PUBLIC VERSION
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:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE **FILED / PRODUIT** Date: June 21, 2017 CT-2016-015 Andrée Bernier for / pour REGISTRAR / REGISTRAIRE	**COMMISSIONER OF COMPETITION** **Applicant** **—and—** **VANCOUVER AIRPORT AUTHORITY** **Respondent**
OTTAWA, ONT. # 104	

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT (MOVING PARTY), VANCOUVER AIRPORT AUTHORITY
(Motion Challenging Adequacy and Accuracy of Reordered Summaries)

June 21, 2017

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PART I – STATEMENT OF FACTS

A. Overview

1. This motion is brought pursuant to Gascon J.'s Directions to Counsel issued on May 8, 2017 and June 8, 2017, respectively.

2. The respondent, Vancouver Airport Authority ("VAA"), brings this motion challenging the adequacy and accuracy of the Reordered Summaries of Third Party Information that have been provided herein by the Commissioner of Competition. The delivery of those summaries was necessitated by the fact that the Commissioner has maintained a claim of public interest privilege over approximately 1200 documents, among which are every single relevant memorandum, interview note, presentation, affidavit, note, letter and virtually every relevant email in the Commissioner's possession or control.

3. This Tribunal has held that the provision of adequate and accurate summaries is a critical "safety valve" and "safeguard", necessary to ensure the fairness of proceedings before the Tribunal. Indeed, the provision of such adequate and accurate summaries is a key, integral element of the Tribunal's treatment of the Commissioner's public interest privilege.

4. In order to fulfill their intended purpose, the summaries must ensure that the respondent has disclosure of all of the facts that are known to the Commissioner, are sufficient to assist the respondent's counsel in the preparation of a defence, and allow for effective pre-trial preparation, including the conduct of a meaningful examination for discovery of the

Commissioner's representative, thereby ensuring that the trial will be conducted fairly and efficiently.

5. In this case, as might be expected given the quantity of documents and information being withheld, the summaries are voluminous, running in excess of 200 pages and containing thousands of pieces of information.

6. However, although the summaries are divided into a number of thematic "chapters", the pieces of information contained therein are provided in manner so as to render them essentially meaningless. For example, any given chapter will have multiple pieces of information on a given topic, much of it contradictory or inconsistent, and all of it coming from an identically described source. Thus, multiple pieces of inconsistent or contradictory information are provided on the same topic, with each described as having been provided by [redacted] Other pieces of information on a different topic, again inconsistent or contradictory, with each described as having been provided by [redacted] No indication is given as to whether any of the pieces of information were provided by the same source and, if so, which pieces of information were provided by one source and which by another.

7. The result is a set of summaries that cannot play the crucial safeguard role for which they are intended. As established by the jurisprudence of this Tribunal, summaries (as well as the right to bring a motion to challenge the adequacy and accuracy of the summaries) are intended to address the legitimate concerns regarding the impact that the Commissioner's very broad public interest privilege has on the search for truth and the right to a fair hearing,

including the right to prepare for and conduct a meaningful and effective examination for discovery of the Commissioner's representative.

8. In the present case, the reordered summaries delivered by the Commissioner are, on their face, so wholly unintelligible that they cannot fulfill their intended purpose and therefore fail to meet the standard established by the jurisprudence.

B. The Within Proceedings

9. The Commissioner began this proceeding by Notice of Application, dated September 29, 2016, seeking relief against VAA pursuant to section 79 of the *Competition Act*.

10. Broadly speaking, the proceeding relates to VAA's decision to permit only two in-flight catering service providers to operate on-site at the Vancouver International Airport (the "Airport"). The Commissioner's application is based upon, among other things, allegations that VAA controls the market for "Galley Handling" at the Airport, that it acted with an anti-competitive purpose, and that the effect of its policy decision was a "substantial prevention or lessening of competition", resulting in "higher prices, dampened innovation and lower service quality".

> Notice of Application, para. 1 and 36-38, Public Motion Record, Tab 7, pp. 62 and 70-71

11. In its Notice of Application, the Commissioner asserts that airlines purchase two bundles of catering-related products and services. The Commissioner has termed those two bundles "Catering" and "Galley Handling". Together, "Catering" and "Galley Handling" make up "In-flight Catering" – all of which are defined terms in the Notice of Application.

12. The Commissioner defines “Catering” as follows:

> **Catering** consists primarily of the preparation of meals for distribution, consumption or use on-board a commercial aircraft by passengers and crew, and includes buy-on-board offerings and snacks.
>
> Notice of Application, para. 12, Public Motion Record, Tab 7, pp. 64-65

13. The Commissioner defines “Galley Handling” as follows:

> **Galley Handling** consists primarily of the loading and unloading of Catering, commissary products (typically non-food items and non-perishable food items) and ancillary products (such as duty-free products, linen and newspapers) on a commercial aircraft, including in relation thereto: warehousing; inventory management; assembly of meal trays and aircraft trolley carts (including bar and boutique assembly); transportation of Catering, commissary and ancillary products between aircraft and warehouse or Catering kitchen facilities; equipment cleaning; handheld point-of-sale device management; and trash removal.
>
> Notice of Application, para. 12, Public Motion Record, Tab 7, pp. 64-65

14. Stated more simply, as used in the Notice of Application, “Catering” consists of the preparation of food items, while “Galley Handling” consists of the loading and unloading of such food items (and related items), as well as services ancillary thereto (e.g., transportation of food items, assembly of trolley carts, trash removal). And “In-flight Catering” encompasses all of the foregoing services.

15. The Commissioner acknowledges that, “historically”, all of the foregoing services have typically been provided by “full service In-flight Catering firms”, but pleads that, now, Catering and Galley Handling “can be, and are, provided by separate firms”.

> Notice of Application, para. 15, Public Motion Record, Tab 7, pp. 65-66

16. The Commissioner does not allege that VAA has engaged in any anti-competitive acts with respect to the market for the supply of Catering. Rather, the Commissioner's allegations focus solely on whether VAA is engaging in anti-competitive acts with respect to the market for the supply of Galley Handling at the Airport (and with respect to the market for access to the Airport airside for the supply of Galley Handling).

