

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

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT Date: October 12, 2017 CT-2016-015	
Andrée Bernier for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	# 132

MEMORANDUM OF FACT AND LAW OF THE COMMISSIONER OF COMPETITION

(Respondent's Motion to Compel Answers to Questions Refused on Discovery of Kevin Rushton, returnable October 13, 2017)

ATTORNEY GENERAL OF CANADA
DEPARTMENT OF JUSTICE CANADA
COMPETITION BUREAU LEGAL SERVICES
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau QC K1A 0C9
Fax: 819-953-9267

Jonathan Hood
Tel: 416-954-5925
jonathan.hood@canada.ca

Katherine Rydel
Tel: 819-994-4045
katherine.rydel@canada.ca

Ryan Caron
Tel: 819-953-3889
ryan.caron@canada.ca

Fasken Martineau
Bay Adelaide Centre
333 Bay Street, Suite 2400, PO Box 20
Toronto, ON M5H 2T6
Fax: 416-364-7813

Antonio Di Domenico
Tel: 416-868-3410
adidomenico@fasken.com

Counsel to the Commissioner of Competition

TO: GOODMANS LLP
Bay Adelaide Centre 333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Calvin S Goldman, QC
Michael Koch
Julie Rosenthal
Ryan Cookson

Tel: 416.979.2211
Fax: 416.979.1234

Counsel for Vancouver Airport Authority

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Part I: Overview

1. The Commissioner of Competition (the “**Commissioner**”) has fully complied with his discovery obligations and submits that Vancouver Airport Authority’s (“**VAA**”) motion should be denied.
2. VAA has brought a motion to compel the Commissioner to, in effect, issue code his productions and his Reordered Summary of Third Party Information (the “**Reordered Summary**”) for VAA. This relief sought is unreasonable, unsupported by jurisprudence and unprecedented in contested proceedings before the Competition Tribunal (“**Tribunal**”) and civil courts.
3. The Commissioner has disclosed to VAA all relevant documents and facts in his possession, power and control that are not privileged. The Commissioner’s representative was also examined for discovery by VAA for two full days. In bringing this motion, VAA is not seeking relevant facts – which it already has – but a complete written summary of the Commissioner’s interpretation, assessment and characterization of each of those facts.
4. Even if its request to issue code was appropriate, VAA’s request should be denied on the basis of proportionality. VAA’s request is disproportionately burdensome on the Commissioner and contrary to the expeditious conduct of this application as the circumstances and considerations of fairness permit.
5. Finally, VAA inappropriately seeks information that is protected by public interest privilege. VAA appears to misunderstand how public interest privilege, a class-based privilege, functions, or simply seeks to circumvent the privilege, along with the decision of Justice Gascon in his Reasons for Order and Order dated April 24, 2017, which is currently under appeal.

Part II: Summary of Facts

6. VAA moves to compel the Commissioner to answer 55 questions that either have been properly refused or sufficiently answered. These questions can be classified into the following categories:
 - a. questions seeking “all the facts that the Commissioner knows that relate to” an issue in dispute “including references to bullets in the Reordered Summary of Third Party Information... as well as references to specific records in the documentary production” including facts that may be provided through witness statements in the future (the “**Stock Advisements**”);
 - b. questions seeking third party information that is subject to public interest privilege; and
 - c. miscellaneous questions.
7. With respect to the Stock Advisements, the Commissioner has confirmed that he has provided VAA with all relevant facts related to each of the issues identified in the Stock Advisements. Accordingly, VAA, through its motion, in effect seeks an order compelling the Commissioner to organize by issue or topic (“**Issue Code**”) his productions and his Reordered Summary for VAA’s convenience.

A. The Commissioner is a unique litigant

8. The Commissioner heads the Competition Bureau, an independent law enforcement agency responsible for the administration and enforcement of the *Competition Act* (the “**Act**”).¹ The Commissioner, through the Competition Bureau, investigates potential contraventions of the Act, among other things. The Commissioner is not a traditional litigant insofar as neither he nor the Competition Bureau participates in the market at issue. The Commissioner is an investigator. He may bring a proceeding before the Tribunal when he believes that the evidence

¹ *Competition Act*, RSC, 1985, c C-34 [Act].

he has collected during his investigation supports a finding that the relevant section of the Act has been contravened.

