

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

COMMISSIONER OF COMPETITION

Applicant

FILED / PRODUIT
Date: May 10, 2017
CT-2016-015
Andrée Bernier for / pour
REGISTRAR / REGISTRAIRE

—and—

OTTAWA, ONT.

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VANCOUVER AIRPORT AUTHORITY

Respondent

NOTICE OF MOTION

(Respondent's Motion Challenging Adequacy and Accuracy of Summaries)

TAKE NOTICE that the Respondent, Vancouver Airport Authority ("VAA"), will make a motion on June 7, 2017, to a judicial member of the Competition Tribunal who is not sitting on the panel that will eventually hear the within application, pursuant to the Direction to Counsel of Mr. Justice Gascon, dated May 8, 2017. The estimated duration of the motion is one day.

THIS MOTION IS FOR:

1. an Order requiring the Applicant, the Commissioner of Competition (the “Commissioner”), to produce to VAA complete, adequate and accurate summaries of those documents that the Commissioner has refused to produce on the basis of an asserted public interest privilege;
2. VAA’s costs of this motion; and
3. such further and other relief as the Tribunal deems just.

THE GROUNDS FOR THE MOTION ARE:

The Proceedings

1. The Commissioner began this proceeding by Notice of Application, dated September 29, 2016, seeking relief against VAA pursuant to section 79 of the Act.
2. 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”.

3. VAA is statutorily mandated to operate the Airport in a safe and efficient manner, to generate economic development for Vancouver and, more broadly, for British Columbia and the rest of Canada.

4. VAA delivered its Response on or about November 14, 2016. Among other things, VAA asserts that, given the small (and declining) market for in-flight catering of fresh meals, the entry of additional catering firms would imperil the continued viability of the operations of the two existing catering firms at the Airport, thereby adversely affecting VAA's ability to attract and retain flights in furtherance of its public interest mandate.

5. VAA further pleads that the Airport's ability to ensure the availability of a competitive choice of freshly prepared meals is very important to its efforts to attract new airlines and routes and retain existing flights and routes at the Airport. VAA also denies that it substantially controls the relevant market (which it states is broader than the Airport, owing to the fact that airlines can meet their "Galley Handling" needs through self-supply or double catering) and also denies that its conduct has substantially lessened or prevented competition.

6. VAA's pleading also includes the following allegations:

- (a) the 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;
- (b) VAA denies that such self-supply is (as asserted by the Commissioner) not "feasible or preferable" for most airlines in Canada; and

- (c) given the unique ground access issues at YVR and the importance of fresh food being provided to aircraft on a timely basis, and given that flight manifests are subject to last-minute changes, it is not desirable for catering services to be located off-airport.

7. All of the foregoing allegations are denied by the Commissioner.

The Commissioner's Affidavit of Documents and Assertion of Public Interest Privilege

8. 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 in this Application 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: Schedule A, comprising relevant documents in the Commissioner's possession or control that do not contain confidential information and over which the Commissioner does not claim privilege; Schedule B, comprising relevant documents in the Commissioner's possession or control that the Commissioner is willing to produce (as the Commissioner is not claiming privilege in respect thereof) but that the Commissioner asserts contain confidential information; and Schedule C, comprising relevant documents in the Commissioner's possession or control in respect of which the Commissioner claims privilege.

9. 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.

10. Approximately five weeks later, on or about March 21, 2017, the Commissioner delivered an Amended Affidavit of Documents. The Amended Affidavit does not list any new documents additional to those listed in the February Affidavit. Rather, it reflects the Commissioner's decision to waive privilege over approximately 8500 documents.

11. 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).

12. The Commissioner continues to assert public interest privilege over approximately 1200 documents. Those 1200 withheld documents include every 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

13. In other words, despite the fact that the Commissioner has 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.

The Summaries Produced by the Commissioner

14. On or about April 13, 2017, the Commissioner produced a "Summary of Third Party Information". The summary was divided into two documents. The first contains information which the Commissioner claims as Level A pursuant to the Confidentiality Order. The second contains information which the Commissioner claims as Level B pursuant to the Confidentiality Order.

15. Together, the two documents purport to be a summary of relevant information learned 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.

16. The two documents (referred to hereinafter as the “Summaries”) comprise thousands of snippets of information, provided in a jumbled, non-linear manner, wholly divorced from context, in such a way as to render their content essentially meaningless and uninformative.

17. The Summaries do not convey to the Respondent the facts that have been gathered by the Commissioner. They will not permit the Respondent to conduct an efficient and meaningful examination for discovery of the Commissioner’s representative. They will not permit the Respondent to know the case it has to meet. And they will, accordingly, frustrate effective pre-trial preparation.

18. As a result, the Summaries do not meet the requirements set out in the jurisprudence. They are inadequate and deficient and do not fulfill their intended function as a safeguard mechanism to counterbalance the unfairness that would otherwise be the result of the Commissioner’s assertion of public interest privilege – a safeguard mechanism that the Tribunal has repeatedly recognized as necessary to temper the adverse impact on the search for truth and on the Respondent’s right to a fair hearing that the limited disclosure and the high threshold (e.g., compelling circumstances or compelling competing interest) required to authorize lifting public interest privilege would otherwise have.

19. Without summaries that properly serve their intended safeguard function, the Commissioner's assertion of public interest privilege produces a result that is inconsistent with the high level of procedural fairness which is required in proceedings before the Tribunal.

20. All of the foregoing is subject to the Respondent's primary position (as asserted on the motion that was argued on March 22, 2017 that was disposed of by *Reasons for Order and Order of Gascon J.* on April 24, 2017, in respect of which a Notice of Appeal was issued on May 4, 2017) that the public interest privilege as asserted by the Commissioner should not be recognized by the Tribunal. In addition, all of the foregoing is without prejudice to the Respondent's right to bring a motion at a later date seeking to lift the privilege on the basis of compelling circumstances or a compelling competing interest. The Respondent reserves all of its rights in that regard.

21. Such further and other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) affidavit of Monique Allen, sworn May 10, 2017;
- (b) the Amended Affidavit of Documents of the Commissioner of Competition, affirmed March 21, 2017;
- (c) Summary of Third Party Information – Confidential – Level A, dated April 13, 2017;
- (d) Summary of Third Party Information – Confidential – Level B, dated April 13, 2017;

- (e) the Supplemental Affidavit of Documents of the Commissioner of Competition, affirmed April 27, 2017;
- (f) the pleadings and proceedings herein; and
- (g) such further and other evidence as counsel may advise and the Tribunal may permit.

DATED at Toronto, Ontario this 10th day of May, 2017


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