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OTTAWA, ONT.

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CT-2016-015

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF certain conduct of Vancouver Airport Authority relating to the supply of in-flight catering at Vancouver International Airport;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

—and—

VANCOUVER AIRPORT AUTHORITY

Respondent

NOTICE OF MOTION

*(Respondent's Motion re: Right to Conduct Examination for Discovery and
re: Adjustments to Scheduling Order)*

TAKE NOTICE that the Respondent, Vancouver Airport Authority ("VAA"), will make a motion to the Case Management Judge, at the Case Management Conference scheduled for Thursday, November 30, 2017, at 3 p.m. The estimated duration of the motion is one hour.

THIS MOTION IS FOR:

1. an Order that the Commissioner produce his representative to be examined for discovery in respect of the documents produced by the Commissioner on Friday, November 24, 2017, such discovery (and follow-on procedural steps) to be conducted in accordance with the draft Further Amended Scheduling Order attached to this Notice of Motion as Schedule "A";
2. an Order amending the Scheduling Order (as revised by the Tribunal's Order of July 21, 2017) in accordance with the draft Further Amended Scheduling Order attached to this Notice of Motion as Schedule "A";
3. in the alternative to the relief sought in paragraphs 1 and 2 above, an Order extending the deadline for the Respondent to serve documents relied upon and witness statements, and to serve and file expert reports, if any, to January 15, 2018;
4. if necessary, an order abridging the time required for service and filing of VAA's Motion Record herein; and
5. such further and other relief as the Tribunal deems just.

THE GROUNDS FOR THE MOTION ARE:

1. This proceeding was commenced by Notice of Application dated September 29, 2016.

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2. Pleadings were exchanged in the fall of 2016, in accordance with the timelines established by the *Competition Tribunal Rules*, SOR/2008-141.
3. A Scheduling Order was issued by the Tribunal on December 20, 2016. The Scheduling Order provided that the parties were to serve affidavits of documents and were also to deliver all documents being produced on or before February 17, 2017.
4. The Commissioner delivered his affidavit of documents on or about February 15, 2017. The Commissioner's affidavit listed approximately 11,700 documents. Of those 11,700 documents, the Commissioner initially agreed to produce fewer than 2000, virtually all of which were VAA's own documents (produced to the Commissioner pursuant to the Commissioner's investigative authority and, more specifically, pursuant to a section 11 order issued July 29, 2015), or were communications between the Bureau and VAA or communications on which VAA was copied.
5. The remaining documents – numbering almost 10,000 – were withheld from production based upon an assertion of privilege. Of those 10,000, approximately 9700 were withheld from production solely on the basis of public interest privilege.
6. Approximately five weeks later, on or about March 21, 2017, the Commissioner delivered an Amended Affidavit of Documents. The Amended Affidavit reflects the Commissioner's decision to waive privilege over approximately 8500 documents.
7. Virtually all of the 8500 documents produced by the Commissioner pursuant to that March waiver of privilege comprised:

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- (a) price lists, invoices and related documents (approximately 7700 documents);
- (b) flight schedules for various Canadian airports (approximately 150 documents); and
- (c) financial documents, including profit and loss statements and forecasts, of various in-flight caterers (approximately 600 documents).

8. The Commissioner continued to assert public interest privilege over approximately 1185 documents. Those 1185 withheld documents included every single relevant memorandum, interview note, presentation, affidavit, note, letter and virtually every relevant email in the Commissioner's possession, as set out in the following chart.

| Type of Document | Approximate Number Withheld on the Basis of Public Interest Privilege | Number Produced by the Commissioner |
|-------------------------|--|--|
| Affidavit | 13 | 0 |
| Email | 230 | 18 |
| Interview Notes | 50 | 0 |
| Letters | 35 | 0 |
| Memoranda | 45 | 0 |
| Notebooks | 70 | 0 |
| Presentation | 25 | 0 |

9. In other words, despite the fact that the Commissioner had in excess of 475 affidavits, emails, interview notes, letters, memos, notebooks and presentations, the Commissioner withheld virtually all such documents on the basis of public interest privilege.

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10. At approximately the same time as the foregoing waiver, VAA brought a motion, heard by Gascon J. on March 22, 2017, in which it challenged the Commissioner's continued assertion of public interest privilege over the remaining 1185 documents. That motion was dismissed by order of Gascon J. dated April 24, 2017, which order is under appeal.