Notice of Application, para. 52-58, Public Motion Record, Tab 7, pp. 74-76

17. VAA delivered its Response on or about November 14, 2016.

18. Among other allegations made in its defence, including those related to the applicability of the regulated conduct exemption, VAA denies the Commissioner's market definitions related to "Catering" and "Galley Handling". Instead, VAA defines "Catering" as the preparation and loading onto aircraft of fresh meals and other perishable food offerings. And VAA defines "Galley Handling" as the provision and loading onto aircraft of non-perishable food and drink, as well as other items (such as duty free products).

Response of Vancouver Airport Authority, para. 29, Public Motion Record, Tab 8, p. 89

19. VAA pleads that the demand for Catering (i.e., for the preparation and loading of perishable food offerings) declined significantly over the early years of the century. As a result of this shrinking demand, the revenues earned by Catering operations at the Airport declined. The lack of demand led to the exit of one of the three companies offering Catering and Galley Handling services at the Airport, leaving two in operation.

Response of Vancouver Airport Authority, para. 47-49, Public Motion Record, Tab 8, p. 93

20. VAA explains that its decision not to permit additional Catering firms to operate at the Airport was not made for an anti-competitive purpose, but rather was (and is) motivated by its concern that, if one or more new firms were permitted to provide Galley Handling services at the Airport, the operations of one or both of the existing firms (who provide both Catering and Galley Handling) would no longer be viable:

> [T]he Authority is concerned that, if one or more new firms were permitted to provide Galley Handling services at the Airport, one or both of the existing firms – who provide both Catering and Galley Handling – would no longer be viable.
>
> Response of Vancouver Airport Authority, para. 75, Public Motion Record, Tab 8, pp. 98-99

21. VAA further pleads that it has an efficiency-enhancing, pro-competitive, valid business justification for requiring Catering firms to be located on-site at the airport: it believes that the presence of Catering firms on-site ensures optimal levels of quality and service:

> Given YVR's geographic location and unique ground access issues, in order to ensure delivery of such high quality, fresh meals on a timely and flexible basis, it is necessary that catering firms be located at the Airport.

Similarly:

> The Authority reasonably believes that the presence of Catering firms on-site at the Airport is important to ensure optimal levels of quality and service, which, in turn, are important to ensuring the efficient operation of the Airport as a whole, including achieving its public interest mandate, mission and vision.
>
> Response of Vancouver Airport Authority, para. 2 and 79, Public Motion Record, Tab 8, pp. 83 and 99

22. VAA is not involved in the Galley Handling business and it does not have any similar commercial interest in the relevant markets, a fact which distinguishes the within proceeding from prior cases brought under section 79 of the *Act*. VAA also specifically denies that it has any plausible competitive interest in adversely affecting competition in the market for Galley Handling.

> Response of Vancouver Airport Authority, para. 81 and 82, Public Motion Record, Tab 8, p. 100

23. In addition, VAA denies that it substantially or completely controls the market for Galley Handling. It explains that airlines can meet their Galley Handling needs through "self-supply" or "double catering". ("Double catering", also sometimes called "ferrying", refers to the practice of transporting extra meals and supplies from one airport for service during a flight departing a second airport.):

> The Authority further denies that it substantially or completely controls the market for Galley Handling. Because airlines can meet their Galley Handling needs through self-supply or double catering, the relevant geographic market for Galley Handling is broader than the Airport.
>
> Response of Vancouver Airport Authority, para. 31-32 and 66, Public Motion Record, Tab 8, pp. 89-90 and 97

24. VAA also pleads that the airlines have considerable negotiating power with Galley Handling firms, owing in part to the fact that airlines can meet all or a portion of their respective Galley Handling needs through self-supply or double catering:

> [T]he ability of airlines to self-supply, including by "ferrying" food and snacks from other airports, effectively limits the ability of the existing catering firms from imposing a significant, non-transitory increase in prices.

Response of Vancouver Airport Authority, para. 12 and 91, Public Motion Record, Tab 8, pp. 85 and 101-102

25. All of the foregoing allegations are expressly denied by the Commissioner.

Reply of the Commissioner of Competition, para. 4, Public Motion Record, Tab 9, p. 109

C. The Commissioner's Affidavit of Documents

26. On or about February 15, 2017, the Commissioner delivered his Affidavit of Documents, which purported to list all of the documents relevant to the matters in issue that were in the possession, power or control of the Commissioner as at December 31, 2016. Attached to the Affidavit of Documents were three Schedules:

(a) Schedule A, comprising relevant documents in the Commissioner's possession or control that do not contain confidential information and over which the Commissioner did not claim privilege;

(b) Schedule B, comprising relevant documents in the Commissioner's possession or control that the Commissioner was willing to produce (as the Commissioner is not claiming privilege in respect thereof) but that the Commissioner asserted contained confidential information; and

(c) Schedule C, comprising relevant documents in the Commissioner's possession or control in respect of which the Commissioner claimed privilege.

27. The Commissioner's February Affidavit of Documents listed approximately 10,000 documents in Schedule C, in respect of which the Commissioner claimed privilege and which the Commissioner accordingly objected to producing.

28. 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.

> Amended Affidavit of Documents of the Commissioner of Competition, Confidential Motion Record, para. 7, Volume I, Tabs 3 and 3B

29. Virtually all of the 8500 documents produced by the Commissioner pursuant to this waiver of privilege comprise:

(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).

> Schedule B to the Amended Affidavit of Documents of the Commissioner of Competition, Confidential Motion Record, Volume I, Tab 3B
>
> Exhibit "A" to the Affidavit of Monique Allen, Confidential Motion Record, Volume I, Tab 2A

30. The Commissioner continued (and continues to this day) to assert public interest privilege over approximately 1200 documents. Those 1200 withheld documents include <u>every</u>

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	Number Withheld on the Basis of Public Interest Privilege	Number Produced by the Commissioner
Affidavit	13	0
Email	230	18
Interview Notes	65	0
Letters	35	0
Memoranda	45	0
Notebooks	65	0
Presentation	25	0

Schedule C to the Amended Affidavit of Documents of the Commissioner of Competition, Confidential Motion Record, Volume I, Tab 3C

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

32. 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 1200 documents. That motion was dismissed by order of Gascon J. dated April 24, 2017, which order is under appeal.

33. On or about April 27, 2017, the Commissioner delivered a Supplemental Affidavit of Documents which 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.