9. Given the Commissioner's unique position as a non-market participant, he has no independent knowledge of facts regarding the market at issue. Rather, all of the facts or information in the Commissioner's possession, power or control arise from what he, through the Competition Bureau, has gathered from market participants, including the respondent in the application. This information is provided to the Commissioner voluntarily, or through formal powers such as pursuant to orders issued by the courts under section 11 of the Act.

B. The role of discovery in applications to the Tribunal

10. As the Tribunal stated in *Canada (Director of Investigation and Research) v Southam Inc.*, "[d]iscovery has two purposes: (1) the obtaining of admissions so that the issues between the parties can be narrowed; (2) the obtaining by one party of the information in the knowledge of the other party."² These purposes are true in civil litigation cases generally and specifically in competition litigation.
11. As provided for in the *Federal Court Rules*,³ a party may object to a question during discovery because: (1) the answer to the question is privileged; (2) the question is not relevant to the pleadings; (3) the question is unreasonable or unnecessary; or (4) it would be unduly onerous to require the person to make the inquiries.⁴

²*Canada (Director of Investigation and Research) v Southam Inc.*, (1991), 38 CPR (3d), at 3 (CT) [Southam], Book of Authorities ("BOA"), Tab 3.

³ *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*], BOA, Tab 9; and *Competition Tribunal Rules*, SOR/2008-141, s 34(1), BOA, Tab 10, which provides that "[i]f, in the continuance of proceedings, a question arises as to the practice or procedure to be followed in cases not provided for by the *Competition Tribunal Rules*, the practice and procedure set out in the *Federal Court Rules* may be followed."

⁴ *Federal Courts Rules*, *supra* note 3, Rule 242, BOA, Tab 9.

C. The Commissioner has disclosed all of the relevant facts to VAA

12. There are four procedures through which the Commissioner has provided disclosure to VAA.

a. Documentary productions

13. The Commissioner has produced to VAA all relevant, non-privileged documents in his possession, power or control. The Commissioner served VAA with his Affidavit of Documents, affirmed 14 February 2017, on 15 February 2017. He subsequently served VAA on 22 March 2017 with his Amended Affidavits of Documents affirmed on 21 March 2017. The Amended Affidavit of Documents did not list additional records, but waived privilege over 8,513 records in the 14 February 2017 Affidavit of Documents. The Commissioner served three Supplemental Affidavits of Documents on 28 April 2017, 12 July 2017 and 29 September 2017.⁵

14. In total, the Commissioner produced 14,398 records to VAA. Of these, 11,621 are in-flight catering pricing data records (invoices, pricing databases and price lists); 1,277 records were provided to the Commissioner by VAA and were simply re-produced by the Commissioner to VAA; and 342 records were email correspondence between VAA (or its counsel) and the Competition Bureau.⁶ Excluding these categories of records, the Commissioner has produced 1,158 records to VAA.⁷

b. Third party summary

15. Pursuant to longstanding jurisprudence, the Commissioner has provided, prior to the start of examinations for discovery, complete summaries of the privileged information,⁸ including not merely information which may support the relief he

⁵ Affidavit of Alicia Foster, affirmed October 5, 2017, at paragraphs 4 to 8 [Foster Affidavit].

⁶ *Ibid.*, at paragraphs 9 to 11.

⁷ *Ibid.*, at paragraph 12.

⁸ The Commissioner provided his Summary of Third Party Information, Confidential Level A and Confidential Level B on April 13, 2017; his Reordered Summary of Third Party Information, Confidential Level A and Confidential Level B on June 6, 2017; and his Supplemental Summary of Third Party Information, Confidential Level A and Confidential Level B, on September 29, 2017.

seeks but also information that may favour the respondent, which information is gathered during the investigation and protected by public interest privilege.⁹ What has been withheld in the Commissioner's third party summaries is information that would reveal the source of the provider – information that is protected by public interest privilege.