11. On or about April 27, 2017, the Commissioner delivered a Supplemental Affidavit of Documents in which it purported to disclose additional relevant documents that were in the Commissioner's possession, power or control "for the period 1 January 2017 through 28 February 2017". That Supplemental Affidavit of Documents listed at Schedule B an additional 3900 confidential documents that the Commissioner was producing. Similar to the documents already produced, those documents comprised:

(a) price lists, invoices and related documents; and

(b) financial documents, including profit and loss statements and forecasts, of various in-flight caterers.

12. Further production made by the Commissioner was similarly limited to financial documents.

13. Notwithstanding that further production, the Commissioner continued to withhold approximately 1185 documents on the basis of public interest privilege, including, as noted above, every relevant affidavit, interview note, letter, memo, notebook and presentation and virtually every email.

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14. On or about April 13, 2017, the Commissioner produced a "Summary of Third Party Information". Thereafter, by Notice of Motion dated May 10, 2017, VAA brought a motion challenging the adequacy and accuracy of the Summary.

15. The Commissioner subsequently produced a re-ordered Summary. VAA's motion challenging the adequacy and accuracy of the re-ordered Summary was dismissed by Order of Mr. Justice Phelan, dated July 4, 2017.

16. VAA conducted its examination for discovery of the Commissioner's representative on August 23 and 24, 2017.

17. A subsequent motion brought by VAA to compel answers to certain questions refused on the Commissioner's examination for discovery was granted in part by Gascon J., by Reasons for Order and Order dated October 26, 2017.

18. Throughout the proceeding up to that point in time, the Commissioner continued to assert public interest privilege over the 1185 documents (and the information contained therein) referenced above.

19. On November 15, 2017, the Commissioner delivered his witness statements. They included statements provided by the following witnesses:

(a) Mark Brown, President and Chief Executive Officer of Strategic Aviation Holdings Ltd.;

(b) Jonathan Stent-Torriani, Co-Chief Executive Officer of Newrest Group Holding S.A.;

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- (c) Geoffrey Lineham, President and co-owner of Optimum Strategies Inc.;
- (d) Ken Colangelo, President and Managing Director of Gate Gourmet Canada Inc.;
- (e) Barbara Stewart, former Senior Director, Procurement, for Air Transat A.T. Inc.;
- (f) Rhonda Bishop, Director, Inflight Services and Onboard Product of Jazz Aviation LP;
- (g) Mark MacVittie, Director, Strategic Procurement, for Air Canada; and
- (h) Colin Murphy, Director of Inflight Cabin Experience for WestJet.

20. Certain exhibits were attached to the various witness statements. The total number of documents attached to the witness statements as exhibits was approximately 100.

21. Following receipt and initial review of the witness statements, VAA wrote to the Commissioner and noted that the Commissioner had failed to produce all relevant documents relating to the testimony contained in the various witness statements.

22. The Commissioner responded on November 20, 2017, stating that he “continues to assert public interest privilege over those records so designated in his Affidavits of Documents, and over which he has not already expressly waived such privilege”. The Commissioner went on to “invite” VAA to bring a motion to “pierce” the privilege, if it believed that it had “evidence of a compelling competing interest”.

23. VAA then asked the Commissioner to clarify whether he was taking the position that all relevant documents relating to the various witnesses’ testimony had already been produced, or

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whether he was taking the position that he was not obliged to produce all relevant documents relating to the various witnesses' testimony.

24. The next day, on November 21, 2017, the Commissioner advised that "upon further consideration of the particular circumstances of this case, and in the interest of expeditiously bringing this matter to trial in accordance with the Scheduling Order", the Commissioner was waiving privilege over "relevant documents relating to the testimony of the various witnesses". No indication was provided by the Commissioner at that time as to how many documents would be produced, or as to the nature of the documents to be produced, or as to their length.

25. Moreover, no indication was given by the Commissioner as to why the waiver had not been effected at an earlier date. The privilege should not be used in order to gain a tactical advantage in the litigation, as that would be fundamentally incompatible with the role of the Commissioner's counsel, which is not to seek a "victory" in the litigation, but rather to act in accordance with the public interest, working to achieve a fundamentally fair and properly informed proceeding before the Tribunal, so as to best ensure that justice is done.

