



Date: November 24, 2017

Subject: CT-2016-015 - *Commissioner of Competition v Vancouver Airport Authority*

Direction to Counsel (from Mr. Justice Gascon, Chairperson)

Further to the Case Management Conference (“CMC”) held on November 23, 2017 to discuss the Commissioner of Competition’s alleged non-compliance with his disclosure obligations pursuant to the Scheduling and Confidentiality Orders in this matter, and considering the subsequent November 23, 2017 emails received from both parties regarding their availabilities for a further CMC as well as the Commissioner’s additional records to be produced to Vancouver Airport Authority (“VAA”), the Tribunal directs as follows:

1. The Tribunal confirms that, as of November 24, 2017, the Commissioner will have provided to VAA’s counsel a USB key containing 1,011 records that were in the Commissioner’s power or control as of August 31, 2017, over which the Commissioner had claimed public interest privilege and for which that privilege has now been waived by the Commissioner (“Tranche 1 Records”);
2. The Commissioner will, by 4:00 p.m. on November 29, 2017, provide the confidentiality designation (i.e., Confidential Level A or Confidential Level B) of the Tranche 1 Records;
3. The Tribunal confirms that, as of November 15, 2017, the Commissioner has 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 by the Commissioner (“Tranche 2 Records”). The confidentiality designation (i.e., Confidential Level A or Confidential Level B) of the Tranche 2 Records has already been provided by the Commissioner;
4. A CMC will take place on Thursday, November 30, 2017 at 3:00 p.m. (Ottawa time) to discuss potential amendments to the timetable for the steps remaining in the July 21, 2017 Scheduling Order, following the above-noted additional disclosures made by the Commissioner;
5. Each party shall provide to the Tribunal, by 4:00 p.m. on November 29, 2017, the amendments, if any, that they propose to make to the existing schedule for the disposition of the application, bearing in mind that the hearing is scheduled to commence on January 29, 2017, that the Tranche 1 Records will have been provided by the Commissioner nine (9) days after November 15, 2017, with the confidentiality designation of such records being specified five (5) days later, and that every effort shall be made to keep the current hearing dates.

The Tribunal further directs the Commissioner to inform the Tribunal, by 4:00 p.m. on November 29, 2017, on:

1. the total number of records that, as of November 24, 2017, will have been produced and/or attached to the Commissioner's witness statements served on VAA (including the Tranche 1 Records);
2. out of the total in item 1, the total number of records that were initially classified as records over which the Commissioner claimed public interest privilege prior to serving his witness statements and for which that privilege has now been waived;
3. the total number of records that, as of November 24, 2017, remain classified as records over which the Commissioner still claims public interest privilege and which have therefore not been produced to VAA.

The Tribunal makes the following additional observations:

1. Throughout this matter, the various Scheduling Orders issued by the Tribunal have reflected the agreement of the parties to a tight timetable for pre-hearing disclosure, reflective of the delays provided in the Competition Tribunal Rules, including in particular the service of the parties' respective documents relied upon and witness statements;
2. In its April 24, 2017 decision on public interest privilege (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 6 ("**VAA Privilege Decision**"), the Tribunal specified the following at paragraph 86: "[...] A third safeguard mechanism is the fact that, if a third party is to testify at the hearing and if the Commissioner is to rely on his or her evidence, a full witness statement and all relevant documents relating to the testimony are to be provided by the Commissioner to the respondent before the hearing (*Superior Propane* at para 8; *TREB* at para 7; *Direct Energy* at para 15). In other words, no claims of public interest privilege will be maintained on documents relied on by the Commissioner to support his case" [emphasis added];
3. Additionally, at paragraph 176 of the VAA Privilege Decision, the Tribunal further stated: "If the Commissioner intends to rely upon information before the Tribunal that is protected by public interest privilege and to have the Tribunal consider it, the privilege will need to be waived on such relevant information, and full witness statements will need to be provided for the witnesses testifying at the hearing. Before the hearing of the Commissioner's Application, VAA will have copies of all documents on which the Commissioner intends to rely" [emphasis added];
4. Furthermore, in its October 26, 2017 decision on refusals (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 ("**VAA Refusals Decision**"), the Tribunal further said at paragraph 86: "[...] the third safeguard mechanism will require the Commissioner to waive his public interest privilege on relevant documents and communications from witnesses providing will-say statements, if he wants to rely on that information. [...]" [emphasis added]. However, the Tribunal further clarified the point by adding, at paragraph 87 of the VAA Refusals Decision: "[...] I should not be taken to have determined that, in order to comply with his

obligations at the witness statements stage, the Commissioner could simply waive his privilege claims over those documents and communications he will actually *rely on* in his materials, as opposed to all documents and communications related to the witness(es) for whom the privilege is waived. This is a fact based matter that the Tribunal will address as needed. I would however mention that, depending on the circumstances, considerations of fairness could well require that the privilege be waived on all relevant information provided by a witness appearing on behalf of the Commissioner, both helpful and unhelpful to the Commissioner, even if some of the information has not been relied on by the Commissioner (*Direct Energy* at para 16). [...]” [emphasis added];

5. In light of these two decisions, the Tribunal considers that, when the Commissioner served his witness statements to VAA on November 15, 2017, he was required to provide *all relevant documents he intended to rely upon and to waive his public interest privilege on such documents*, if any, which he did. 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, even if some of this information had not been relied on by the Commissioner. It was up to VAA to raise this issue with the Commissioner and the Tribunal if VAA 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 request to the Tribunal for the November 23, 2017 CMC. The Tribunal adds that, in view of the comments it made at paragraph 87 of the VAA Refusals Decision, it could reasonably have been anticipated that such a request for *all relevant documents* would be forthcoming from VAA.
6. The Tribunal understands that, by providing the Tranche 1 Records, the Commissioner has now effectively waived his public interest privilege on all relevant information provided by witnesses appearing on his behalf, both helpful and unhelpful to the Commissioner, including information not relied on by the Commissioner. There is therefore no need for the Tribunal to determine whether, on the facts of this case, considerations of fairness would have required it to order that the privilege be waived on all relevant information provided by a witness appearing on behalf of the Commissioner.

Bianca Zamor
Registry Officer
Competition Tribunal
600-90 Sparks, Ottawa ON K1P 5B4
Tel.: 613-941-2440