c. Examinations for discovery

16. VAA conducted its examination of the Commissioner's representative on August 23 and 24, 2017. As noted, as a non-market participant but an investigator, the Commissioner has no independent knowledge of the facts related to the matter at issue. Accordingly, he can only answer questions about information that he, through the Competition Bureau, has gathered during his investigation. For example, the Commissioner's representative at an examination for discovery cannot explain why a document prepared by a third party says what it says, nor can the representative describe the meaning of a document authored by a third party.¹⁰

d. Witness statements and expert reports

17. Finally, to the extent a third party is to testify at the hearing and if the Commissioner is to rely on that party's evidence,¹¹ a full witness statement and all relevant documents related to the testimony (to the extent they have not already been disclosed) will be served on VAA before the hearing, pursuant to the Tribunal's Scheduling Order.¹²

⁹ *Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 6, at paragraph 84 [*Commissioner v VAA*], BOA, Tab 6.

¹⁰ See for example Examination for Discovery of Kevin Rushton, August 23, 2017, Confidential Motion Record of the Respondent, at page 152, lines 23 to 25, and at page 153, lines 1 to 21 [August 23 Transcript].

¹¹ *Commissioner v VAA*, *supra* note 9, at para 86, BOA, Tab 6; *Commissioner of Competition v Toronto Real Estate Board*, 2012 Comp Trib 8, at para 7, BOA, Tab 5; and *Commissioner of Competition v Direct Energy Marketing Limited*, 2014 Comp Trib 17, at para 15, BOA, Tab 4.

¹² Scheduling Order (December 12, 2016), Order amending scheduling Order dated December 20, 2016 (February 13, 2017), Scheduling Order amending Scheduling Order dated December 20, 2016 (February 16, 2017), and Order amending the Scheduling Order (July 21, 2017) [collectively, the "Scheduling Order"].

18. The Commissioner has disclosed to VAA all relevant facts in his possession at the time he produced his documentary productions and Reordered Summary. *The Commissioner is not withholding any relevant facts that are not protected by privilege.*

Part III: Submissions

A. VAA's request that the Commissioner Issue Code his productions and Reordered Summary is improper

19. VAA asks the Commissioner to identify all documents related to certain topics specified by VAA, including in some instances documents produced by VAA itself.¹³ As outlined in the transcript arising from the examination for discovery of the Commissioner's representative, many of VAA's questions began with the phrase "(p)lease provide all facts that the Commissioner knows" regarding a particular issue (such as market definition), rather than a series of specific questions arising from a specific document(s), portion(s) of the third party summary, portion(s) of a pleading or a specific issue.¹⁴ For example, VAA asked only three clarification questions regarding the Reordered Summary. Of these questions, one was answered, and two were taken under advisement, with one answered following the examination. VAA is not challenging those responses.¹⁵
20. In response to these wide-ranging, catch-all questions, in an effort to be helpful, the Commissioner's representative provided as complete an answer as he could from memory, while also pointing out that further documents in the productions and portions of the Reordered Summary may also be relevant to the particular

¹³ See for example: Memorandum of Fact and Law of the Respondent, at pages 21 to 22 (Confidential Motion Record of the Respondent, at pages 610 to 611), where VAA characterises Request 21 as follows: "Provide all facts that the Commissioner knows that relate to the market definition that does not include catering as alleged in paragraph 11 of the Commissioner's Application, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions."

¹⁴ See for example August 23 Transcript, *supra* note 10, at pages 68 to 71.

¹⁵ VAA made two Requests in which it asked for clarification regarding the Reordered Summary: Request 26 (August 23 Transcript at page 95, lines 12 to 25 and page 96, lines 1 to 5) and Request 44 (August 23 Transcript at page 161, lines 10 to 19).

issue.¹⁶ His answers ought not to be surprising, as it is practically impossible for a witness to exhaustively answer VAA's wide-ranging, catch-all questions, particularly by memory. Further, there are numerous documents in a production set and portions of a Reordered Summary that may relate to issues in a proceeding, such as market definition. Each party's view on what documents and portions of the Reordered Summary are relevant to a particular issue may – and frequently do – differ.

