

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 24, 2017 CT-2016-015 Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 85

COMMISSIONER OF COMPETITION

Applicant

– and –

VANCOUVER AIRPORT AUTHORITY

Respondent

**MEMORANDUM OF FACT AND LAW OF THE
COMMISSIONER OF COMPETITION TO THE RESPONDENT'S MOTION
CHALLENGING ADEQUACY AND ACCURACY OF SUMMARIES**

PART I: OVERVIEW

1. The Commissioner of Competition (the "**Commissioner**"), acting in the public interest, has provided a 206 page third party summary ("**TPS**") to Vancouver Airport Authority ("**VAA**"), summarizing information the Commissioner has obtained from third parties during his investigation that is contained in records that are subject to a class-based public interest privilege.
2. This privilege exists to protect and facilitate the Commissioner's ability to enforce and administer the *Competition Act*. As such, in providing the facts to VAA in the TPS, the Commissioner has done so in a manner that preserves the public interest privilege in the underlying records upon which the TPS is based, so as to protect the identities of the third parties who provided the information and the integrity of the investigation while maximizing the amount of disclosure to VAA.
3. There are no indicia in the TPS to indicate that facts have been improperly shielded and no evidence filed by VAA to support its bald allegation that the TPS is inadequate or inaccurate. The evidentiary threshold that a respondent must meet to challenge the adequacy and accuracy of summaries prior to discovery of the Commissioner's representative is high. VAA has failed to meet this threshold.
4. Because the TPS has no indicia of inadequacy or inaccuracy, no other evidence has been filed, and discovery of the Commissioner's representative has not yet occurred, the Tribunal should dismiss VAA's motion. To do otherwise invites inefficient uses of Tribunal process and resources, and would encourage future respondents to automatically challenge the TPS, even where, as in this case, there is no basis on which to do so.

PART II: SUMMARY OF FACTS

A. VAA's Abuse of Dominance

5. On September 29, 2016, the Commissioner applied to the Tribunal 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 ("**Commissioner's Application**").¹
6. New-entrant firms have sought, and continue to seek, to provide In-flight Catering², comprising Catering and Galley Handling, at the Airport. Airlines operating commercial passenger air transportation services wish to procure In-flight Catering at the Airport from these new-entrant firms, to realize substantial cost savings and other benefits. Standing as a wall between these buyers and sellers of In-flight Catering is VAA.
7. VAA substantially or completely controls the market for access to the airside at the Airport for the supply of Galley Handling. Without VAA's authorization to access the airside, firms cannot supply Galley Handling at the Airport. VAA thus also substantially or completely controls the market for the supply of Galley Handling at the Airport.
8. Despite repeated requests from new-entrant firms seeking to provide In-flight Catering at the Airport, and unlike other airport authorities in Canada, VAA unjustifiably refuses to authorize their access to the airside. VAA also requires firms providing In-flight Catering at the Airport to lease land from VAA for the operation of Catering kitchen facilities, as

¹ The paragraphs that follow provide a high-level summary for context. For full particulars, see the pleadings in the Motion Record of the Respondent, Volume II, Tab 7 and Tab 9.

² Where capitalized terms are not defined in this Memorandum of Fact and Law, the Commissioner relies on those terms as they are defined in the Commissioner's Application.

a condition of authorizing access to the airside. VAA's conduct is a practice of anti-competitive acts, the purpose and effect of which is to exclude new-entrant firms from providing In-flight Catering or Galley Handling at the Airport.

9. VAA's practice with respect to airside access for the supply of Galley Handling has had, is having and is likely to have the effect of preventing or lessening competition substantially in the market for the supply of Galley Handling at the Airport. But for VAA's practice, the market for the supply of Galley Handling at the Airport would be substantially more competitive, including by way of lower prices, enhanced innovation and/or more efficient business models, and higher service quality.

B. Disclosure to VAA

10. 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 ("**Scheduling Order**"), the Commissioner served VAA with the Commissioner's Affidavit of Documents on February 15, 2017.
11. On March 20, 2017, Justice Gascon issued a confidentiality order regarding the treatment of certain classes of protected information ("**Confidentiality Order**").
12. 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.

13. On April 13, 2017, consistent with Tribunal practice, the Commissioner served VAA with his 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.
14. On April 28, 2017, pursuant to his continuing production obligation, the Commissioner delivered a supplemental affidavit of documents producing an additional 3,892 documents. In the supplemental affidavit of documents, the Commissioner asserts privilege over 66 documents; 49 documents are subject to claims of public interest privilege as well as one or more other forms of privilege and the remaining 17 documents are subject to claims of litigation privilege only.
15. 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.

