

**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 26, 2017  
CT-2016-015

Andrée Bernier for / pour  
REGISTRAR / REGISTRAIRE

**COMMISSIONER OF COMPETITION**

**Applicant**

—and—

OTTAWA, ONT.

# 109

**VANCOUVER AIRPORT AUTHORITY**

**Respondent**

---

**AFFIDAVIT OF RYAN COOKSON**

*(Sworn June 25, 2017)*

---

I, **RYAN COOKSON**, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND**

**SAY:**

1. I am a lawyer at Goodmans LLP, counsel for the Respondent, Vancouver Airport Authority (“VAA”). As such, I have knowledge of the matters to which I depose in this affidavit,

except where that information was obtained from others, in which case I have identified the source of that information and verily believe such information to be true.

2. Attached as **Exhibit "A"** is an e-mail from Jonathan Hood, counsel for the Applicant, Commissioner of Competition, to Julie Rosenthal, Michael Koch and Calvin Goldman, counsel for VAA, sent on June 23, 2017 at 11:58am, which was forwarded to me by Ms. Rosenthal.

3. Attached as **Exhibit "B"** is an e-mail from Ms. Rosenthal to Mr. Hood sent June 23, 2017, at 1:41pm, on which I was copied.

4. Attached as **Exhibit "C"** is an e-mail from Ms. Rosenthal to Mr. Hood sent June 23, 2017, at 2:38pm, on which I was copied.

5. Attached as **Exhibit "D"** is an e-mail from Mr. Hood to Ms. Rosenthal sent June 23, 2017, at 2:41pm, which was forwarded to me by Ms. Rosenthal.

6. Attached as **Exhibit "E"** is an e-mail from Ms. Rosenthal to Mr. Hood sent June 23, 2017, at 3:00pm, on which I was copied.

7. Attached as **Exhibit "F"** is an e-mail from Mr. Hood to Andrée Bernier, Deputy Registrar, Competition Tribunal, sent June 23, 2017, at 3:02pm, which was forwarded to me by Ms. Rosenthal.

8. Attached as **Exhibit "G"** is an e-mail from Ms. Rosenthal to Mr. Hood sent June 23, 2017, at 3:12pm, on which I was copied.

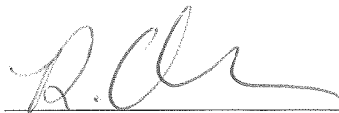
9. Attached as **Exhibit "H"** is an e-mail from Ms. Rosenthal to Mr. Hood sent June 23, 2017, at 3:16pm, on which I was copied.
10. Attached as **Exhibit "I"** is an e-mail from Ms. Rosenthal to Ms. Bernier sent June 23, 2017, at 3:17pm, on which I was copied.
11. Attached as **Exhibit "J"** is an e-mail from Mr. Hood to Ms. Bernier sent June 23, 2017, at 3:21pm, which was forwarded to me by Ms. Rosenthal.
12. Attached as **Exhibit "K"** is an e-mail from Ms. Rosenthal to Mr. Hood sent June 23, 2017, at 3:24pm, on which I was copied.
13. Attached as **Exhibit "L"** is an e-mail from Ms. Rosenthal to Ms. Bernier sent June 23, 2017, at 3:25pm, which was forwarded to me by Ms. Rosenthal.
14. Attached as **Exhibit "M"** is an e-mail from Ms. Bernier to Ms. Rosenthal and Mr. Hood, among others, sent June 23, 2017, at 3:34pm, which was forwarded to me by Ms. Rosenthal.
15. Attached as **Exhibit "N"** is an e-mail from Ms. Rosenthal to Mr. Hood sent June 23, 2017, at 3:42pm, on which I was copied.
16. Attached as **Exhibit "O"** is an e-mail from Mr. Hood to Ms. Rosenthal sent June 23, 2017, at 3:52pm, which was forwarded to me by Ms. Rosenthal.
17. Attached as **Exhibit "P"** is an e-mail from Ms. Rosenthal to Mr. Hood sent June 23, 2017, at 3:53pm, on which I was copied.

18. I am advised by Ms. Rosenthal, and believe, that she has not received any response to her e-mail sent June 23, 2017, at 3:53pm.

19. Attached as **Exhibit "Q"** is an e-mail that was forwarded to me by Ms. Rosenthal, which attaches an audio recording of the Case Management Conference held before Justice Gascon in this matter on May 4, 2017.

20. Attached as **Exhibit "R"** is an unofficial transcription of the audio recording of the Case Management Conference held before Justice Gascon in this matter on May 4, 2017.

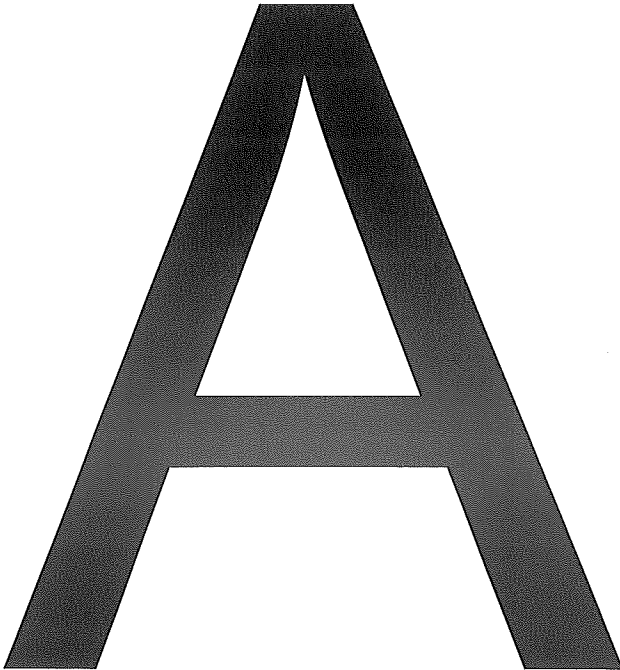
SWORN before me at the City of Toronto,  
in the Province of Ontario on June 25, 2017.