Schedule B to the Supplemental Affidavit of Documents No. 1 of the Commissioner of Competition, Confidential Motion Record, Volume I, Tab 4B

Exhibit "A" to the Affidavit of Monique Allen, Confidential Motion Record, Volume I, Tab 2A

34. Notwithstanding that additional production, the Commissioner continues to withhold approximately 1200 documents on the basis of public interest privilege.

D. The Summaries Produced by the Commissioner

35. On or about April 13, 2017, the Commissioner produced a "Summary of Third Party Information". The summary was divided into two documents. The first contained information which the Commissioner claimed as "Confidential – Level A" pursuant to the Confidentiality Order. The second contained information which the Commissioner claimed as "Confidential – Level B" pursuant to the Confidentiality Order made by Gascon J. on March 20, 2017.

Summary of Third Party Information – Confidential Level A, Confidential Motion Record, Volume II, Tab 5

Summary of Third Party Information – Confidential Level B, Confidential Motion Record, Volume II, Tab 6

36. Together, the two documents purported to be a summary of relevant information gathered by the Commissioner from third parties, including relevant information contained in the documents which the Commissioner is withholding from production on the basis of public interest privilege.

37. The two documents (referred to hereinafter as the "original summaries") comprised thousands of snippets of information, provided in a jumbled, non-linear matrix, wholly divorced from context, in such a way as to render their content essentially meaningless and uninformative.

38. In response, VAA brought the within motion challenging the adequacy and accuracy of the original summaries. Upon learning of VAA's motion, the Commissioner took the position that the motion could not be brought until after the completion of examinations for discovery. That argument was considered and rejected by Gascon J. following a case management conference. In his Direction to Counsel of May 8, 2017, Gascon J. held:

> 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 inaccuracy of the Summaries affects its right to know the case against it and to have a meaningful opportunity to prepare its own case.
>
> Direction to Counsel (from Mr. Justice Gascon, Chairperson), dated May 8, 2017, CT-2016-015, para. 3

39. Further to that Direction, VAA delivered its motion materials in respect of the original summaries.

40. In its motion materials, VAA argued that, because the original summaries were so long, so jumbled and so wholly lacking in any context, they were rendered essentially meaningless. VAA provided certain illustrative examples of some of the ways in which the presentation of information served to obscure meaning. The examples provided were as follows:

(a) The various "chapters" of the original summaries contained multiple pieces of inconsistent or contradictory information provided on the same topic, with each piece of information being attributed to an identically described source. No indication was given as to whether any of the pieces of information were provided by the same source and, if so, which pieces were provided by one source and which by another.

(b) Within any given chapter, multiple pieces of information on the same topic were scattered across multiple pages, intermixed with hundreds of other pieces of information on different topics.

(c) No attempt appeared to have been made to present the information in any kind of chronological order, with related pieces of information scattered across a chapter, jumping backwards and forwards in time.

41. Upon receipt of VAA's motion materials, the Commissioner advised that he intended to deliver revised summaries.

42. The revised summaries (which the Commissioner refers to as "reordered" summaries) were delivered on or about June 6, 2017.

43. Certain amendments have been made to the summaries. Specifically, the Commissioner has reordered the snippets of information contained within any given chapter so that the snippets appear in chronological order according to the year in which the information was gathered. The Commissioner has also reorganized the snippets of information within any given chapter so that they are more obviously grouped by topic.

44. Despite those changes, the summaries, even as revised, remain wholly inadequate. As with the original summaries, the reordered summaries comprise thousands of snippets of information presented in a jumbled fashion, wholly divorced from context, in such a way as to render their content essentially meaningless and uninformative.

45. And, as was the case with the original summaries, the various chapters of the reordered summaries contain multiple pieces of inconsistent or contradictory information provided on the same topic, with each piece of information being attributed to an identically described source. As was the case with the original summaries, no indication is given as to whether any of the pieces of information were provided by the same source and, if so, which pieces were provided by one source and which by another.

46. The result is that the reordered summaries (like the original summaries) are deficient and inadequate on their face. They do not convey to VAA the facts that have been gathered by the Commissioner. They will not permit VAA's counsel to conduct an efficient and meaningful examination for discovery of the Commissioner's representative. They will not permit VAA to know the case it has to meet. And they will, accordingly, frustrate effective pre-trial preparation.

47. As a result, and as is discussed more fully below, the summaries do not meet the requirements set out in the jurisprudence.

PART II – SUBMISSIONS

A. Proceedings Before the Tribunal Attract and Necessitate a High Degree of Procedural Fairness

48. It is beyond doubt that proceedings before the Tribunal attract and necessitate the very highest level of procedural fairness, as the Tribunal resides very close to, if not at, the "judicial end of the spectrum". As Gascon J. has stated:

> [A] high degree of procedural protection is needed in Tribunal proceedings because of its court-like process. . . . 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.
>
> *The Commissioner of Competition v. Vancouver Airport Authority*, 2017 Comp. Trib. 6 at para. 169
>
> *Bell Canada v. Canadian Telephone Employees Assn*., 2003 SCC 36 at para. 21

49. With respect to the importance of the principles of procedural fairness, subsection 9(2) of the *Competition Tribunal Act* provides as follows:

> All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit. [emphasis added]
>
> *Competition Tribunal Act*, R.S.C. 1985, c. 19, as amended, s. 9(2)

B. The Extraordinary Public Interest Privilege Enjoyed by the Commissioner

50. The jurisprudence of this Tribunal has recognized a unique privilege enjoyed by the Commissioner, which is commonly referred to as "public interest privilege". However, the "public interest privilege" enjoyed by the Commissioner is unlike any other species of public interest privilege recognized in Canadian law.

51. Every other public interest privilege recognized in Canadian law is a "qualified" privilege, which requires the court, in each case, to balance the importance of guarding the secrecy of the particular documents in question against the importance of disclosing those particular documents to the party seeking access.

Novacor Chemicals (Canada) Ltd. v. R., [1999] 2 C.T.C. 145 at para. 14 (F.C.T.D.)

52. Accordingly, whenever any person other than the Commissioner of Competition asserts a public interest privilege in a Canadian court, the court undertakes an analysis on a case-by-case basis – i.e., an analysis that is specific to the contents of the particular documents in question, rather than simply considering the manner in which the documents were created or gathered. The analysis has three main steps:

(a) Are the documents in question relevant?