26. Ultimately, well over 1000 relevant documents were produced on November 24, 2017, with the total number of pages produced running well into the tens of thousands.

27. In addition to being voluminous, the documents are highly probative and highly material to the matters in issue in the proceeding.

28. The documents produced include:

- 210 emails;
- 35 letters;
- 14 memoranda;
- 33 notebooks;
- 20 interview notes; and
- 9 presentations.

29. Included in the documents produced are notes of lengthy interviews conducted with many of the witnesses in respect of whom the Commissioner has delivered witness statements. Most of the notes are handwritten. Many are difficult to decipher and call out for explanation, including in respect of notations made therein that appear to be inconsistent with other parts of the notes or that appear to contradict assertions contained in the witness statements.

30. Pursuant to the *Competition Tribunal Rules* and having regard to subsection 9(2) of the *Competition Tribunal Act* and the fundamental principles of procedural fairness, VAA is entitled to conduct an examination for discovery in respect of these recently produced documents. A refusal of VAA's right to conduct such an examination for discovery, in circumstances such as the present case, where an exceptionally large volume of significant, probative and highly material documents were produced by the Commissioner at this very late stage, would seriously undermine VAA's ability to prepare its responding case, thereby prejudicing VAA and rendering the proceeding fundamentally unfair.

31. Moreover, the rules of procedural fairness and the interests of justice require that VAA be given a reasonable amount of time to review the documents and to prepare for and conduct such an examination for discovery. The refusal of such a reasonable period of time to review

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the documents and to prepare for and conduct an examination for discovery would frustrate VAA's attempt to exercise such a discovery right.

32. However, reviewing the documents, as well as preparing for and conducting an examination for discovery in respect of the recently produced documents cannot reasonably (or fairly) be completed within the time remaining before the trial is scheduled to begin on January 29, 2018, particularly in light of the other pre-trial steps that would also need to occur in that period.

33. Accordingly, the interests of justice as well as the duty of fairness and VAA's right to make full answer and defence require that the trial be adjourned and that the schedule for the remaining pre-hearing steps be adjusted in accordance with the proposed Further Amended Scheduling Order, attached as Schedule "A".

34. In the alternative, should the Tribunal decline to order that the Commissioner produce his representative to be examined for discovery, then fairness and the interests of justice require that the deadline for VAA to serve a list of documents relied upon and witness statements, and to serve and file expert reports be extended until January 15, 2018, in order to allow a reasonable time for VAA (including not only VAA's counsel, but also the involved client representatives and any experts that may have been retained by VAA) to review the documents and consider the manner in which the documents and their contents may affect VAA's case in chief as well as its broader trial strategy. Such an order is required in order to ensure that justice and fairness are not subordinated to expedition.

35. Rules 5, 60 and 64 of the *Competition Tribunal Rules*, SOR/2008-141, as amended.

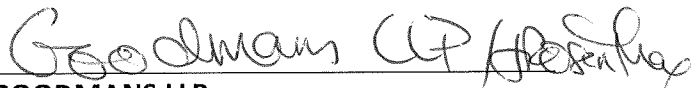
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36. Subsection 9(2) of the *Competition Tribunal Act*. R.S.C. 1985, c. 19, as amended.
37. Such further and other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) the affidavit of Monique Allen, sworn November 29, 2017;
- (b) the pleadings and proceedings herein; and
- (c) such further and other evidence as counsel may advise and the Tribunal may permit.

DATED at Toronto, Ontario this 29th day of November, 2017



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SCHEDULE "A" – PROPOSED FURTHER AMENDED SCHEDULING ORDER**THE TRIBUNAL ORDERS THAT:**

The schedule for the remaining pre-hearing steps shall be as follows:

- | | |
|------------------------|---|
| February 28, 2018 | Last day for examination for discovery of the Commissioner's representative in respect of the documents produced by the Commissioner on Friday, November 24, 2017 |
| March 28, 2018 | Deadline for the Commissioner to fulfill answers to undertakings |
| April 6, 2018 | Last day for VAA to file motion arising from answers to undertakings and refusals |
| [To be decided] | Hearing of any motion arising from answers to undertakings or refusals |
| May 31, 2018 | Last day for follow-up examinations for discovery |
| July 31, 2018 | Respondent to serve documents relied upon and witness statements, and to serve and file expert reports, if any |

[Remainder of dates to follow, depending upon trial date.]

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