A Commissioner for taking affidavits

Name: *Rebecca Olscher*

  
RYAN COOKSON



Cookson, Ryan

**Subject:** FW: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015) -- Motion re: Summaries  
**Attachments:** VAA- Commissioner Supplementary Factum- Confidential - final.pdf

**From:** Hood, Jonathan (IC) [mailto:jonathan.hood@canada.ca]  
**Sent:** June-23-17 11:58 AM  
**To:** Goldman, Calvin; Rosenthal, Julie; Koch, Michael  
**Cc:** Rydel, Katherine (IC); Caron, Ryan (IC); Bergeron, Francis (IC); Rushton, Kevin (IC); Foster, Alicia (IC); Antonio Di Domenico  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015) -- Motion re: Summaries

All:

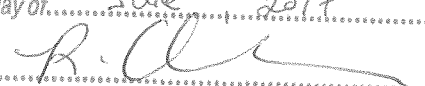
Please find attached the Confidential Commissioner's Supplementary Motion Record which contains our supplementary Memorandum of Fact and Law.

Please confirm receipt.

Regards,

Jonathan

**Jonathan Hood**  
Counsel - Avocat  
Tel: (416) 954-5925 | Fax: (416) 973-5131  
jonathan.hood@canada.ca  
Department of Justice - Ministère de la Justice  
Services juridiques - Bureau de la concurrence  
Competition Bureau - Legal Services  
151 Yonge Street, 3rd Floor, Toronto, Ontario. M5C 2W7  
Gouvernement du Canada | Government of Canada  
[www.cb-bc.gc.ca](http://www.cb-bc.gc.ca)

This is Exhibit.....<sup>"A"</sup>.....referred to in the  
affidavit of..... Ryan Cookson.....  
sworn before me, this..... 25<sup>th</sup>.....  
day of..... June..... 2017.....  
  
A COMMISSIONER FOR TAKING AFFIDAVITS

This e-mail message including any of its attachments is confidential, may be privileged and is intended for the exclusive use of the addressee. Any other person is strictly prohibited from disclosing, distributing or reproducing it. If the addressee cannot be reached or is unknown to you, please inform the sender by return e-mail immediately and delete this e-mail message and destroy all copies. Thank you.

Le présent message et toutes les pièces jointes qui l'accompagnent peuvent contenir de l'information confidentielle ou protégée destinée uniquement à la personne ou à l'entité à laquelle elle est adressée. Toute diffusion, distribution, copie ou autre action concernant son contenu par une autre personne que son destinataire est strictement interdite. Si vous avez reçu ce message par erreur, veuillez m'en informer immédiatement à l'adresse ci-dessus et l'effacer. Merci.

**From:** Olscher, Rebecca [mailto:rolscher@goodmans.ca]  
**Sent:** June-21-17 3:46 PM  
**To:** Hood, Jonathan (IC)  
**Cc:** Rydel, Katherine (IC); Caron, Ryan (IC); Bergeron, Francis (IC); Rushton, Kevin (IC); Foster, Alicia (IC); Goldman, Calvin; Rosenthal, Julie  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015) -- Motion re: Summaries

Jonathan,

Please find attached the confidential version of VAA's Memorandum of Fact and Law in respect of VAA's summaries motion. The text that will be redacted in the public version is highlighted in the attached confidential version.

The redacted public version of the Memorandum of Fact and Law will follow shortly, at which time I will send both versions to the Tribunal as well.

Regards,

**Rebecca Olscher**  
Goodmans LLP

416.849.6984  
[rolscher@goodmans.ca](mailto:rolscher@goodmans.ca)  
goodmans.ca

---

**From:** Olscher, Rebecca  
**Sent:** Wednesday, June 21, 2017 1:14 PM  
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**Cc:** Rydel, Katherine (IC); Caron, Ryan (IC); Bergeron, Francis (IC); Rushton, Kevin (IC); Foster, Alicia (IC); Goldman, Calvin; Rosenthal, Julie  
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Jonathan,

VAA's Memo of Fact and Law will follow later this afternoon.

Regards,

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**Cc:** Rydel, Katherine (IC); Caron, Ryan (IC); Bergeron, Francis (IC); Rushton, Kevin (IC); Foster, Alicia (IC); Goldman, Calvin; Rosenthal, Julie  
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Received. Thanks Rebecca.

Will we be receiving a revised or supplementary factum later today?

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Regards,

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[goodmans.ca](http://goodmans.ca)

\*\*\*\*\* Attention \*\*\*\*\*

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B

Cookson, Ryan

From: Rosenthal, Julie
Sent: Friday, June 23, 2017 1:41 PM
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Regards,

Julie

This is Exhibit....."B".....referred to in the affidavit of..... Ryan Cookson..... sworn before me, this... 25th..... day of..... June..... 2017..... R. Al..... A COMMISSIONER FOR TAKING AFFIDAVITS

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Regards,

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Jonathan Hood
Counsel - Avocat
Tel: (416) 954-5925 | Fax: (416) 973-5131

[jonathan.hood@canada.ca](mailto:jonathan.hood@canada.ca)

Department of Justice - Ministère de la Justice  
Services juridiques - Bureau de la concurrence  
Competition Bureau - Legal Services  
151 Yonge Street, 3rd Floor, Toronto, Ontario. M5C 2W7  
Gouvernement du Canada | Government of Canada

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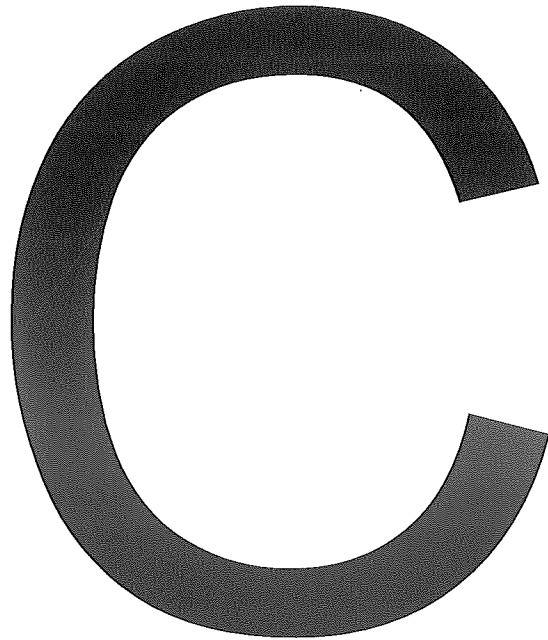
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Cookson, Ryan