C. The detailed TPS provided by the Commissioner

16. The TPS provides facts that have been gathered by the Commissioner during his investigation. The underlying documents are protected by public interest privilege. Thus the TPS must provide the facts in a manner that protects the identity of the parties who provided that information and protects the integrity of the investigation.

17. Acting in the public interest, the Commissioner must balance his obligation to protect third parties and the integrity of the investigation while maximizing the information that can be provided to the respondents in the TPS.
18. The TPS provided by the Commissioner is 206 pages. Because of the nature of the investigation, organizing the TPS by topics is the way that the Commissioner can maximize disclosure of the information while still protecting the identity of third parties and the integrity of the investigation.
19. Below is the table of contents from the Level B and Level A TPS respectively which demonstrates that information has been provided on all topics:

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20. The TPS has been drafted to maximize the amount of disclosure provided to VAA without revealing information that is protected by public interest privilege. VAA's motion asks for the Commissioner to redo this summary based on a bald unsupported allegation that this information lacks context. There are no indicia in the TPS or evidence provided to indicate that information has been withheld.

PART III: ISSUE IN DISPUTE

21. This motion raises the following issue: whether the Commissioner should be ordered to provide a further and better TPS where there is no evidentiary basis on which to do so.

PART IV: SUBMISSIONS

22. VAA's motion should be dismissed for the following reasons:
 - a. First, the TPS follows Tribunal jurisprudence and practice by providing the facts gathered during the investigation while protecting the information that is protected by a class-based public interest privilege. It does not contain any indicia that would indicate the TPS is inadequate or inaccurate.
 - b. Second, VAA has failed to file any evidence that the TPS is inadequate or inaccurate, and no evidence that would rebut the presumption that the Commissioner, acting in the public interest, has provided an adequate and accurate TPS.
 - c. Third, there is no breach of procedural fairness and to grant VAA's motion would invite an automatic challenge of the TPS in future applications. VAA has the opportunity to examine the Commissioner's representative on the TPS and then seek a remedy from the Tribunal pursuant to the Scheduling Order.

A. The TPS follows Tribunal jurisprudence and does not contain any indicia that would indicate the summary is inadequate or inaccurate

23. The Tribunal and multiple courts have consistently recognized that it is in the public interest to allow the Commissioner to maintain confidentiality over all information supplied by third parties, including their identities. This class privilege, which need not be established on a case-by-case basis, applies to notes, materials and statements obtained or prepared by the Commissioner and his staff from meetings, discussions or other communications with third parties.³
24. This long-standing recognition of public interest privilege over third party information has been coupled with a well-established practice in Competition Tribunal proceedings for the Commissioner to produce, prior to discovery, a TPS that informs the respondent about the facts the Commissioner has gathered.⁴ The TPS includes information, both favourable and adverse to the Commissioner's case, obtained from third parties.
25. Typically, respondents in Tribunal proceedings use discovery of the Commissioner's representative to help clarify the respondents' understanding of the information in the TPS and its context. Disputes, if any, related to the TPS are then settled at the refusals motion.⁵

³ *Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 6 [VAA Public Interest Privilege Decision]; *Canada (Commissioner of Competition) v Rogers Communications Inc*, 2013 ONSC 5386; *Commissioner of Competition v Toshiba of Canada Ltd*, 2010 ONSC 659; *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2016 BCSC 97; *Director of Investigation and Research v D & B Companies of Canada Ltd*, [1994] FCJ No 1643 (FCA), leave to appeal to the SCC refused.

⁴ *Director of Investigation and Research v. Southam Inc.* (16 July 1991), CT9001/130, Order Regarding Disclosure of Summaries at 4, [1991] CCTD No 21 (QL) (Comp Trib); *Director of Investigation and Research v Canadian Pacific Ltd* (1997), 78 CPR (3d) 421, at paras 9-12 (CT) [*Canadian Pacific*].

⁵ See eg, *Canada (Commissioner of Competition) v Air Canada*, CT-2011-004, available online <<http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=348>>; and

26. Notwithstanding that information regarding third parties will have been provided via the TPS, where a third party is to be called as a witness, the respondent will be informed of the identity of that third party and will be provided that third party's relevant evidence in advance of the hearing in accordance with the *Competition Tribunal Rules*.⁶
27. As required by Tribunal jurisprudence and practice, the Commissioner has produced a TPS that is 206 pages. Acting in the public interest,⁷ the Commissioner has organized the TPS to maximize the amount of disclosure provided to VAA without compromising the public interest privilege. This means drafting the TPS so as to protect the identity of the third parties who provided the information and protecting the integrity of the investigation.
28. On its face, there are no indicia to indicate the TPS is inadequate or inaccurate.
29. The TPS contains information:
 - a. that is both helpful and unhelpful⁸ to the Commissioner's Application;
 - b. about every topic at issue in the Commissioner's Application;⁹
 - c. from the time the investigation started;¹⁰ and

Canada (Commissioner of Competition) v Direct Energy Marketing Limited, CT-2012-003, available online <<http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=356>>.

