Competition Tribunal Tribunal de la Concurrence

Reference: *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 8
File No.: CT-2016-015
Registry Document No.: 110

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 motion by Vancouver Airport Authority challenging adequacy and accuracy of Summaries.

BETWEEN:

The Commissioner of Competition
(applicant)

and

Vancouver Airport Authority
(respondent)

Date of hearing: June 26, 2017
Before Judicial Member: M. Phelan J.
Date of Reasons for Order and Order: July 4, 2017

REASONS FOR ORDER AND ORDER DISMISSING A MOTION CHALLENGING ADEQUACY AND ACCURACY OF SUMMARIES

I. INTRODUCTION

[1] This is a motion to compel the production of complete, adequate, and accurate Summaries of the documents over which the Commissioner of Competition [Commissioner] has asserted public interest privilege. The issue has been further narrowed, as discussed below.

II. BACKGROUND

[2] The Commissioner produced to the Respondent, Vancouver Airport Authority [VAA], summaries of the facts [Summaries] obtained by him in his investigation leading up to these proceedings under s 79 of the *Competition Act*, RSC 1985, c C-34 (abuse of dominance). The Commissioner has claimed public interest privilege over the actual contents of the investigation, contained in interview notes, affidavits, e-mails, letters, memoranda, notebooks, and presentations.

[3] The VAA challenged the Commissioner's claim of public interest privilege. This resulted in the decision of the Chair, Justice Gascon, dated April 24, 2017, upholding the Commissioner's claim of privilege over approximately 1,200 documents. That decision is under appeal.

The April 24 decision contained detailed considerations of the issues of the right to a fair hearing and procedural fairness.

[4] The first version of the Summaries was produced on April 13, 2017. VAA was unhappy with the level of detail in the Summaries and made moves to challenge the adequacy and accuracy of the Summaries.

[5] In the April 24 decision, Justice Gascon contemplated that such a motion would usually be brought following discovery of the Commissioner's representative:

> 176 … If, after reviewing the summaries and obtaining discovery from the Commissioner, VAA believes that the summaries are deficient or improperly shield relevant information, VAA will have the option of applying to the Tribunal to request a review of the summaries by a judicial member not sitting on the merits of the case, to determine the adequacy and sufficiency of the summaries. …

[6] As to whether a motion could be brought prior to discovery, Justice Gascon, in the context of a case management conference, held that:

> The principles of procedural fairness direct the Tribunal to allow a respondent to present such a motion before discoveries where the respondent claims, as is the case here, that the alleged inadequacy and/or accuracy of the Summaries affects its rights to know the case against it and to have a meaningful opportunity to prepare its case.

[7] Following this case management conference ruling, VAA brought this motion. In the lead-up to the initial hearing date, the Commissioner delivered revised Summaries largely addressing the alleged deficiencies identified by VAA, but the Commissioner refused to provide identifiers for sources due to the professed concern that such identification would compromise

privileged information. An adjournment of the initial hearing date was granted to allow VAA the opportunity to review the revised Summaries.

[8] Despite the significant compromises made by the Commissioner, VAA chose to proceed with this motion prior to discovery.

[9] VAA's complaint is that the Summaries do not sufficiently identify sources so as to allow it to marry the statements made to a particular source. For example, it complains that by using the phrase "an airline based in Canada stated…" in the Summaries, VAA cannot determine whether statements are made by the same carrier when the phrase is used again in respect of different statements. VAA goes so far as to say that where two statements are diametrically opposed, it cannot discern if it is the same carrier saying contradictory things or whether it is different carriers making those statements.

[10] From examples of this type, VAA goes on to say that it is unable to conduct a proper discovery and is otherwise denied fairness in this litigation process.

[11] VAA does not concede that if it is given better particulars with respect to the sources, this will satisfy its concern regarding the Summaries or that this will render the Summaries adequate. VAA does not admit to the accuracy of the Summaries, but it is not challenging accuracy at this time.

[12] Prior to the rescheduled hearing, the Commissioner filed a supplemental record on the eve of the hearing to which VAA objected. Once it became clear that the evidence was submitted to show the compromises that the Commissioner had made in its disclosure, VAA's objection dissipated somewhat.

I ruled that the supplementary record was admitted for the limited purpose of showing what had occurred between the parties.

III. DETERMINATION

[13] A review of the revised Summaries shows that the disclosure of the facts gathered by the Commissioner contained information that was both helpful and unhelpful to the Commissioner. The facts cover, and are categorized by, all of the relevant topics. The period of time covered by the disclosure is the beginning of the investigation to the present. In addition, the information comes from every type of market participant and is identified by the type of participant.

[14] In considering this motion, it is worthwhile to begin with some first principles. The information at issue is privileged under public interest privilege, a class privilege, and it is information which would otherwise not be disclosed.

[15] The Tribunal and the Courts have developed a disclosure regime designed to balance public interest privilege with fairness. In *Canada (Commissioner of Competition) v United Grain Growers Ltd*, 2002 Comp Trib 35 at para 90, 21 CPR (4th) 140 [*UGG*], relied on by VAA, Justice Lemieux captured the rights that VAA has: to disclosure of "an aggregated summary of the main relevant facts gathered during the Commissioner's investigation". Justice Lemieux went

on to discuss the discovery process and the limited role public interest privilege should play, but emphasized the importance of not revealing the sources of information.