(b) Would disclosure of the documents cause harm to a specified public interest?

(c) Does the harm caused by continued secrecy outweigh the harm that would be caused by disclosure?

Khadr v. Canada(Attorney General), 2008 FC 807 at para. 48

Wang v. Canada(Minister of Public Safety and Emergency Preparedness), 2016 FC 493 at paras. 34-47

Canada(Attorney General) v. Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, 2007 FC 766 at para. 37

53. Thus, whenever any public official – other than the Commissioner of Competition – asserts that documents or information should not be disclosed owing to a public interest privilege, the Crown bears the onus of identifying the public interest allegedly at risk and proving that disclosure of the information in question would have an adverse effect on that public interest. Discharging that onus requires specific, concrete evidence demonstrating how disclosure of the particular documents at issue would harm the asserted public interest; generalized assertions will not suffice:

> [T]he Court must guard against reliance on "generalized assertions of possible disadvantage to an ongoing investigation". . . . Rather, the onus is on the Minister to establish that the disclosure of the information in question would have a concrete deleterious effect on the ongoing investigation. [emphasis added]

Wang v. Canada(Minister of Public Safety and Emergency Preparedness), 2016 FC 493 at para. 35

54. If the Crown cannot discharge that onus, then the privilege is not established and the documents must be produced. If the Crown does discharge its onus, then the Court must engage in a balancing exercise, weighing the harm that would be caused by disclosure against the harm that would be caused by maintaining the secrecy, based on a number of factors. In other words, the Court must weigh the interest in continued secrecy against the interest in disclosing the document(s) to the party seeking access. As Mactavish J. explained:

> If the Court is satisfied that disclosure of the evidence in question would indeed encroach on a specified public interest, it must then consider whether the public interest in protecting an ongoing investigation is outweighed by the public interest in disclosure.
>
> *Wang v. Canada(Minister of Public Safety and Emergency Preparedness)*, 2016 FC 493 at para. 36

55. In carrying out this balancing exercise under the third step, the Federal Court has held that it should consider the following factors, which include factors identified by Justice Rothstein in *Khan v. R*:

(a) the nature of the public interest(s) asserted;

(b) the degree of connection between the documents in question and the matters in issue in the proceeding - i.e., the probative value of the disputed documents;

(c) the nature of the underlying proceeding, including the public interest in that proceeding;

(d) the effect that non-disclosure would have on the public's perception of the justice system;

(e) the timing, source and sensitivity of the information contained in the disputed documents; and

(f) other evidence available to the party seeking disclosure.

Canada (Attorney General) v. Tepper, 2016 FC 307 at paras. 5 and 15, citing *Khan v. R*., [1996] 2 F.C. 316 (F.C.T.D.) at para. 26.

56. Those are the principles that apply whenever any public official asserts a public interest privilege. There is only one exception: the Commissioner of Competition.

57. The Commissioner alone enjoys an entirely different and infinitely more expansive type of public interest privilege. The Commissioner alone can assert public interest privilege not on a case-by-case basis (as applies to every other public official), but rather on a class basis. The Commissioner alone is excused from the need to adduce specific, concrete evidence (or, indeed, any evidence) demonstrating that disclosure of the particular documents at issue would harm the asserted public interest. The Commissioner alone is excused from the need to prove that the interest in continued secrecy outweighs the respondent's interest in having access to the documents.

58. Instead, the Commissioner need only demonstrate that he gathered the documents or information through his investigative process.

59. Moreover, the Commissioner remains free to waive the privilege in whole or in part, at any time up to and including the date for delivery of the Commissioner's witness statements, which is set by the *Competition Tribunal Rules* as 60 days prior to the start of trial. This raises the prospect of substantial disclosure being made at the eleventh hour, at a time when examinations for discovery are long since completed.

60. Of course, the respondent does not enjoy any analogous privilege. Accordingly, while the respondent is denied full rights of discovery, is faced with the prospect of selective, eve-of-trial disclosure, and is denied access to information that could help the its case, the Commissioner does not labour under any such restrictions. Rather, the Commissioner is

entitled to production – at virtually the outset of the proceedings – of all relevant documents in the respondent's possession or control (subject only to solicitor-client and litigation privilege). The Commissioner is granted full rights of examination for discovery to find out all information in the respondent's knowledge that relate to the matters in issue in the litigation. And the Commissioner has all of this information months before he needs to prepare his witness statements.

C. Safeguard Mechanisms Are Crucial to Tempering the Unfairness of the Privilege

61. In attempt to temper the unfairness and the adverse effect on the search for truth that would otherwise result from the assertion of this extraordinary privilege, the Tribunal has crafted certain "safeguards" and "special mechanisms". As explained by Gascon J.:

> [T]he Tribunal has repeatedly discussed the special mechanisms put in place to address the legitimate concerns for the search for truth and for the right to a fair hearing raised by this limit imposed on the full disclosure of relevant documents and communications.
>
> *The Commissioner of Competition v. Vancouver Airport Authority*, 2017 Comp. Trib. 6 at para. 82

62. Similarly:

> Over the years, the Tribunal has thus consistently discussed and referred to the particular safety valves and safeguards endorsed by the Tribunal to compensate for the limited disclosure of information resulting from the Commissioner's claim of public interest privilege.
>
> *The Commissioner of Competition v. Vancouver Airport Authority*, 2017 Comp. Trib. 6 at para. 82

63. These safeguard mechanisms are necessary to ensure the fairness of the proceedings:

> [T]he Tribunal has developed a process that protects procedural fairness in the context of the Commissioner's important mandate, in the form of safeguard mechanisms which are closely attached to the recognition of the Commissioner's public interest privilege . . .
>
> *The Commissioner of Competition v. Vancouver Airport Authority*, 2017 Comp. Trib. 6 at para. 161

64. Thus, the "safeguard mechanisms" and "safety valves" are not merely adjuncts. Rather, they form an essential and integral part of the privilege, underpinning the entire evidentiary regime. As Gascon J. stated:

> There is no doubt, in my view, that these safeguard mechanisms have been a key element of the Tribunal's treatment of the Commissioner's public interest privilege and indeed form an integral part, in the Tribunal's reasons, of the class recognition awarded to the Commissioner's privilege.
>
> *The Commissioner of Competition v. Vancouver Airport Authority*, 2017 Comp. Trib. 6 at para. 82

