

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 practices of Vancouver Airport Authority relating to the supply of in-flight catering services 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 May 15, 2017 CT-2016-015 Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 84

COMMISSIONER OF COMPETITION

Applicant

- and -

VANCOUVER AIRPORT AUTHORITY

Respondent

**COMMISSIONER OF COMPETITION'S RESPONSE TO
RESPONDENT'S NOTICE OF MOTION**

PART I. GROUNDS ON WHICH THE MOTION IS OPPOSED

1. The Commissioner of Competition (the “**Commissioner**”) has provided to Vancouver Airport Authority (“**VAA**”) a third party summary (“**TPS**”) providing the facts, both helpful and unhelpful to the Commissioner’s Application, that have been gathered by the Commissioner during his investigation. Acting in the public interest, the Commissioner has organized the TPS to maximize the amount of information provided to VAA without compromising the applicable public interest privilege. The TPS follows Competition Tribunal (“**Tribunal**”) jurisprudence on what a TPS should contain.

2. On its face, the TPS has no indicia to indicate that the over 200 pages are inadequate or inaccurate. The Respondent also has not provided any evidence to support its claims.

3. VAA will obtain discovery from the Commissioner’s representative where, among other topics, VAA will be able to ask questions about the information in the TPS.

4. As no evidence has been provided on the TPS’ adequacy or accuracy and discovery of the Commissioner’s representative has not occurred, there is no basis for an order for the Commissioner to provide a further and better TPS. In fact, such an order would encourage future respondents to automatically challenge the TPS prior to discovery, even where, as in this case, there is no basis on which to do so. VAA’s motion should be dismissed.

Background

5. The Commissioner applied to the Tribunal on September 29, 2016, seeking to remedy the abuse of a dominant market position by VAA in excluding and denying the benefits of competition to the in-flight catering marketplace at Vancouver International Airport (the "**Commissioner's Application**").
6. Pursuant to the scheduling order of Justice Gascon dated December 20, 2016, as amended by further orders dated February 13, 2017, and February 16, 2017, the Commissioner served VAA with the Commissioner's Affidavit of Documents on February 15, 2017.
7. On March 20, 2017, Justice Gascon issued a confidentiality order regarding the treatment of certain classes of protected information (the "**Confidentiality Order**").
8. On March 21, 2017, the Commissioner served VAA with an amended Affidavit of Documents, which does not list any new documents. Rather, the Commissioner waived privilege over 8,513 documents. Of the remaining 1,393 documents listed in Schedule C, the Commissioner claims public interest privilege, and no other type of privilege, over 1,183 documents. The Commissioner also asserts public interest privilege as well as one or more other forms of privilege over an additional 207 documents. The remaining 3 documents are subject to claims of litigation privilege only.
9. On April 13, 2017, consistent with Tribunal practice, the Commissioner served VAA with a TPS, which consists of information that the Commissioner claims are level A or level B pursuant to the Confidentiality Order. The TPS is 206 pages long.

10. Over the course of the inquiry, the Commissioner has gathered information from third parties. Representatives of the Commissioner summarized information from these third parties and organized this information according to the topics relevant to issues in the Commissioner's Application.
11. The TPS contains information that is both helpful and unhelpful to the Commissioner's Application.
12. On May 8, 2017, following a dispute between the parties over whether this motion should be heard before or after the discovery of the Commissioner's representative, the Tribunal issued a direction that this motion from VAA challenging the adequacy and accuracy of the TPS could be heard prior to examinations for discovery.

There is no indicia or evidence to indicate that the TPS is inadequate or inaccurate

13. In this motion, VAA challenges the adequacy and accuracy of the TPS prior to obtaining discovery of the Commissioner's representative. It has not provided any evidence to support its allegations about the TPS.
14. Acting in the public interest, the Commissioner has organized the TPS to maximize the amount of information provided to VAA without compromising the public interest privilege he has asserted.
15. The Commissioner has provided over 200 pages of TPS. On its face, there are no indicia to indicate the TPS is inadequate or inaccurate. The TPS contains information:
 - a. that is both helpful and unhelpful to the Commissioner's application;
 - b. about every topic at issue in the Commissioner's application;
 - c. from the time the investigation started; and
 - d. from every type of market participant.

16. VAA attempts to point to inconsistent statements contained in the TPS as evidence of inadequacy. VAA also argues that because the information is contained in 'snippets' without context it is unable to evaluate the strength and importance of this information. VAA misunderstands the purpose and nature of the TPS.
17. Consistent with Tribunal jurisprudence, the summaries are used to aggregate the facts, both helpful and unhelpful, known to the Commissioner, while keeping confidential the identity of the third parties that provided information. VAA is entitled to know that the Commissioner has been provided with an opinion or view on a relevant subject.
18. The nature of an investigation means that the Commissioner can obtain inconsistent information on an issue. It is possible that, given the different and often competing interests of the many market participants from whom the Commissioner has sought information, and as the Commissioner's understanding of the market evolves during the investigation, conflicting information will be obtained from different market contacts or even the same market contact.
19. It is not necessary at this stage for VAA to be able to assess the weight or importance of the information included in the TPS. As long as VAA is provided with the relevant information in the possession of the Commissioner along with information from the Commissioner's representative during discovery, VAA is able to prepare its case by, for example, obtaining evidence that contradicts the helpful information in the TPS.
20. As no evidence has been provided on the TPS' adequacy or accuracy and discovery of the Commissioner's representative has not occurred, there is no basis for an order for the Commissioner to provide a further

and better TPS. In fact, such an order would encourage future respondents to automatically challenge the TPS prior to discovery, even where, as in this case, there is no basis on which to do so.

21. The Commissioner seeks his costs of this motion and such further and other grounds as counsel may advise and the Tribunal may permit.

PART II. EVIDENCE TO BE USED AT THE HEARING

22. The Commissioner will use at the hearing such material as counsel may advise and this Court may permit.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15th DAY OF
MAY, 2017**



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