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**Jonathan Hood**

**Counsel - Avocat**

Tel: (416) 954-5925 | Fax: (416) 973-5131

[jonathan.hood@canada.ca](mailto:jonathan.hood@canada.ca)

Department of Justice - Ministère de la Justice

Services juridiques - Bureau de la concurrence

Competition Bureau - Legal Services

151 Yonge Street, 3rd Floor, Toronto, Ontario. M5C 2W7

Gouvernement du Canada | Government of Canada

[www.cb-bc.gc.ca](http://www.cb-bc.gc.ca)

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\*\*\*\*\* Attention \*\*\*\*\*



**Public Version**

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D

Cookson, Ryan

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Regards,

Julie

**From:** Hood, Jonathan (IC) [mailto:[jonathan.hood@canada.ca](mailto:jonathan.hood@canada.ca)]

**Sent:** June-23-17 11:58 AM

**To:** Goldman, Calvin; Rosenthal, Julie; Koch, Michael

**Cc:** Rydel, Katherine (IC); Caron, Ryan (IC); Bergeron, Francis (IC); Rushton, Kevin (IC); Foster, Alicia (IC); Antonio Di Domenico

**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015) -- Motion re: Summaries

All:

Please find attached the Confidential Commissioner's Supplementary Motion Record which contains our supplementary Memorandum of Fact and Law.

Please confirm receipt.

Regards,

Jonathan

**Jonathan Hood**

**Counsel - Avocat**

Tel: (416) 954-5925 | Fax: (416) 973-5131

[jonathan.hood@canada.ca](mailto:jonathan.hood@canada.ca)

Department of Justice - Ministère de la Justice

Services juridiques - Bureau de la concurrence

Competition Bureau - Legal Services

151 Yonge Street, 3rd Floor, Toronto, Ontario. M5C 2W7

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---

**From:** Olscher, Rebecca [mailto:[rolscher@goodmans.ca](mailto:rolscher@goodmans.ca)]

**Sent:** June-21-17 3:46 PM

**To:** Hood, Jonathan (IC)

**Cc:** Rydel, Katherine (IC); Caron, Ryan (IC); Bergeron, Francis (IC); Rushton, Kevin (IC); Foster, Alicia (IC); Goldman, Calvin; Rosenthal, Julie

**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015) -- Motion re: Summaries

Jonathan,

Please find attached the confidential version of VAA's Memorandum of Fact and Law in respect of VAA's summaries motion. The text that will be redacted in the public version is highlighted in the attached confidential version.

The redacted public version of the Memorandum of Fact and Law will follow shortly, at which time I will send both versions to the Tribunal as well.

Regards,

**Rebecca Olscher**

Goodmans LLP

416.849.6984

[rolscher@goodmans.ca](mailto:rolscher@goodmans.ca)

goodmans.ca

**From:** Olscher, Rebecca

**Sent:** Wednesday, June 21, 2017 1:14 PM

**To:** 'Hood, Jonathan (IC)'

**Cc:** Rydel, Katherine (IC); Caron, Ryan (IC); Bergeron, Francis (IC); Rushton, Kevin (IC); Foster, Alicia (IC); Goldman, Calvin; Rosenthal, Julie

**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015) -- Motion re: Summaries

Jonathan,

VAA's Memo of Fact and Law will follow later this afternoon.

Regards,

**Rebecca Olscher**

Goodmans LLP

416.849.6984

[rolscher@goodmans.ca](mailto:rolscher@goodmans.ca)

goodmans.ca

**From:** Hood, Jonathan (IC) [<mailto:jonathan.hood@canada.ca>]

**Sent:** Wednesday, June 21, 2017 12:51 PM

**To:** Olscher, Rebecca

**Cc:** Rydel, Katherine (IC); Caron, Ryan (IC); Bergeron, Francis (IC); Rushton, Kevin (IC); Foster, Alicia (IC); Goldman, Calvin; Rosenthal, Julie

**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015) -- Motion re: Summaries

Received. Thanks Rebecca.

Will we be receiving a revised or supplementary factum later today?

**From:** Olscher, Rebecca [<mailto:rolscher@goodmans.ca>]

**Sent:** June-21-17 12:44 PM

**To:** Hood, Jonathan (IC)

**Cc:** Rydel, Katherine (IC); Caron, Ryan (IC); Bergeron, Francis (IC); Rushton, Kevin (IC); Foster, Alicia (IC); Goldman, Calvin; Rosenthal, Julie

**Subject:** Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015) -- Motion re: Summaries

Mr. Hood,

Please find attached VAA's Supplementary Motion Record (a public version and a confidential version) in respect of VAA's summaries motion.

Hard copies will follow by courier.

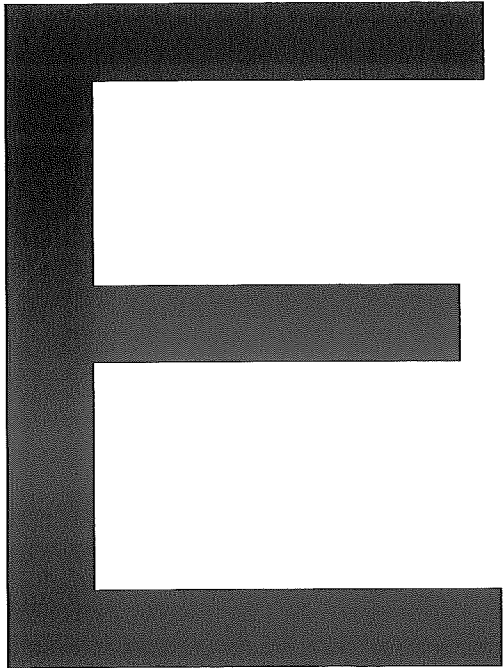
Regards,

**Rebecca Olscher**  
Goodmans LLP

416.849.6984  
[rolscher@goodmans.ca](mailto:rolscher@goodmans.ca)  
goodmans.ca

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Cookson, Ryan

**From:** Rosenthal, Julie  
**Sent:** Friday, June 23, 2017 3:00 PM  
**To:** Hood, Jonathan (IC)  
**Cc:** Rydel, Katherine (IC); Caron, Ryan (IC); Bergeron, Francis (IC); Rushton, Kevin (IC); Foster, Alicia (IC); 'Antonio Di Domenico'; Goldman, Calvin  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015) -- Motion re: Summaries

Jonathan,

In light of the late hour and the uncertainty, it would appear that the motion cannot go ahead on Monday and we intend to contact the Tribunal to so advise. Unless we hear from you in the next 20 minutes, this is the email we intend to send to Andree Bernier.