65. Indeed, in a recent direction to counsel in respect of the within motion, Gascon J. emphasized the importance of these safeguards:

> [T]he Tribunal reiterates that these safeguard mechanisms have been and remain a key element of the Tribunal's treatment of the Commissioner's public interest privilege.
>
> Direction to Counsel (from Mr. Justice Gascon, Chairperson), dated May 8, 2017, CT-2016-015, para. 4

66. The jurisprudence has identified three such "safeguard mechanisms", the first two of which are implicated by the within motion:

(a) the Commissioner's obligation to provide, prior to examinations for discovery, of "detailed", "complete", "adequate" and "accurate" summaries of all information being withheld on the basis of public interest privilege;

(b) the respondent's right to have a non-sitting judicial member adjudicate upon the adequacy and accuracy of the summaries; and

(c) the fact that, if the Commissioner wishes to rely on certain privileged information at trial, he will have to waive privilege over such information at the time that he provides his witness statements.

67. As Gascon J. stated:

> [The] mechanisms put in place to safeguard the respondent's right to a fair hearing include: (1) the provision of detailed summaries, prior to the examination for discoveries, containing both favourable and unfavourable facts to the Commissioner's application; (2) the option for the respondent to have a judicial member of the Tribunal, who would not be adjudicating the matter on the merits, to review the underlying documents to ensure they have been adequately summarized and are accurate; and (3) the fact that the Commissioner will have to waive privilege on relevant documents and communications and provide will-say statements ahead of the hearing, if he wants to rely upon that information in proceedings before the Tribunal.
>
> *The Commissioner of Competition v. Vancouver Airport Authority*, 2017 Comp. Trib. 6 at para. 161

68. Similarly:

> The Tribunal decisions have first established that the Commissioner should provide, prior to the start of examinations for discovery, complete summaries of the privileged information including not merely

> information which supports his case but also information which favours the respondent.
>
> *The Commissioner of Competition v. Vancouver Airport Authority*, 2017 Comp. Trib. 6 at para. 84

69. The first of these "safeguard mechanisms" – the provision of summaries – plays a crucial role in ensuring the fairness of the proceeding. As explained by the Tribunal, the purpose of the summaries is to ensure that the respondent knows the facts that the Commissioner has gathered:

> The purpose of this disclosure is obvious. The respondent is put in the position of knowing what facts the Commissioner has gathered up to that point in time including those which have led him to make the application on the basis of the [Statement of Grounds and Material Facts].
>
> *Canada (Commissioner of Competition) v. United Grain Growers Ltd.*, 2002 Comp. Trib. 35 at para. 91

70. The summaries should provide <u>all facts</u> that the Commissioner has gathered, save those that would reveal the source of the information:

> The application of the public interest privilege, in the discovery process, should be limited to refusing to disclose facts which the Commissioner has which would reveal the source of the information.
>
> *Canada (Commissioner of Competition) v. United Grain Growers Ltd.*, 2002 Comp. Trib. 35 at para. 93

71. By ensuring that the respondent has disclosure of all of the facts that are known to the Commissioner, the summaries assist the respondent in the preparation of its case. As Gascon J. noted:

> In *Superior Propane*, Mr. Justice Rothstein, when referring to the practice of providing summaries of the information obtained, underlined its purpose of disclosing facts to assist respondents in the preparation of their case.
>
> *The Commissioner of Competition v. Vancouver Airport Authority*, 2017 Comp. Trib. 6 at para. 84

72. More broadly, by promoting effective pre-trial preparation, the summaries help to ensure the smooth and efficient conduct of the trial on the merits:

> [T]o mitigate the harshness which a rigid application of the public interest privilege would have on the discovery process and in order to promote effective pre-trial preparation which ensures the trial will be conducted smoothly and efficiently, narrowed to the greatest extent with surprises eliminated as much as possible, the Tribunal requires, prior to discovery, production of documents as well as an aggregated summary of the main relevant facts gathered during the Commissioner's investigation.
>
> *Canada (Commissioner of Competition) v. United Grain Growers Ltd.*, 2002 Comp. Trib. 35 at para. 90

73. Thus, in order to serve their intended purpose, the summaries must:

(a) allow the respondent to know and evaluate the information upon which the Commissioner has based his claim as well as the information that might assist in the respondent's defence,

(b) present information in a manner that allows the respondent to understand and use that information in preparing its defence, and

(c) promote effective pre-trial preparation by the respondent, including effective and efficient conduct of examinations for discovery, so as to ensure that the trial

> will be conducted smoothly and efficiently, with the issues narrowed and surprises eliminated as much as possible.

74. Of course, exactly what is required to achieve those objectives will vary according to the particular circumstances of each case. What is required in one case may not be required in another, as the adequacy of the summaries must be determined based upon the facts of each case, including:

(a) the quantity of the withheld documents and information;

(b) the nature of the withheld documents and information; and

(c) the particular allegations made in the pleadings, including the nature of the matters in issue in the proceeding, and the respondent's role in the markets in question.

75. To the extent that a respondent is concerned that the summaries provided are "inadequate or insufficient" as measured by the foregoing standards, the Tribunal will "arrange for a judicial member of the Tribunal not sitting on the panel that eventually hears the application to review the documents and summaries in order to determine whether the [respondent's] suspicion is well founded and to ensure the adequacy and accuracy of the summaries."

> *The Commissioner of Competition v. Vancouver Airport Authority*, 2017 Comp. Trib. 6 at para. 84-85

D. The Summaries Provided by the Commissioner Are Inadequate to Fulfill Their Intended Purpose

76. In the present case, the reordered summaries are wholly inadequate. They are needlessly confusing; they present information in a way that renders the information effectively meaningless; and they present a matrix that is impossible for counsel to navigate by any objectively professional standard. The result is that they do not serve their intended purpose. The do not allow the respondent to know and evaluate the information gathered by the Commissioner. They do not present information in a manner that allows the respondent to understand and use that information in preparing its defence. And they do not promote effective pre-trial preparation, including efficient and effective conduct of the examination for discovery of the Commissioner's representative.