21. Nonetheless, for each Stock Advisement, the Commissioner was asked to (1) identify all produced documents (and portions thereof) relevant to that issue, i.e. Issue Code each document; (2) identify every bullet in the Reordered Summary relevant to that issue, i.e., Issue Code each bullet; and (3) identify any additional information that has not been produced that is relevant to that issue.
22. The Commissioner has answered part (3) for each Stock Advisement. In doing so, the Commissioner has confirmed that he has provided VAA with all relevant non-privileged facts related to each of the issues referenced in the Stock Advisement. Accordingly, all relevant, non-privileged facts that the Commissioner knows regarding each of the issues referenced in the Stock Advisements have already been provided to VAA through the Commissioner's documentary production or through his Reordered Summary.
23. The Commissioner has properly refused to Issue Code his productions and Reordered Summary (parts (1) and (2) of the Stock Advisements). Importantly:
 - a. A request for a party to Issue Code productions and information produced in a contested proceeding for the adverse party is not only an improper discovery question but would, if ordered, be an unprecedented expansion of a party's discovery obligations in contested proceedings before the Tribunal and the

¹⁶ Counsel to the Commissioner indicated that the Commissioner would rely on facts in the evidence the Commissioner collected, but would allow the Commissioner's representative to answer the questions in order to be helpful. See for example: August 23 Transcript, *supra* note 10, at page 41, lines 8 to 21; at page 42, lines 1 to 5; at page 45, lines 6 to 25; at page 50, lines 10 to 25; and at page 51, lines 1 to 8.

civil courts. As discussed below, the jurisprudence upon which VAA relies does not support the relief it seeks.

- b. VAA could itself Issue Code the productions and Reordered Summary, as is customarily done by parties in contested litigation. There is nothing preventing VAA from doing so, particularly since VAA has presumably already analyzed these documents in preparation for the hearing and has access to an electronic index and electronic search functions.
 - c. Each party to a contested proceeding will have its own interpretation, assessment and characterization of facts relevant to a particular issue. For example, the relevance of particular documents and portions of the Reordered Summary to issues in this proceeding, such as market definition, will differ between the Commissioner and VAA. Accordingly, there is minimal utility to ordering the Commissioner to engage in such an exercise.
24. To expect a party to identify each document or part thereof that is related to a particular allegation is unreasonable. As noted by the Tribunal in *Southam* in the context of a request to identify any document or part thereof a party relied upon:

It is unreasonable to expect a party to identify every document or part thereof which might be relied upon to support an allegation such as those under consideration here. The allegations by their nature are of a type that a great many documents might relate thereto, some of minimum probative value.¹⁷

25. Further, the Tribunal reached a similar conclusion in *Canada (Director of Investigation & Research) v NutraSweet Co.*:

With respect to the various questions which ask the Director to identify the particular document, or part thereof, upon which he relies for certain allegations of fact ... these do not need to be answered. The requirement of a witness to specifically identify where, in documents, certain facts are to be found, was discussed by Mr. Justice Mahoney in *Foseco International Ltd. v. Blman Canada* (1980). 53 C.P.R. (2d) 186, at. P. 188:

¹⁷ *Southam*, *supra* note 2, at 18, BOA, Tab 3.

... I accept that the documentation produced may be so voluminous or otherwise so complex that an opposing party is entitled to have the sort of identification or definition asked for. The party seeking an order to that effect must establish the complexity and the Court is entitled to take into account of that party's own probable capability of coping with what, to a layman, seems complex.

See also *Loewen, Ondaatje, McCutcheon & Co. Ltd. V. Snelling*, (1985), 2 C.P.C. (2d) (Ont. Sup. Ct.) and *Leliever v. Lindson*, (1977), 3 C.P.C. 245 (Ont. Sup Ct.).¹⁸

26. In any event, and as noted, the productions in this case when VAA's own productions and caterer pricing records are removed, constitute 1,158 documents. It is not voluminous, having particular regard to VAA's access to an electronic index and electronic data search functions.
27. VAA's reliance on *Rule-Bilt Ltd. v Shenkman Corporation et al*,¹⁹ does not support its request to Issue Code the documents. The issue before Master Sandler was whether the plaintiff was obliged to identify the specific productions on which it relied in support of an allegation in the pleadings, and whether it was obliged to select them out for identification.²⁰
28. This question can be distinguished from VAA's Stock Advisements, which ask for all the facts that the Commissioner knows related to a given allegation in the pleadings. Accordingly, *Rule-Bilt* does not stand for the proposition that a party must identify which documents contained in its productions are related to particular allegations or issues in the litigation. VAA itself knows this distinction as it refused during the examination for discovery of the VAA's representative to answer questions regarding facts or information upon which VAA relied regarding a particular allegation.²¹

¹⁸ *Canada (Director of Investigation & Research) v NutraSweet Co.*, 1989 CarswellNat 1074, at paragraph 29 [*NutraSweet*], BOA, Tab 1.