Ms. Bernier,

At noon today, the Commissioner served a Supplementary Motion Record that contained an affidavit, along with a Supplemental Memorandum of Fact and Law that contains argument relying upon that affidavit. The parties are currently in discussion as to whether the Supplementary Motion Record is proper and how best to proceed. As these discussions are unlikely to be completed within the hour, it would appear that Monday's hearing cannot proceed as scheduled. In the circumstances, we would ask that the hearing be adjourned to a date and time to be fixed by Justice Gascon.

Counsel for the Commissioner is copied on this email.

**From:** Hood, Jonathan (IC) [mailto:jonathan.hood@canada.ca]  
**Sent:** June-23-17 2:41 PM  
**To:** Rosenthal, Julie  
**Cc:** Rydel, Katherine (IC); Caron, Ryan (IC); Bergeron, Francis (IC); Rushton, Kevin (IC); Foster, Alicia (IC); 'Antonio Di Domenico'; Goldman, Calvin  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015) -- Motion re: Summaries

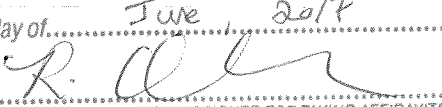
I am getting instructions.

**From:** Rosenthal, Julie [mailto:jrosenthal@goodmans.ca]  
**Sent:** June-23-17 2:38 PM  
**To:** Hood, Jonathan (IC)  
**Cc:** Rydel, Katherine (IC); Caron, Ryan (IC); Bergeron, Francis (IC); Rushton, Kevin (IC); Foster, Alicia (IC); 'Antonio Di Domenico'; Goldman, Calvin  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015) -- Motion re: Summaries

Jonathan,

May we please hear from you.

**From:** Rosenthal, Julie  
**Sent:** June-23-17 1:41 PM

This is Exhibit..... "E" referred to in the  
affidavit of..... Ryan Cookson  
sworn before me, this..... 25<sup>th</sup>  
day of..... June..... 2017  
  
A COMMISSIONER FOR TAKING AFFIDAVITS



**To:** Hood, Jonathan (IC)  
**Cc:** Rydel, Katherine (IC); Caron, Ryan (IC); Bergeron, Francis (IC); Rushton, Kevin (IC); Foster, Alicia (IC); Antonio Di Domenico; Goldman, Calvin  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015) -- Motion re: Summaries

Jonathan,

We have had a very brief opportunity to review the materials you have delivered.

The motion was briefed (and the schedule agreed to) on the basis that the Commissioner would not be filing any further evidence. That was reflected by Justice Gascon's Direction to Counsel, which permitted you to file a Supplementary Memo of Fact and Law by mid-day today. No leave to file any supplementary evidence was ever sought by the Commissioner nor was it granted by the Tribunal.

In these circumstances, please confirm that you will not be filing your Supplementary Motion Record as it merely contains supplementary evidence and argument based thereon.

Absent this confirmation, we have to assess next steps, including whether the motion can proceed on Monday.

Regards,

Julie

---

**From:** Hood, Jonathan (IC) [<mailto:jonathan.hood@canada.ca>]

**Sent:** June-23-17 11:58 AM

**To:** Goldman, Calvin; Rosenthal, Julie; Koch, Michael

**Cc:** Rydel, Katherine (IC); Caron, Ryan (IC); Bergeron, Francis (IC); Rushton, Kevin (IC); Foster, Alicia (IC); Antonio Di Domenico

**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015) -- Motion re: Summaries

All:

Please find attached the Confidential Commissioner's Supplementary Motion Record which contains our supplementary Memorandum of Fact and Law.

Please confirm receipt.

Regards,

Jonathan

**Jonathan Hood**

**Counsel - Avocat**

Tel: (416) 954-5925 | Fax: (416) 973-5131

[jonathan.hood@canada.ca](mailto:jonathan.hood@canada.ca)

Department of Justice - Ministère de la Justice

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**Sent:** June-21-17 3:46 PM

**To:** Hood, Jonathan (IC)

**Cc:** Rydel, Katherine (IC); Caron, Ryan (IC); Bergeron, Francis (IC); Rushton, Kevin (IC); Foster, Alicia (IC); Goldman, Calvin; Rosenthal, Julie

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The redacted public version of the Memorandum of Fact and Law will follow shortly, at which time I will send both versions to the Tribunal as well.

Regards,

**Rebecca Olscher**

Goodmans LLP

416.849.6984

[rolscher@goodmans.ca](mailto:rolscher@goodmans.ca)

goodmans.ca

**From:** Olscher, Rebecca

**Sent:** Wednesday, June 21, 2017 1:14 PM

**To:** 'Hood, Jonathan (IC)'

**Cc:** Rydel, Katherine (IC); Caron, Ryan (IC); Bergeron, Francis (IC); Rushton, Kevin (IC); Foster, Alicia (IC); Goldman, Calvin; Rosenthal, Julie

**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015) -- Motion re: Summaries

Jonathan,

VAA's Memo of Fact and Law will follow later this afternoon.

