
February 2, 2018	Deadline for responding to any Requests for Admissions
February 2, 2018	Hearing of any motions related to the evidence;

[64] The hearing of this Application shall commence at 9:30 a.m. on February 6, 2017 in the Hearing Room of the Competition Tribunal located at 600-90 Sparks Street, Ottawa. The schedule for the hearing shall be as follows:

February 6-9, 2018	First week of hearing (4 days in Ottawa), with the understanding that the Commissioner's experts will not testify until the second week
February 13-16, 2018	Second week of hearing (4 days in Ottawa)
February 20-23, 2018	Third week of hearing (4 days in Vancouver)
February 28-March 2, 2018	Oral argument (3 days in Ottawa)

[65] The other reliefs sought by VAA in its Motion are dismissed.

[66] As success on VAA's requests and Motion has been divided, costs shall be in the cause.

DATED at Ottawa, this 6th day of December 2017.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

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