[16] Justice Lemieux's comments are consistent with a decision of Justice McKeown in *Canada (Competition Act, Director of Investigation and Research) v Canadian Pacific Ltd*, 78 CPR (3d) 421, [1997] CCTD No 42 (QL) [*CP* cited to CCTD]. That case is a close parallel to the present case, and it is persuasive if not binding. I can do no better than to repeat the critical paragraphs:

> 8 Finally, CP asserts that there are a number of failures to properly attribute the sources of statements and information in the document summary. CP submits that it is entitled to know from which (properly defined) categories of informants the statements in the document summary are derived.
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> 9 In my view, CP's request is not proper. The Tribunal has long recognized that there is a public interest in protecting the sources of information provided to the Director in the course of his inquiries. A practice has developed in Tribunal proceedings where the Director provides to the respondents summaries of the facts he has obtained. However, in order to protect the identity of sources, the Director has not been required to provide this information otherwise than in an aggregated form, as was made clear by Reed J. in Southam, the first case where summaries were provided by the Director:
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> > It should be noted that the earlier order did not require summaries on an interview-by-interview basis; aggregated information was said to suffice.
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> 10 This is precisely what the Director has done in this case. However, to enhance the usefulness of the summaries, the Director has chosen to provide a list of the categories of interviewees from whom he has obtained this information. In my view, to require the Director to further break down his categories in the manner suggested by CP would very likely reveal or significantly narrow the possible sources of the information. This is clearly contrary to the intention of providing aggregated summaries of facts. Similarly, to require the Director to reveal the number of interviews he has conducted under each category of interviewee would potentially have the effect of revealing, or significantly compromising the secrecy of, the identities of those interviewees.
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> 11 The purpose of the summaries is to disclose to the respondents the facts known to the Director. This information is apparent from the Director's summaries, even if the categories of sources are not as discrete or homogeneous as CP would like or if it is not perfectly clear that a given statement is derived from a certain category of interviewee. At this stage, CP need not know whose views are reflected in the summaries with any greater degree of certainty than has already been provided by the Director. This is consistent with the Tribunal's decision in Nielsen where it was held:

> While it might be useful for the respondent to know what every individual that the Director spoke to had to say, because it would probably reduce the length of case preparation, whether or not such information is made available is primarily a matter of convenience; the nature of the issues are not such that a case depends on the views of a few industry participants. Should this ever be so, the respondent would undoubtedly know who the participants in question were.
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> 12 CP is entitled to know that the Director has been provided with an opinion or view on a relevant subject. With this opinion or view in hand, CP is able to prepare its case by determining whether there is an opposing view or opinion. In my view, it is not necessary at this time that CP be able to assess the weight or importance of the views or opinions included in the Director's summaries. If at the hearing of the application the Director chooses to rely on a view or opinion contained in the summary, he will have waived his privilege over the information and the source of the statement will have been revealed to the respondents in a timely fashion.

[17] This decision indicates that VAA is entitled only to aggregated information – VAA claims much more than that and in fact seeks very segmented information. It is not necessary at this stage to disclose whose views are reflected in the Summaries with any greater degree of certainty than has already been disclosed. Further, it is not important at this stage to assess the weight or importance of the views or opinions included in the Summaries – despite VAA's claim that it needs to do so prior to discovery. In essence, *CP* holds that the identity of the source is not relevant at this stage.

[18] VAA has provided no evidence that it needs the increased source identity information that it claims. The burden to make out this point rests with it and it has not satisfied that burden. At best, VAA has argued that it cannot conduct a proper discovery. With great respect, I am not persuaded by its argument that it is in such a position. None of the examples provided show that VAA cannot conduct a proper discovery. Moreover, VAA has not established that information on the identities of the sources is relevant at this stage of the proceedings.

[19] VAA argues that it cannot conduct discovery based on the Summaries alone. However, discovery is based not only on the Summaries but also on other productions and disclosures as well as VAA's own knowledge. There is no evidence that VAA cannot conduct a proper discovery with all of this information.

[20] VAA has argued that the non-disclosure of better source identification breaches procedural fairness. It argued that there is some heightened fairness element at play, involving the assertion of public interest privilege.

[21] The issue of the level of procedural fairness owed to VAA was specifically addressed by Justice Gascon in the April 24 decision (see, in particular, paras 171 and 173). It is the normal level of procedural fairness applicable to the circumstances.

[22] There is no evidence showing that there has been any breach of procedural fairness. I am not persuaded by VAA's argument that any such breach has been established at this stage.

[23] As the Commissioner pointed out, a respondent is not entitled to a source's identity – particularly at this stage of the proceedings. The identity may be disclosed before trial if the Commissioner relies on the source for evidence.

[24] At this stage of the proceedings, there is a public interest in not identifying sources of information or giving such information from which sources may be identified. In the current circumstances, no one suggests that VAA does not have a good base of knowledge as to which caterers are in the airport market or which Canadian based carriers (or carrier groups) may have catering requirements at Vancouver International Airport. Each of these market segments is small and the players appear to be well-known.

IV. CONCLUSION

[25] VAA has not made out a case for further and better disclosure of source identification, even in a limited form or under limited access.

[26] The Commissioner has met its obligations (and arguably more) in its disclosure. There is no breach of fairness in the form and content of the Summaries at this time.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

[27] Therefore, this motion is dismissed with costs.

DATED at Ottawa, this 4th day of July 2017.

SIGNED on behalf of the Tribunal by the Judicial Member.

(s) Michael Phelan

COUNSEL:

For the applicant:

The Commissioner of Competition

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For the respondent:

Vancouver Airport Authority

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