Regards,

**Rebecca Olscher**

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416.849.6984

[rolscher@goodmans.ca](mailto:rolscher@goodmans.ca)

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**Sent:** Wednesday, June 21, 2017 12:51 PM

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**Cc:** Rydel, Katherine (IC); Caron, Ryan (IC); Bergeron, Francis (IC); Rushton, Kevin (IC); Foster, Alicia (IC); Goldman,

Calvin; Rosenthal, Julie

**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015) -- Motion re: Summaries

Received. Thanks Rebecca.

Will we be receiving a revised or supplementary factum later today?

**From:** Olscher, Rebecca [<mailto:rolscher@goodmans.ca>]

**Sent:** June-21-17 12:44 PM

**To:** Hood, Jonathan (IC)

**Cc:** Rydel, Katherine (IC); Caron, Ryan (IC); Bergeron, Francis (IC); Rushton, Kevin (IC); Foster, Alicia (IC); Goldman, Calvin; Rosenthal, Julie

**Subject:** Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015) -- Motion re: Summaries

Mr. Hood,

Please find attached VAA's Supplementary Motion Record (a public version and a confidential version) in respect of VAA's summaries motion.

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Regards,

**Rebecca Olscher**

Goodmans LLP

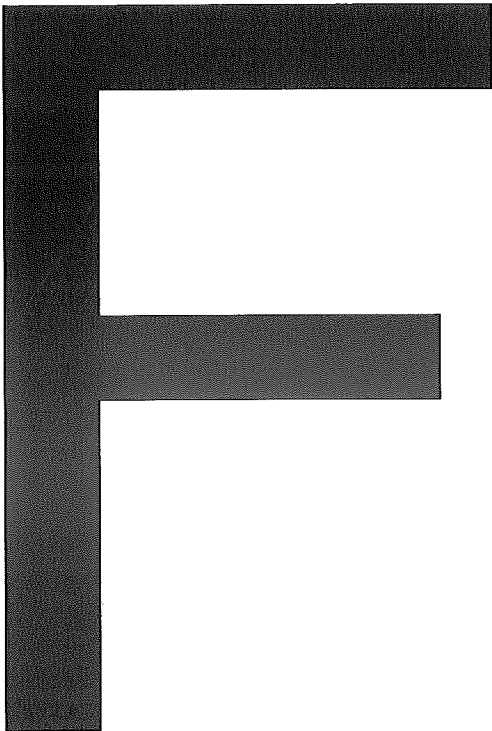
416.849.6984

[rolscher@goodmans.ca](mailto:rolscher@goodmans.ca)

[goodmans.ca](http://goodmans.ca)

88145 Attention 88145

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**Cookson, Ryan**

**Subject:** FW: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

**From:** Hood, Jonathan (IC) [mailto:[jonathan.hood@canada.ca](mailto:jonathan.hood@canada.ca)]

**Sent:** June-23-17 3:02 PM

**To:** Bernier, Andrée

**Cc:** Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC); Goldman, Calvin; Rosenthal, Julie; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)

**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Dear Ms. Bernier:

The Commissioner will be seeking leave from the Tribunal on Monday to file the attached Supplementary Motion Record that includes our Supplementary Memorandum of Fact and Law. We sent the attached materials to VAA by email at 11:58 a.m. this morning.

Ms. Rosenthal sent the attached email at 1:41 pm objecting to our filing the Supplementary Motion Record.

We submit that the Tribunal should accept late filing of these materials and hear VAA's motion on Monday. The supplementary motion record contains an affidavit from a paralegal that only attaches correspondence between counsel related to the production of the reordered summaries. There should therefore be no issue with respect to the authenticity of the correspondence between us. In addition, the legal argument in the supplementary memorandum of fact and law, while it does cite one letter, relies principally on the reordered summaries. We have also provided the correspondence to demonstrate why we provided the reordered summaries. Therefore, accepting these materials will cause no prejudice to VAA.

Please let us know if the Tribunal will proceed with hearing this motion on Monday.

The attached materials from the Commissioner are Confidential Level B and should not be posted to the website.

Regards,

Jonathan

This is Exhibit.....<sup>"F"</sup>.....referred to in the  
affidavit of.....*Ryan Cookson*.....  
sworn before me, this.....*25<sup>th</sup>*.....  
day of.....*June*.....*2017*.....  
*R. Hood*  
.....  
A COMMISSIONER FOR TAKING AFFIDAVITS

**Jonathan Hood**

**Counsel - Avocat**

Tel: (416) 954-5925 | Fax: (416) 973-5131

[jonathan.hood@canada.ca](mailto:jonathan.hood@canada.ca)

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**From:** Bernier, Andrée [<mailto:Andree.Bernier@tribunal.gc.ca>]  
**Sent:** June-23-17 1:30 PM  
**To:** Hood, Jonathan (IC); Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC)  
**Subject:** FW: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Good afternoon Counsel,

I am writing to follow up on the Direction attached. The Commissioner was directed to serve and file his Supplementary Memorandum of Fact and Law, if any, by mid-day today. It seems that as of now, the Tribunal did not receive it. Would you please confirm that the Commissioner does not intend to file one. Or if yes, when are you expecting to submit it.

Please respond at your earliest convenience.

**Andrée Bernier**  
A/Deputy Registrar/Registraire adjointe par intérim  
Competition Tribunal / Tribunal de la concurrence  
600-90 Sparks, Ottawa ON K1P 5B4  
Tel.: 613-954-0857 Fax: 613-952-1123

**From:** Bernier, Andrée  
**Sent:** June-16-17 3:07 PM  
**To:** 'Rosenthal, Julie'; Hood, Jonathan (IC); Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC) ([katherine.rydel@canada.ca](mailto:katherine.rydel@canada.ca)); Koch, Michael  
**Subject:** Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Good afternoon,

The attached direction was served to you electronically but our system isn't sending us a confirmation that you received it. Would you please acknowledge receipt of this email for the record.

Thank you.