¹⁹ *Rule-Bilt Ltd. v Shenkman Corporation et al*, 1977 CarswellOnt 274 [*Rule-Bilt*], BOA, Tab 7.

²⁰ *Ibid.*, at para. 24, BOA, Tab 7.

²¹ For example, the following exchanges between counsel for the Commissioner and VAA took place at the examinations for discovery of VAA's representative, Mr. Craig Richmond:

B. VAA's request to Issue Code would impose a disproportionate burden on the Commissioner

29. In the alternative, even if the request to Issue Code were appropriate, it is submitted that the Tribunal should not order the Commissioner to answer the Stock Advisements because of the principle of proportionality. In particular, there is minimal utility arising from an order causing the Commissioner to Issue Code all of his productions and the Reordered Summary when balanced with the burden that would be imposed on the Commissioner.

30. When examining the propriety of the request to Issue Code, the Tribunal must weigh the probability of the usefulness of this exercise with the time, trouble, expense and difficulty involved in obtaining it. When the proportionality test factors are considered,²² it is clear that they favour the Commissioner. VAA's request should be denied because:

- a. VAA has not made a targeted request but rather asks the Commissioner to Issue Code for virtually all of the issues relevant to this application;
- b. the request will not lead to the discovery of critical information because it has already been produced by the Commissioner;

[REDACTED]

[REDACTED]

- c. VAA could conduct this analysis itself, and presumably has done so (or should do so) to prepare for the hearing;
 - d. this exercise will not benefit the Tribunal which will decide itself what documents are relevant and to what issue; and
 - e. given the timelines established by the schedule, it would be unduly burdensome and onerous for the Commissioner to conduct this exercise.²³
31. In an effort to be helpful, the Commissioner's representative provided responses to the Stock Advisements during his examination. However, given the breadth of the questions, it is not reasonable for the responses to such broad questions to be exhaustive.²⁴

C. The production of the content of witness statements is premature

32. Through its requests, VAA is seeking to obtain, in advance of the timeline set out in the Scheduling Order, what will be the contents of the Commissioner's witness statements if the Commissioner is to rely on that third party's evidence. For example, Request 117, states:

With respect to each party that the Commissioner calls as a witness and thus submits a witness statement for, to provide references to each of the bullet points in Exhibits 3 and 4 that related to information obtained from each of those witnesses. For example, if the Commissioner files a witness statement from [REDACTED] to provide references to each of the bullet points in Exhibits 3 and 4 that related to information obtained from [REDACTED]

Exhibit 3 is the Reordered Summary of Third Party Information, Confidential-Level A. Exhibit 4 is the Reordered Summary of Third Party Information, Confidential-Level B.²⁵

33. Pursuant to the Scheduling Order, any third party witness statements on which the Commissioner may rely at the hearing are scheduled to be served on November

²³ *Ibid*, BOA, Tab 8.

²⁴ See for example Continued Examination for Discovery of Kevin Rushton, August 24, 2017, at pages 392 to 400 (Confidential Motion Record of the Respondent at pages 152 to 154), where the Commissioner's representative is providing extensive information that is responsive to VAA's Request 86.

²⁵ Memorandum of Fact and Law of the Respondent, at page 66 (Confidential Motion Record of the Respondent, at page 655).

15, 2017. Production of a third party witness statement in advance is premature and improper.