77. Although the Commissioner did make certain revisions to the original summaries, in that he organized the information within chapters on a chronological basis and made a greater effort to group information within chapters by topic, the reordered summaries still do not provide any indication as to which information was provided by one source and which by another. Thus, with respect to any given topic and within any given chapter, the summaries present numerous snippets of inconsistent and even contradictory information. However, because no context is given for the information, and because no indication is given as to whether any two or more pieces of information came from the same source, it is impossible to know how (or even whether) to reconcile those inconsistencies and contradictions and it is accordingly impossible to make sense of the information contained in the reordered summaries.

78. Far from allowing the respondent to know and evaluate the information that the Commissioner has gathered, the reordered summaries (like the original summaries) obscure the very meaning that they are intended to reveal. As a result, they cannot fulfill their role as a crucial safeguard mechanism, helping to ensure the fairness of the within proceedings.

79. With respect to the changes that are needed to bring the reordered summaries up to the standard required by the jurisprudence, VAA continues to suggest (as it did in its original motion materials) that it would be helpful if indications were given as to which snippets of information within any given chapter came from one source and which came from a different source (without, of course, providing the identity of the source(s) in question). However, without access to the underlying documents and information (which access, of course, is denied to the respondent and its counsel by the assertion of public interest privilege), it is impossible for the respondent to provide an exhaustive or definitive enumeration of the required changes. Notwithstanding that limitation, VAA provides below (as it did in its original motion materials) suggestions as to the manner in which the summaries' deficiencies could be addressed.

80. Of course, whether the implementation of the changes suggested below would be sufficient to meet the standard established by the jurisprudence can be known only to the Commissioner, who alone has access to the underlying documents and information.

81. A non-exhaustive series of examples of the difficulties posed by the manner in which the summaries present information is provided below.

(i) Information Provided Relating to the Location of Caterers

82. The Commissioner alleges that VAA has engaged in a practice of anti-competitive acts through, *inter alia*, "its continued tying of access to the Airport airside for the supply of Galley Handling to the leasing of Airport land from VAA for the operation of Catering kitchen facilities". The Commissioner goes on to allege that this practice was motivated by an anti-competitive purpose.

> Notice of Application, para. 36, Public Motion Record, Tab 7, p. 70

83. In its response, VAA denies that it has acted with an anti-competitive purpose. And it explains that it has a valid business justification for requiring catering firms to be located on-Airport. For example:

> Given YVR's geographic location and unique ground access issues, in order to ensure delivery of such high quality, fresh meals on a timely and flexible basis, it is necessary that catering firms be located at the Airport.
>
> Response of Vancouver Airport Authority, para. 2, Public Motion Record, Tab 8, p. 83

84. This plea is denied by the Commissioner.

> Reply of the Commissioner of Competition, para. 4, Public Motion Record, Tab 9, p. 109

85. The issue has evidently been the focus of a considerable amount of the Commissioner's attention, as information related to this issue fills over seven pages of the Commissioner's summaries. The information has been gathered variously from catering firms, from one or more airlines [redacted] and from one or more airlines [redacted]

86. However, the information is presented in the reordered summaries in such a way as to obscure its meaning, rendering it completely useless to the respondent, and thereby defeating the very purpose of the summaries. Multiple pieces of information relating to [redacted] are presented. Most of those pieces of information are inconsistent and contradictory, but all of them are attributed to an identically described source, namely, [redacted] Because no information is provided as to which pieces of information (if any) came from the same source, it is impossible to reconcile the inconsistencies.

87. Thus, the reordered summaries tell us, at page 46, that:

[redacted]

Reordered Summary of Third Party Information – Confidential Level B, p. 46,
Confidential Supplementary Motion Record, Tab 3, p. 77

88. The very next bullet provides information that is directly contradictory to the foregoing, but without any indication being provided as to whether the two pieces of information were provided by the same [redacted] or by [redacted]. The summaries state:

[redacted]

Reordered Summary of Third Party Information – Confidential Level B, p. 46,
Confidential Supplementary Motion Record, Tab 3, p. 77

89. Then, a few bullets later, the reordered summaries again provide information on this same issue, again with the source being described as [redacted] and again without any indication as to whether the source is the same source who provided the information set out in either (or both) of the two preceding bullets:

[redacted]

Reordered Summary of Third Party Information – Confidential Level B, p. 46,
Confidential Supplementary Motion Record, Tab 3, p. 77

90. The following pages contain multiple additional pieces of information on that same topic, much of it inconsistent, and all of it being attributed to a source described simply as [redacted] Those additional pieces of information state as follows:

[redacted]

Reordered Summary of Third Party Information – Confidential Level B, p. 47,
Confidential Supplementary Motion Record, Tab 3, p. 78

91. Then, the following page contains two further pieces of information, again inconsistent and again being attributed to [redacted]

[redacted]

Reordered Summary of Third Party Information – Confidential Level B, p. 48,
Confidential Supplementary Motion Record, Tab 3, p. 79

92. And then, the following page contains still more (inconsistent) snippets information from the identically described source:

[redacted]

Reordered Summary of Third Party Information – Confidential Level B, p. 49,
Confidential Supplementary Motion Record, Tab 3, p. 80

93. Thus, over four pages, the summaries provide ten different pieces of sometimes contradictory and inconsistent information on the identical topic, all from [redacted] with no indication as to whether the ten pieces of information were all provided by the same [redacted] or by two different [redacted], or by ten different [redacted] The ten pieces of information merely indicate that [redacted] stated that:

- [redacted]
- [redacted]
- [redacted]

[redacted]

94. It is impossible to make sense of these ten pieces of information together without knowing which pieces (if any) were provided by the same source. The meaning of the foregoing pieces of information and the manner in which the respondent and its counsel could use those pieces of information to prepare its case would obviously be quite different if:

(a) each piece of information was provided by a different source; or

(b) all of the pieces of information were provided by the same source.

95. Similarly, the meaning of the information would be quite different and the manner in which VAA's counsel could use the information – for example, in the conduct of examinations for discovery, or otherwise in preparing VAA's defence – would be quite different if three different sources said that:

[redacted]

as compared to the meaning of those same three pieces of information if they had all been provided by one single source.