⁶ SOR/2008-141.

⁷ *Commissioner of Competition v Pearson Canada Inc*, 2014 FC 376, at para 43 [*Pearson*].

⁸ Motion Record of the Respondent, Summary of Third Party Information, dated April 13, 2017 (Confidential – Level B), Vol 2 of 2, Tab 6, at p 451, bullet-points 5 & 7 from the top of the page [TPS Level B].

⁹ Motion Record of the Respondent, Summary of Third Party Information, dated April 13, 2017 (Confidential – Level A), Vol 2 of 2, Tab 5, at p 384 [TPS Level A]; and TPS Level B, *supra* note 8, at pp 404-405. The table of contents of the TPS highlight the relevant topics at issue.

d. from every type of market participant.¹¹

30. In this motion, VAA points to purported inconsistent statements contained in the TPS as evidence of inadequacy. VAA also argues that the information is contained in 'snippets' and is without context, and as a result VAA is unable to evaluate the strength and importance of this information.
31. VAA misunderstands the purpose and nature of the TPS. VAA is entitled to know that the Commissioner has been provided with an opinion or view on a relevant subject. The purpose of the summary is not for VAA to be able to assess the weight or importance of the information included in the TPS.¹²
32. Additionally, the nature of an investigation means that the Commissioner could potentially obtain inconsistent information on a given topic or issue. This information may be obtained from different market contacts

¹⁰ Information in the TPS dates from 2007 through 2017. On October 17, 2014, the Commissioner commenced the present inquiry.

¹¹ See *eg*, TPS Level A, *supra* note 9; and TPS Level B, *supra* note 8, Examples include:

- one or more firms that provides In-Flight Catering, at pp 385-402, 406-492, 498-503, and 505-592;
- one or more airlines based in Canada, at pp 399, 406-435, 439-446, 448-457, 459-464, 466-477, 480, 484-498, 500-508, 526, 530-531, 533-539, 546-547, 550-551, 553-557, 560-564, 566-573, 575-579, 581-582, 584-585, and 588-593;
- one or more airlines based in Europe, at pp 400, 406, 415-417, 433, 438, 441, 443, 445-446, 449, 451-454, 456-458, 464-465, 472-476, 483, 485-488, 490, 492-493, 495-496, 499, 501-506, 508, 526-527, 529-532, 534, 543, 546, 553, 555, 559, 571-573, 579, 585, and 587-588;
- one or more airport authorities in Canada, at pp 400-401, 425, 453, 529, 532, 536, 540-546, 548-549, 560, 562, 564, 574, and 593;
- one or more food sourcing firms, at pp 402, 407, 410, 420, 436, 438, 456, 474, 491, 502, 512, 551-552, 555-556, 558, 560-562, 566, 568, 570, 572, 575-576, 581, 588-589, 590, and 592;
- one or more airlines based in the United States, at pp 409, 415, 427-429, 430, 432-434, 444, 457, 461, 467, 492-493, 496-497, 500, 504, 505, 507-508, 530, 536, 546, 577-579, and 590;
- one or more food manufacturers, at pp 413-414, 421, 436-442, 535, and 573-574; and
- one or more airlines based in the Asia-Pacific region, at pp 416, 434, 455, 458, 459, 491, 498-499, 505, 527, 554, 557, and 584.

¹² *Canadian Pacific Ltd*, *supra* note 4, at para 10.

or even the same market contact, in light of differing and different perspectives of various market participants from whom the Commissioner obtains information, and in light of how the Commissioner's understanding of the market evolves over the course of the investigation.

33. VAA has not provided any reason to diverge from Tribunal practice and jurisprudence.

B. VAA has failed to meet the high evidentiary burden required to support claims of the inadequacy or inaccuracy of a Third Party Summary

34. Justice Gascon noted in his direction to counsel for this motion that “in all situations, it will always remain the burden of the moving party to provide the required evidence to support, at the time of its motion, its allegations and the reliefs sought from the Tribunal”.¹³ VAA has filed none.
35. Although the Tribunal has never considered the level of evidence required to challenge the adequacy and accuracy of summaries before discoveries have occurred,¹⁴ analogous situations in other contexts suggest that the evidentiary threshold to challenge the adequacy and accuracy of a TPS should be high.