D. VAA inappropriately seeks information that is protected by public interest privilege

34. In a number of requests made by VAA, such as Request 32,²⁶ where the Commissioner refused the request on the basis that the information requested is protected by public interest privilege, VAA asserts that the Commissioner has provided no basis to support the class-based nature of public interest privilege. The Commissioner submits that the class-based nature of public interest privilege is clear in the jurisprudence, as recently confirmed in *Commissioner of Competition v Vancouver Airport Authority*.²⁷
35. In addition, at page 40 of its Memorandum of Fact and Law, VAA states that “compelling circumstances outweigh the public interest element of the privilege”,²⁸ without providing further explanations or evidence. The Commissioner submits that VAA has not met the threshold set out in the case law for compelling circumstances such that the class-based nature of public interest privilege should be overridden.

E. Specific questions

36. In the alternative, in the event that the Commissioner is ordered to answer the Stock Advisements, the Commissioner submits that there are additional reasons why specific requests are improper.

a. Requests 72 and 73

37. Requests 72 and 73 ask:

²⁶ Memorandum of Fact and Law of the Respondent, at page 64 (Confidential Motion Record of the Respondent, at page 653).

²⁷ *Commissioner v VAA*, *supra* note 9, BOA, Tab 6.

²⁸ Memorandum of Fact and Law of the Respondent, at page 40 (Confidential Motion Record of the Respondent, at page 629).

Provide all facts that the Commissioner knows that relate to what transpired at any meeting between Newrest or Strategic Aviation and Vancouver Airport Authority, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.²⁹

38. In these requests the Commissioner is being asked what occurred during meetings between VAA and new entrants. The Commissioner has indicated that he has produced all the facts in his possession, subject to privilege. Moreover, VAA states: "VAA itself was at the meetings at issue and knows what transpired."³⁰ VAA therefore admits it has the facts. What VAA is seeking is how the Commissioner, new entrants, or both, may interpret or characterize those facts. Such a question is improper and the Commissioner submits that he should not be compelled to answer it.

b. Requests that ask for economic opinions, such as 22, 56 and 104

39. VAA is seeking to compel the Commissioner to answer requests that ask for economic opinions or arguments.

40. VAA characterizes Request 22 as follows:

Provide all facts that the Commissioner knows that relate to geographic market definition, being characterized solely as Vancouver International Airport, as alleged in paragraph 11 of the Application, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.

41. VAA characterizes Request 56 as follows:

Provide all facts that the Commissioner knows that relate to the Commissioner's allegation that Vancouver Airport Authority has considerable latitude to determine or influence price and non-price dimensions of competition in the market for the supply of galley handling at Vancouver International Airport, as alleged at paragraph 35 in the Application, including

²⁹ Memorandum of Fact and Law of the Respondent, at page 39 (Confidential Motion Record of the Respondent, at page 628).

³⁰ Memorandum of Fact and Law of the Respondent, at page 41 (Confidential Motion Record of the Respondent, at page 630).

without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.

42. VAA characterizes Request 104 as follows:

Provide all facts that the Commissioner knows that relate to scale and scope economies in catering, scale and scope economies in galley handling and scale and scope economies that could cross over from catering to galley handling, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.³¹

43. The Tribunal jurisprudence is clear that the examining party is not entitled to conclusions or economic opinions. For example, in *Southam*, the Tribunal held that questions seeking opinions or requiring conclusions do not need to be answered.³² Further, in *NutraSweet*, the Commissioner was not required to provide definitions of economic terms because the questions related to the Commissioner's position:

[b]oth questions (i.e. that with respect to acquisition cost and that with respect to long run average cost) relate to the position which the Director proposes to take as opposed to the facts upon which that position is based. On discovery it is facts which have to be disclosed, not the conclusion, which either party intends to argue, should be drawn from those facts.³³

44. The Commissioner has already produced all relevant facts in his documentary productions and the Reordered Summary. VAA is asking for the Commissioner's assessment, characterization and interpretation of these facts (i.e. economic opinions or conclusions regarding geographic market in Request 22, VAA's latitude to determine or influence price and non-price dimensions of competition in Request 56, and scale and scope economies in Request 104). In essence, VAA is seeking the Commissioner's litigation strategy. Importantly, this analysis could be the subject of expert evidence. For these reasons, the Commissioner submits that this question is improper and he should not be compelled to answer it.