**Andrée Bernier**  
A/Deputy Registrar/Registraire adjointe par intérim  
Competition Tribunal / Tribunal de la concurrence  
600-90 Sparks, Ottawa ON K1P 5B4  
Tel.: 613-954-0857 Fax: 613-952-1123

G

This is Exhibit.....<sup>66</sup> <sup>64</sup> **Public Version**  
affidavit of..... *Ryan Cookson*.....  
sworn before me, this..... *25<sup>th</sup>*.....  
day of..... *June 2017*.....  
*R. Cookson*  
A COMMISSIONER FOR TAKING AFFIDAVITS

**Cookson, Ryan**

**From:** Rosenthal, Julie  
**Sent:** Friday, June 23, 2017 3:12 PM  
**To:** Hood, Jonathan (IC)  
**Cc:** Antonio Di Domenico (adidomenico@fasken.com); Rydel, Katherine (IC); Goldman, Calvin; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Jonathan,

We strenuously object to your unilateral correspondence below to the Tribunal below of which we had no notice and which we believe to be entirely improper.

We repeat our earlier position that the affidavit of Amani Syed is improper and should not form part of the record. We expressed our position to you and were awaiting your response. Rather than providing such a response, you chose to send unilateral correspondence to the Tribunal.

Without prejudice to our position that the affidavit is improper and should not be accepted as part of the record, the motion obviously needs to be adjourned so that we can conduct a cross-examination of the affiant and, if necessary, file a Supplementary Memo of Fact and Law. In those circumstances, the most expedient way to proceed would be for you to bring a motion for leave to file the Syed affidavit at the return of our motion with respect to the adequacy and accuracy of the summaries. If the Syed affidavit is admitted into evidence, then so too would be the cross-examination thereon and so too would be any Supplementary Memo of Fact and Law.

We intend to so advise the Tribunal as follows:

Ms. Bernier,

We object to Mr. Hood's correspondence below, of which we had no notice and which we believe to be improper. Furthermore, we object to the filing of the Commissioner's Motion Record – a position of which we advised the Commissioner and in respect of which we were awaiting his response, when we received a copy of the email sent to you, below.

We have advised Mr. Hood that, without prejudice to our position that the affidavit contained in the Motion Record (as well as the Supplemental Memo of Fact and Law that relies upon it) is improper, we require an opportunity to conduct a cross-examination on that affidavit.

In the circumstances, it would appear that a case management conference might be the most efficient way to resolve the uncertainty.

**From:** Hood, Jonathan (IC) [mailto:jonathan.hood@canada.ca]  
**Sent:** June-23-17 3:02 PM  
**To:** Bernier, Andrée  
**Cc:** Antonio Di Domenico (adidomenico@fasken.com); Rydel, Katherine (IC); Goldman, Calvin; Rosenthal, Julie; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)



Dear Ms. Bernier:

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Ms. Rosenthal sent the attached email at 1:41 pm objecting to our filing the Supplementary Motion Record.

We submit that the Tribunal should accept late filing of these materials and hear VAA's motion on Monday. The supplementary motion record contains an affidavit from a paralegal that only attaches correspondence between counsel related to the production of the reordered summaries. There should therefore be no issue with respect to the authenticity of the correspondence between us. In addition, the legal argument in the supplementary memorandum of fact and law, while it does cite one letter, relies principally on the reordered summaries. We have also provided the correspondence to demonstrate why we provided the reordered summaries. Therefore, accepting these materials will cause no prejudice to VAA.

Please let us know if the Tribunal will proceed with hearing this motion on Monday.

The attached materials from the Commissioner are Confidential Level B and should not be posted to the website.

Regards,

Jonathan

**Jonathan Hood**

**Counsel - Avocat**

Tel: (416) 954-5925 | Fax: (416) 973-5131

[jonathan.hood@canada.ca](mailto:jonathan.hood@canada.ca)

Department of Justice - Ministère de la Justice

Services juridiques - Bureau de la concurrence

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**From:** Bernier, Andrée [<mailto:Andree.Bernier@tribunal.gc.ca>]

**Sent:** June-23-17 1:30 PM

**To:** Hood, Jonathan (IC); Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC)

**Subject:** FW: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Good afternoon Counsel,

## Public Version

I am writing to follow up on the Direction attached. The Commissioner was directed to serve and file his Supplementary Memorandum of Fact and Law, if any, by mid-day today. It seems that as of now, the Tribunal did not receive it. Would you please confirm that the Commissioner does not intend to file one. Or if yes, when are you expecting to submit it.

Please respond at your earliest convenience.

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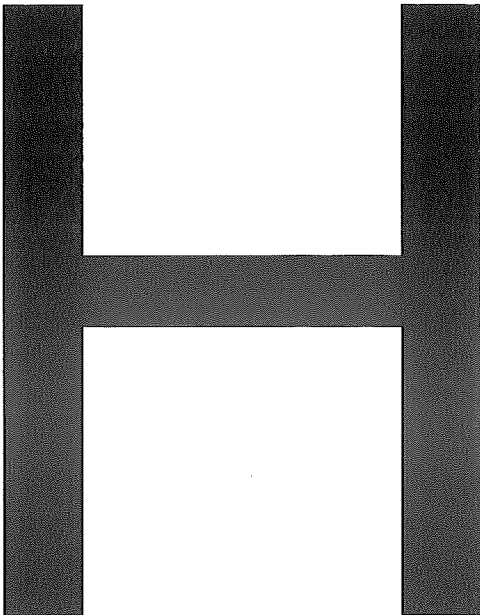
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**Subject:** Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

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Competition Tribunal / Tribunal de la concurrence  
600-90 Sparks, Ottawa ON K1P 5B4  
Tel.: 613-954-0857 Fax: 613-952-1123



This is Exhibit "H" Public Version  
affidavit of Ryan Cookson  
sworn before me, this 25<sup>th</sup>  
day of June, 2017  
R. Cl  
A COMMISSIONER FOR TAKING AFFIDAVITS

**Cookson, Ryan**

**From:** Rosenthal, Julie  
**Sent:** Friday, June 23, 2017 3:16 PM  
**To:** 'Hood, Jonathan (IC)'  
**Cc:** 'Antonio Di Domenico (adidomenico@fasken.com)'; 'Rydel, Katherine (IC)'; Goldman, Calvin; Koch, Michael; 'Rushton, Kevin (IC)'; 'Foster, Alicia (IC)'; 'Bergeron, Francis (IC)'; 'Caron, Ryan (IC)'  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Revised version of email we are going to send to Bernier below:

Ms. Bernier,

We object to Mr. Hood's correspondence below, of which we had no notice and which we believe to be improper. Furthermore, we object to the filing of the Commissioner's Motion Record – a position of which we advised the Commissioner and in respect of which we were awaiting his response, when we were copied on the email he sent to you, below.