96. In addition, the apparent inconsistencies between many of the pieces of information are rendered all the more stark by the fact that the snippets of information are provided wholly devoid of any (potentially explanatory) context. With neither the context, nor even an indication as to whether the apparently disparate pieces of information came from more than one source, the summaries cannot provide the respondent with knowledge of the information that the Commissioner has gathered. They present the information in a manner that cannot be used by the respondent's counsel in preparing for and conducting the examination for discovery of the Commissioner's representative, or more broadly in preparing a defence. And they will not promote effective pre-trial preparation.

97. A further example of the manner in which the summaries serve to obfuscate the meaning of the information gathered by the Commissioner is set out below.

(ii) Information Provided Relating to [redacted]

98. As noted above, in its pleading, VAA denies that it substantially or completely controls the market for Galley Handling. It explains that airlines can meet their Galley Handling needs through "self-supply" or "double catering" (the latter of which is discussed below) and that, as a result of that ability to "self supply" or "double cater" the airlines have considerable negotiating power with Galley Handling firms.

> Response of Vancouver Airport Authority, para. 12, 31-32, 66 and 91, Public Motion Record, Tab 8, pp. 85, 89-90, 97 and 101-102

99. As further noted above, those allegations are denied by the Commissioner.

Reply of the Commissioner of Competition, para. 4, Public Motion Record, Tab 9, p. 109

100. The Commissioner has evidently gathered a quantity of information relating to the issue of [redacted] However, as with the information relating to [redacted], the information related to [redacted] is presented in such a way as to render it effectively meaningless to the reader. As before, multiple pieces of inconsistent and even contradictory pieces of information are presented and all of the information is described as coming from an identically described source, namely, [redacted] As before, no indication is given as to which pieces of information (if any) came from the same source. It is accordingly impossible to reconcile the inconsistencies, impossible to make sense of the information provided and, therefore, impossible for VAA's counsel to use that information in the conduct of examinations for discovery or otherwise in the preparation of VAA's defence.

101. Thus, on page 21, the reordered summaries state:

[redacted]

Reordered Summary of Third Party Information – Confidential Level B, p. 21, Confidential Supplementary Motion Record, Tab 3, p. 52

102. The next page contains an additional piece of information on that same topic, which is inconsistent with the information supplied on the previous page, but which is attributed to an identically described source – namely, [redacted]

Reordered Summary of Third Party Information – Confidential Level B, p. 22,
Confidential Supplementary Motion Record, Tab 3, p. 53

103. Then, the following page contains multiple additional pieces of information, all of it contradictory, all of it attributed to an identically described source, with no indication as to whether these multiple pieces of contradictory information were provided by one[redacted], two [redacted] or more:

Reordered Summary of Third Party Information – Confidential Level B, p. 23,
Confidential Supplementary Motion Record, Tab 3, p. 54

104. The next page contains still more contradictory, inconsistent pieces of information, again attributed to an identically described source:

[redacted]

Reordered Summary of Third Party Information – Confidential Level B, p. 24,
Confidential Supplementary Motion Record, Tab 3, p. 55

105. Thus, the summaries present at least ten pieces of information on the same topic indicating that [redacted] stated that:

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

106. It is impossible to make sense of these ten pieces of information – some of which plainly contradict others – without knowing, at a minimum, which (if any) pieces of information were provided by the same source(s). The meaning of those ten pieces of information and the manner in which the information could be used in the preparation of VAA's defence would be quite different if:

(a) each piece of information was provided by a different source; or

(b) all of the pieces of information were provided by the same source.

107. Thus, as before, the reordered summaries present the information in such a way as to frustrate their intended purpose.

(iii) Information Provided Relating to [redacted]

108. In addition to information related to [redacted] the Commissioner also appears to have gathered a substantial amount of information related to whether [redacted] However, as before, this information is presented in such a way as to render it effectively meaningless to the reader. As before, multiple pieces of inconsistent information are presented, all of which are attributed to an identically described source. As before, because no indication is given as to which pieces of information (if any) came from the same source, it is impossible to reconcile the inconsistencies and impossible to make sense of the information provided.

109. Thus, the [redacted] contains the following statements:

[redacted]

[redacted]

Reordered Summary of Third Party Information – Confidential Level B, p. 25-31,
Confidential Supplementary Motion Record, Tab 3, p. 56-62

110. Once again, an identically described source appears to be providing multiple pieces of wholly contradictory information. Thus, an [redacted] does not [redacted] at all, and yet an [redacted] that it can. And an [redacted] believes that [redacted] is possible, and yet [redacted] believes that [redacted] is not possible. Was this information provided by the same [redacted] or two different [redacted]? Only the Commissioner knows.

111. Based on the information as presented in the reordered summaries, it is impossible to know if the foregoing information is attributable to [redacted], or if it is attributable to [redacted]. Without knowing which, if any, of those pieces of information were provided by

the same source, it is impossible to make any sense of the information, rendering the reordered summaries effectively useless.

(iv) Information Provided Relating to [redacted]

112. A further example of the shortcomings of the reordered summaries can be seen in the manner in which the summaries present information related to [redacted]. It would appear that the Commissioner has gathered a substantial amount of information related to this topic. However, that information is presented in such a way as to wholly obscure its meaning. The information is scattered across dozens of pages, in multiple different "chapters" of the summaries and, as always, multiple disparate pieces of inconsistent information are attributed to an identically named source, with no indication as to whether the information was provided by one source, two sources, or more.

113. Thus, the chapter entitled [redacted] provides certain information related to whether [redacted]. The reordered summaries state:

> [redacted]
>
> Reordered Summary of Third Party Information – Confidential Level B, p. 63,
> Confidential Supplementary Motion Record, Tab 3, p. 94

114. The subsequent chapter, entitled [redacted] also contains information related to this same topic, all of which is, as always, attributed to the ever-present [redacted]

[redacted]

Reordered Summary of Third Party Information – Confidential Level B, p. 66,
Confidential Supplementary Motion Record, Tab 3, p. 97

115. The next page contains still more information on the same topic:

[redacted]

Reordered Summary of Third Party Information – Confidential Level B, p. 67,
Confidential Supplementary Motion Record, Tab 3, p. 98

116. Then, two pages later, one further related piece of (inconsistent) information appears:

[redacted]

Reordered Summary of Third Party Information – Confidential Level B, p. 69,
Confidential Supplementary Motion Record, Tab 3, p. 100

117. Then, three pages after that, another piece of information on that same topic appears:

[redacted]

Reordered Summary of Third Party Information – Confidential Level B, p. 72,
Confidential Supplementary Motion Record, Tab 3, p. 103

118. Still more information on this same topic is provided by the reordered summaries. However, that additional information – again inconsistent and again attributed to an identically described source – does not appear until 30 pages later, in an entirely different section of the summaries:

[redacted]

Reordered Summary of Third Party Information – Confidential Level B, p. 103-104, Confidential Supplementary Motion Record, Tab 3, p. 134-135

119. Thus, the reordered summaries contain at least eight pieces of information related to whether an [redacted] In order to find those seven pieces of information, the reader must comb through 40 pages of summaries, sifting through thousands of other pieces of unrelated information.