³¹ Memorandum of Fact and Law of the Respondent, at pages 57-58 (Confidential Motion Record of the Respondent at pages 646 to 647).

³² *Southam*, *supra* note 2, at 6, BOA, Tab 3.

³³ *Canada (Director of Investigation & Research) v NutraSweet Co*, [1989] CCTD No 55, BOA, Tab 2.

45. For these reasons, the Commissioner submits that these requests, and other requests in which VAA is in essence seeking the economic analysis that requires the Commissioner's assessment, characterization and interpretation of facts, are improper and he should not be compelled to answer them.³⁴

c. Request 60

46. VAA characterizes Request 60 as follows:

Provide all facts that the Commissioner knows that relate to prices that airlines pay for in-flight catering to various competitors at airports across Canada, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.

47. The Commissioner has produced 11,621 in-flight caterer pricing data records that contain information relating to the prices in-flight catering firms invoice for services they provide at airports in Canada. The Commissioner has, therefore, already answered this request.

d. Requests 129 and 130

48. Request 129 asks:

For each entry throughout Exhibits 3 and 4 to the examination of Mr. Rushton that references a [REDACTED] that provides [REDACTED] identify:

(a) all other references to [REDACTED] throughout the summaries
[REDACTED]

³⁴ VAA asks a number of additional questions that require economic analysis and could be the subject of expert evidence, including all facts related to: market definition (Request 21); whether Vancouver International Airport competes with other airports to attract airlines or flights (Request 48); how land rents charged to in-flight catering firms by VAA compare to rents charged by other North American airports (Request 53); whether the concession fees charged by VAA are constrained by VAA's competition with other airports (Request 66); how the businesses of Gate Gourmet and CLS at the Vancouver International Airport are profitable (Request 71); how VAA's market power in relation to galley handling is affected or would change as a result of VAA's tying of airside access to leasing land at the Vancouver International Airport (Request 81); the impact at Vancouver International Airport of a reduction from two caterers to one (Request 100); competition between Gate Gourmet and CLS for galley handling and catering services at Vancouver International Airport (Request 105); and how prices for catering and galley handling at Vancouver International Airport compare to prices at airports where new entry is not limited (Request 106).

[REDACTED]

Furthermore, answers should draw on all facts known by the Commissioner, not just those contained within the summaries.

49. The Commissioner already provided the facts in his possession, power and control that answer the above sub-questions, only he has not linked them to each bullet in the Reordered Summary that references an in-flight catering firm because, as explained below, to do so would violate his assertion of public interest privilege. In addition, some of the information requested, short of linking it to each bullet in the Reordered Summary, is already available to VAA. For example:

- For Request [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- For Request [REDACTED]
[REDACTED]
[REDACTED]
- For Request [REDACTED]
[REDACTED]
- For Request [REDACTED]
[REDACTED]
[REDACTED]
- For Request [REDACTED]
[REDACTED]
[REDACTED]

- For Request [REDACTED]
[REDACTED]
[REDACTED]

50. Request 130 asks:

For each entry throughout Exhibits 3 and 4 to the examination of Mr. Rushton that references an [REDACTED] identify:

1. all other references to [REDACTED] throughout the summaries

[REDACTED]

Furthermore, answers should draw on all facts known by the Commissioner, not just those contained within the summaries

51. The Commissioner already provided the facts in his possession, power and control that answer the above sub-questions, only he has not linked them to each bullet in the Reordered Summary that references airlines based in Canada because, as described below, to do so would require disclosure of information protected by public interest privilege. In addition, much of the information requested, short of linking it to each bullet in the Reordered Summary, is available to VAA. For example:

- For Requests [REDACTED] and [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- For Request [REDACTED]
[REDACTED]
[REDACTED]
- For Request [REDACTED]
[REDACTED]
- For Request [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

52. VAA already has all the facts in the possession, power and control of the Commissioner for Requests 129 and 130, subject to privilege, as well as access to the information that is publicly available that responds to those requests. The Commissioner submits that the relevance and probative value of how that information relates to each bullet in the Reordered Summary is minimal. The Commissioner further submits that the exercise of linking the information to each bullet in the Reordered Summary can only serve to identify the [REDACTED] or [REDACTED] thus undermining the public interest privilege asserted by the Commissioner.