We have advised Mr. Hood that, without prejudice to our position that the affidavit contained in the Motion Record (as well as the Supplemental Memo of Fact and Law that relies upon it) is improper, we require an opportunity to conduct a cross-examination on that affidavit and that, accordingly, an adjournment of Monday's motion will be required.

In the circumstances, it would appear that a case management conference would be the most efficient way to resolve the uncertainty. We apologise for the late notice. However, it was due entirely to the unilateral action of the Commissioner's counsel.

In addition, please advise as to when you can produce Amani Syed for cross-examination.

**From:** Rosenthal, Julie  
**Sent:** June-23-17 3:12 PM  
**To:** Hood, Jonathan (IC)  
**Cc:** Antonio Di Domenico (adidomenico@fasken.com); Rydel, Katherine (IC); Goldman, Calvin; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Jonathan,

We strenuously object to your unilateral correspondence below to the Tribunal below of which we had no notice and which we believe to be entirely improper.

We repeat our earlier position that the affidavit of Amani Syed is improper and should not form part of the record. We expressed our position to you and were awaiting your response. Rather than providing such a response, you chose to send unilateral correspondence to the Tribunal.

Without prejudice to our position that the affidavit is improper and should not be accepted as part of the record, the motion obviously needs to be adjourned so that we can conduct a cross-examination of the affiant and, if necessary, file a Supplementary Memo of Fact and Law. In those circumstances, the most expedient way to proceed would be for you to bring a motion for leave to file the Syed affidavit at the return of our motion with respect to the adequacy and

accuracy of the summaries. If the Syed affidavit is admitted into evidence, then so too would be the cross-examination thereon and so too would be any Supplementary Memo of Fact and Law.

We intend to so advise the Tribunal as follows:

Ms. Bernier,

We object to Mr. Hood's correspondence below, of which we had no notice and which we believe to be improper. Furthermore, we object to the filing of the Commissioner's Motion Record – a position of which we advised the Commissioner and in respect of which we were awaiting his response, when we received a copy of the email sent to you, below.

We have advised Mr. Hood that, without prejudice to our position that the affidavit contained in the Motion Record (as well as the Supplemental Memo of Fact and Law that relies upon it) is improper, we require an opportunity to conduct a cross-examination on that affidavit.

In the circumstances, it would appear that a case management conference might be the most efficient way to resolve the uncertainty.

**From:** Hood, Jonathan (IC) [<mailto:jonathan.hood@canada.ca>]

**Sent:** June-23-17 3:02 PM

**To:** Bernier, Andrée

**Cc:** Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC); Goldman, Calvin; Rosenthal, Julie; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)

**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Dear Ms. Bernier:

The Commissioner will be seeking leave from the Tribunal on Monday to file the attached Supplementary Motion Record that includes our Supplementary Memorandum of Fact and Law. We sent the attached materials to VAA by email at 11:58 a.m. this morning.

Ms. Rosenthal sent the attached email at 1:41 pm objecting to our filing the Supplementary Motion Record.

We submit that the Tribunal should accept late filing of these materials and hear VAA's motion on Monday. The supplementary motion record contains an affidavit from a paralegal that only attaches correspondence between counsel related to the production of the reordered summaries. There should therefore be no issue with respect to the authenticity of the correspondence between us. In addition, the legal argument in the supplementary memorandum of fact and law, while it does cite one letter, relies principally on the reordered summaries. We have also provided the correspondence to demonstrate why we provided the reordered summaries. Therefore, accepting these materials will cause no prejudice to VAA.

Please let us know if the Tribunal will proceed with hearing this motion on Monday.

The attached materials from the Commissioner are Confidential Level B and should not be posted to the website.

Regards,

Jonathan

**Jonathan Hood**

**Counsel - Avocat**

Tel: (416) 954-5925 | Fax: (416) 973-5131

[jonathan.hood@canada.ca](mailto:jonathan.hood@canada.ca)

Department of Justice - Ministère de la Justice

Services juridiques - Bureau de la concurrence

Competition Bureau - Legal Services

151 Yonge Street, 3rd Floor, Toronto, Ontario. M5C 2W7

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**From:** Bernier, Andrée [<mailto:Andree.Bernier@tribunal.gc.ca>]

**Sent:** June-23-17 1:30 PM

**To:** Hood, Jonathan (IC); Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC)

**Subject:** FW: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Good afternoon Counsel,

I am writing to follow up on the Direction attached. The Commissioner was directed to serve and file his Supplementary Memorandum of Fact and Law, if any, by mid-day today. It seems that as of now, the Tribunal did not receive it. Would you please confirm that the Commissioner does not intend to file one. Or if yes, when are you expecting to submit it.

Please respond at your earliest convenience.

Andrée Bernier

A/Deputy Registrar/Registraire adjointe par intérim

Competition Tribunal / Tribunal de la concurrence

600-90 Sparks, Ottawa ON K1P 5B4

Tel.: 613-954-0857 Fax: 613-952-1123

**From:** Bernier, Andrée

**Sent:** June-16-17 3:07 PM

**To:** 'Rosenthal, Julie'; Hood, Jonathan (IC); Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC) ([katherine.rydel@canada.ca](mailto:katherine.rydel@canada.ca)); Koch, Michael

**Subject:** Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

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Thank you.