¹³ *Commissioner of Competition v Vancouver Airport Authority*, Direction to Counsel, CT2016-015, #72 (8 May 2017).

¹⁴ *Commissioner of Competition v Air Canada*, 2012 CACT 21; and *Commissioner of Competition v Direct Energy Marketing Limited*, 2014 CACT 17. But see *Director of Investigation and Research v Canadian Pacific Ltd*, 1997 CarswellNat 3101, [1997] CCTD No 28, where the Respondent sought to override the public interest privilege claim of the Commissioner regarding certain transcripts of examinations pursuant to section 11 of the Act, and where the Respondent raised an alternative request of seeking a further and better summary. The Tribunal left the alternative request unanswered, leaving the Respondent to renew its request.

36. In the context of a challenge to a class-based privilege claim or the sufficiency of production, analogous challenges demonstrate that the evidentiary threshold should be high:
- a. There is a heavy onus on a party attempting to override a class-based privilege.¹⁵ In the present context, one of public interest privilege, the onus is to demonstrate “compelling circumstances” or a “more compelling competing interest”.¹⁶
 - b. Federally, it is well established that the party seeking further and better production must offer persuasive evidence that the documents are available and have not be produced.¹⁷ The discovery process should not be used as a fishing expedition.¹⁸ In Ontario, when challenging the sufficiency of production, speculation, intuition or guesswork are insufficient.¹⁹
37. The evidentiary threshold that a respondent must meet to challenge the adequacy and accuracy of summaries should be at least as high as described in the analogous situations above if not higher, because the Commissioner benefits from a presumption that actions taken pursuant to the *Competition Act*²⁰ are bona fide and in the public interest, absent evidence of bad faith.²¹
38. Acting in the public interest, the Commissioner has organized the TPS to maximize the amount of disclosure provided to VAA without compromising the public interest privilege he has asserted.

¹⁵ *LLA v AB*, [1995] SCJ No 102, at para 65.

¹⁶ VAA Public Interest Decision, *supra* note 3, at paras 88-91.

¹⁷ *Rhodia UK Ltd v Jarvis Imports (2000) Ltd*, 2005 FC 1628, at para 5; *Pharmascience Inc v GlaxoSmithKline Inc*, 2007 FC 1261, at para 18.

¹⁸ *Apotex Inc v Sanofi-Aventis*, 2011 FC 52, at para 20.

¹⁹ *Seelster Farms Inc v Ontario*, 2016 ONSC 97, at para 45; and *Bow Helicopters v Textron Canada Limited*, [1981] OJ No 2265, at para 7 (Ont Sup Ct), as per Master Sandler.

²⁰ RSC 1985, c C-34.

²¹ *Pearson*, *supra* note 7, at para 43.

39. VAA has failed to file any evidence to support its claims on the TPS' purported inadequacy or inaccuracy, much less to overturn the presumption that the Commissioner has acted in the public interest. There is simply no basis on which to order the Commissioner to provide a further and better TPS.

C. No breach of procedural fairness

40. VAA has provided no evidence that the TPS delivered by the Commissioner is a breach of procedural fairness.

41. Justice Gascon noted in the VAA Public Interest Privilege Decision that:

Considerations of procedural fairness are not to be analyzed in silos or in isolation at various stages of a judicial process. Courts need to look at the whole process involved, not strictly at a preliminary stage like the discovery process, in order to determine whether issues of fairness arise or not. As long as there is no final decision, and as long as there might still be changes or further steps in the judicial process, it would be hard to claim a breach of procedural fairness or for a court to conclude that such a breach occurred.²²

42. VAA's motion hardly raises issues of procedural fairness as described by Justice Gascon above. In fact, it invites an inefficient use of Tribunal process and resources.

43. VAA has not yet examined a representative of the Commissioner for discovery, during which discoveries it could ask the questions that it now poses. It would be more efficient for the Tribunal to have a full factual record on which to assess VAA's claims.

²² VAA Public Interest Privilege Decision, *supra* note 3, at para 171.

44. Pursuant to the Scheduling Order, VAA will have an additional opportunity to make a request to the Tribunal for a further and better TPS, following examinations for discovery. The present motion does not preclude this possibility.

45. Finally, the Tribunal should not encourage unsupported challenges to the TPS. Without requiring evidence, the Tribunal may encourage future respondents to automatically challenge a TPS, even where, as in this case, there is no basis on which to do so.

PART V: ORDER SOUGHT

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

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24TH DAY OF
MAY, 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