53. Should the Commissioner answer the questions posed with respect to each applicable bullet in the summary (i.e. every bullet referencing a [REDACTED] that provides [REDACTED] or every bullet referencing an [REDACTED] privileged information will be disclosed. It is apparent that providing such a high level of detail about each [REDACTED] or each [REDACTED] that provides [REDACTED] would result in the third parties being easily identified. In addition, the market structure is such that providing such information would further facilitate the identification of each third party. As the Commissioner stated in his explanation of his refusal:

[REDACTED]

■ [REDACTED]

■ [REDACTED]

[REDACTED]

[REDACTED]

■ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

54. Thus, the Commissioner submits that these questions are improper and the Commissioner should not be compelled to answer them.

d. Request 110

55. Request 110 asks:

Provide a list of the customary requirements in each category – health, safety, security, and performance – that the Commissioner is asking the Tribunal to impose as part of its order.

56. The Commissioner has provided in his Reordered Summary and documentary productions all the facts in his possession (subject to applicable privilege) that relate to health, safety, security and performance requirements. What makes any of these requirements “customary” will be determined through witnesses at the hearing and may be potentially subject to a separate remedy hearing. Witness

³⁵ Memorandum of Fact and Law of the Respondent, at pages 74 to 76 (Confidential Motion Record of the Respondent, at pages 663-665).

statements will be provided in accordance with the Scheduling Order and *Competition Tribunal Rules*. It is thus premature for the Commissioner to characterize certain requirements as customary.

Part IV: Order Sought

57. The Commissioner respectfully requests that this motion be dismissed in its entirety with his costs of the motion.

Supplementary

58. The Commissioner may raise an additional issue with the Tribunal regarding VAA's supplementary productions. The Commissioner served his Supplemental Affidavit of Documents No. 3 and Supplemental Summary of Third Party Information, Confidential Level A and Confidential Level B, on September 29, 2017. VAA On August 31, 2017, VAA committed to serve its supplemental productions by October 6, 2017. On October 6, 2017, VAA advised the Commissioner that its supplemental productions would not be delivered on that date, as VAA required an additional week to prepare its productions. In an email dated October 6, 2017, counsel to the Commissioner indicated that given the timelines contemplated by the schedule, including the follow up examination of VAA scheduled for November 1, 2017 and the Commissioner's requirement to file his case in chief on November 15, 2017, if the Commissioner has not received productions by October 12, 2017, he will move for relief before the Competition Tribunal during the refusals motion scheduled for October 13, 2017. In addition, the Commissioner reserved his right to seek at that time, depending on the scope of production, an adjustment to the scheduling order that does not compromise dates set for the hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10TH DAY OF OCTOBER,
2017.



ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Fax: 819.953.9267

Jonathan Hood
Tel: 416.954.5925
jonathan.hood@canada.ca

Katherine Rydel
Tel: 819.994.4045
katherine.rydel@canada.ca

Ryan Caron
Tel: 819.953.3889
ryan.caron@canada.ca

Fasken Martineau
Bay Adelaide Centre
333 Bay Street, Suite 2400, PO Box 20
Toronto, ON, M5H 2T6
Fax: 416-364-7813

Antonio Di Domenico
Tel: 416-868-3410
adidomenico@fasken.com

Counsel to the Commissioner of Competition

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

**MEMORANDUM OF FACT LAW OF THE
COMMISSIONER OF COMPETITION**

DEPARTMENT OF JUSTICE CANADA
COMPETITION BUREAU LEGAL SERVICES
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau QC K1A 0C9

Jonathan Hood
Tel: 416-954-5925
jonathan.hood@canada.ca

Katherine Rydel
Tel: 819-994-4045
katherine.rydel@canada.ca

Ryan Caron
Tel: 819-953-3889
ryan.caron@canada.ca

Fasken Martineau
Bay Adelaide Centre
333 Bay Street, Suite 2400, PO Box 20
Toronto, ON M5H 2T6
Fax: 416-364-7813

Antonio Di Domenico
Tel: 416-868-3410
adidomenico@fasken.com

Counsel to the Commissioner of Competition