120. And, as always, the information is attributed to an identically described source, with each piece of information being inconsistent with the other pieces of information, and with no indication as to whether the information was provided by one [redacted] two [redacted], three or more. Thus, the reordered summaries indicate that an [redacted] stated that:

[redacted]

121. Even without the difficulty in discerning the information, intermixed as it is with thousands of other pieces of unrelated information spread over dozens of pages, it is impossible to make sense of these ten pieces of information – some of which plainly contradict others – without knowing, at a minimum, which (if any) pieces of information were provided by the same source(s). The meaning of those ten pieces of information and the manner in which the information could be used to prepare VAA's defence would be quite different if:

(a) each piece of information was provided by a different source; or

(b) all of the pieces of information were provided by the same source.

122. Thus, as before, the summaries present the information in such a way as to frustrate their intended purpose. They do not permit the respondent to know the case it has to meet, and they render it impossible for respondent's counsel to conduct a meaningful and effective examination for discovery of the Commissioner's representative and otherwise to prepare VAA's defence.

(v) Information Provided Relating to [redacted]

123. One final illustrative example is provided by the portion of the summaries designated as "Confidential – Level A", which contains a chapter entitled [redacted]. That chapter is eight pages long and consists of bullet after bullet of information related to [redacted] Each piece of information is identified as coming from an identically named source, specifically, [redacted] And, once again, no indication is given as to which pieces of information came from the same source, or as to how many different sources provided the information.

124. Thus, the reordered summaries contain the following statements related to [redacted]

[redacted]

Reordered Summary of Third Party Information – Confidential Level A, p. 11-12,
Confidential Supplementary Motion Record, Tab 2, p. 22-23

125. Because there is no way of knowing which of the bulleted pieces of information came from one source and which from another (or whether they all came from the same source), it is impossible to make any sense of the information.

126. Was the [redacted] the same as the [redacted] Or were those two different [redacted]?

127. Was the [redacted] the same as the [redacted] Or were those two different [redacted]

128. Without knowing the answers to those questions (and others like them), it is impossible to derive any meaning from the hundreds of bullets of financial information.

(vi) The Summaries Do Not Meet the Standard Set Out in the Case Law

129. The examples discussed above are provided merely as representative samples of the entirety of the Commissioner's reordered summaries. The remaining 200+ pages are equally jumbled and equally incomprehensible. They contain thousands of pieces of disparate information, provided with no indication as to which information came from the same source and no attempt to provide any context such as might help to convey meaning to the respondent.

130. The result is a set of summaries that falls far short of the standard set by the jurisprudence. These summaries cannot assist the respondent in the preparation of its case. They cannot to promote effective pre-trial preparation. They do not convey to the respondent the facts that the Commissioner has gathered. And they do not meet the essential standard of fairness that is required of the safeguard mechanisms and that is inherent in the Tribunal's process.

131. Accordingly, they cannot fulfill their intended role as a critical safeguard mechanism, mitigating the harsh and unfair result that flows from the rigid application of the Commissioner's public interest privilege.

132. In the present circumstances, given the volume of information over which privilege is claimed by the Commissioner (and the resulting volume of information that the summaries are intended to convey), and given the nature of that information (particularly the fact that it comprises a large amount of detailed financial information), it is submitted that revisions must be made to the reordered summaries in order for them to fulfill their intended purpose and for these proceedings to move forward fairly and efficiently.

133. As noted above, because neither the respondent nor its counsel has access to the privileged documents and information, it is impossible for VAA or its counsel to provide any definitive statement as to the specific changes that are needed for the reordered summaries to meet the standard established by the case law. However, it is submitted that consideration must be given, at a minimum, to identifying which pieces of information came from one source,

and which came from a different source (of course, without revealing the identity of the source in question).

134. Finally, as recognized by Gascon J., the principles of fairness support addressing the adequacy and accuracy of the summaries at this time, before the respondent has conducted its examination for discovery of the Commissioner's representative. Granting the relief sought herein will help to ensure the fair and effective conduct of the examination for discovery of the Commissioner's representative and, more broadly, will help to ensure the fair and efficient conduct of the proceeding as a whole.

> Direction to Counsel (from Mr. Justice Gascon, Chairperson), dated May 8, 2017, CT-2016-015, para. 3

PART III– ORDER SOUGHT

135. VAA seeks:

(a) an order requiring the Commissioner to produce complete, detailed, adequate and accurate summaries of the documents and information over which the Commissioner has claimed public interest privilege, in a manner specifically directed by the Tribunal;

(b) VAA's costs of this motion; and

(c) such further and other relief as the Tribunal deems just.

DATED at Toronto, Ontario this 21st day of June, 2017

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PART IV – LIST OF AUTHORITIES, STATUTES AND SECONDARY SOURCES REFERRED TO

Jurisprudence	
1	*The Commissioner of Competition v. Vancouver Airport Authority,* 2017 Comp Trib 6
2	*Bell Canada v. Canadian Telephone Employees Assn.,* 2003 SCC 36
3	*Novacor Chemicals (Canada) Ltd. v. R,* [1999] 2 C.T.C. 145 (F.C.T.D.)
4	*Khadr v. Canada (Attorney General)*, 2008 FC 807
5	*Wang v. Canada (Minister of Public Safety and Emergency Preparedness),* 2016 FC 493
6	*Canada (Attorney General) v. Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar,* 2007 FC 766
7	*Canada (Attorney General) v. Tepper,* 2016 FC 307
8	*Khan v. R,* [1996] 2 F.C. 316 (F.C.T.D.)
9	*Canada (Commissioner of Competition) v. United Grain Growers Ltd.,* 2002 Comp Trib 35