Andrée Bernier

A/Deputy Registrar/Registraire adjointe par intérim

**Competition Tribunal / Tribunal de la concurrence**

600-90 Sparks, Ottawa ON K1P 5B4

Tel.: 613-954-0857 Fax: 613-952-1123





This is Exhibit <sup>6</sup> <sup>1</sup> referred to in the  
Public Version  
affidavit of..... Ryan Cookson  
sworn before me, this..... 25<sup>th</sup>  
day of..... June..... 2017  
R. Cl  
A COMMISSIONER FOR TAKING AFFIDAVITS

**Cookson, Ryan**

**From:** Rosenthal, Julie  
**Sent:** Friday, June 23, 2017 3:17 PM  
**To:** Bernier, Andrée  
**Cc:** Antonio Di Domenico (adidomenico@fasken.com); Rydel, Katherine (IC); Goldman, Calvin; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC); 'Hood, Jonathan (IC)'  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Ms. Bernier,

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We have advised Mr. Hood that, without prejudice to our position that the affidavit contained in the Motion Record (as well as the Supplemental Memo of Fact and Law that relies upon it) is improper, we require an opportunity to conduct a cross-examination on that affidavit and that, accordingly, an adjournment of Monday's motion will be required.

In the circumstances, it would appear that an urgent case management conference this afternoon would be the most efficient way to resolve the uncertainty. We apologise for the late notice. However, it was due entirely to the unilateral action of the Commissioner's counsel.

Regards,

Julie Rosenthal

**From:** Hood, Jonathan (IC) [mailto:jonathan.hood@canada.ca]  
**Sent:** June-23-17 3:02 PM  
**To:** Bernier, Andrée  
**Cc:** Antonio Di Domenico (adidomenico@fasken.com); Rydel, Katherine (IC); Goldman, Calvin; Rosenthal, Julie; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

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We submit that the Tribunal should accept late filing of these materials and hear VAA's motion on Monday. The supplementary motion record contains an affidavit from a paralegal that only attaches correspondence between counsel related to the production of the reordered summaries. There should therefore be no issue with respect to the authenticity of the correspondence between us. In addition, the legal argument in the supplementary memorandum of fact and law, while it does cite one letter, relies principally on the reordered summaries. We have also provided the

correspondence to demonstrate why we provided the reordered summaries. Therefore, accepting these materials will cause no prejudice to VAA.

Please let us know if the Tribunal will proceed with hearing this motion on Monday.

The attached materials from the Commissioner are Confidential Level B and should not be posted to the website.

Regards,

Jonathan

**Jonathan Hood**

**Counsel - Avocat**

Tel: (416) 954-5925 | Fax: (416) 973-5131

[jonathan.hood@canada.ca](mailto:jonathan.hood@canada.ca)

Department of Justice - Ministère de la Justice

Services juridiques - Bureau de la concurrence

Competition Bureau - Legal Services

151 Yonge Street, 3rd Floor, Toronto, Ontario. M5C 2W7

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[www.cb-bc.gc.ca](http://www.cb-bc.gc.ca)

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**From:** Bernier, Andrée [<mailto:Andree.Bernier@tribunal.gc.ca>]

**Sent:** June-23-17 1:30 PM

**To:** Hood, Jonathan (IC); Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC)

**Subject:** FW: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Good afternoon Counsel,

I am writing to follow up on the Direction attached. The Commissioner was directed to serve and file his Supplementary Memorandum of Fact and Law, if any, by mid-day today. It seems that as of now, the Tribunal did not receive it. Would you please confirm that the Commissioner does not intend to file one. Or if yes, when are you expecting to submit it.

Please respond at your earliest convenience.

**Andrée Bernier**

A/Deputy Registrar/Registraire adjointe par intérim

Competition Tribunal / Tribunal de la concurrence

600-90 Sparks, Ottawa ON K1P 5B4

Tel.: 613-954-0857 Fax: 613-952-1123

**From:** Bernier, Andrée

**Sent:** June-16-17 3:07 PM

**To:** 'Rosenthal, Julie'; Hood, Jonathan (IC); Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC) ([katherine.rydel@canada.ca](mailto:katherine.rydel@canada.ca)); Koch, Michael

**Subject:** Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

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Thank you.

**Andrée Bernier**  
A/Deputy Registrar/Registraire adjointe par intérim  
Competition Tribunal / Tribunal de la concurrence  
600-90 Sparks, Ottawa ON K1P 5B4  
Tel.: 613-954-0857 Fax: 613-952-1123

J

**Cookson, Ryan**

**Subject:** FW: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

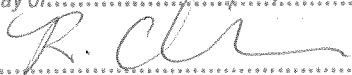
**From:** Hood, Jonathan (IC) [mailto:jonathan.hood@canada.ca]  
**Sent:** June-23-17 3:21 PM  
**To:** Rosenthal, Julie; Bernier, Andrée  
**Cc:** Antonio Di Domenico (adidomenico@fasken.com); Rydel, Katherine (IC); Goldman, Calvin; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Ms. Bernier.

There was nothing improper about our correspondence with the Tribunal as all parties were copied. The Commissioner's position is that this can be addressed on Monday. It is not new evidence or responding evidence. VAA has this correspondence and there is no question to its authenticity. It is simply correspondence between counsel to ensure that the Tribunal has a complete record. Cross examination is not required. The Tribunal can decide whether this material assists them on Monday but it should not delay the hearing of motion.

Regards,

Jonathan

This is Exhibit "J" referred to in the affidavit of Ryan Cookson sworn before me, this 25<sup>th</sup> day of June 2017  
  
A COMMISSIONER FOR TAKING AFFIDAVITS

**From:** Rosenthal, Julie [mailto:jrosenthal@goodmans.ca]  
**Sent:** June-23-17 3:17 PM  
**To:** Bernier, Andrée  
**Cc:** Antonio Di Domenico (adidomenico@fasken.com); Rydel, Katherine (IC); Goldman, Calvin; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC); Hood, Jonathan (IC)  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Ms. Bernier,

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In the circumstances, it would appear that an urgent case management conference this afternoon would be the most efficient way to resolve the uncertainty. We apologise for the late notice. However, it was due entirely to the unilateral action of the Commissioner's counsel.

Regards,

Julie Rosenthal

\*\*\*\*\* Attention \*\*\*\*\*

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**From:** Hood, Jonathan (IC) [<mailto:jonathan.hood@canada.ca>]

**Sent:** June-23-17 3:02 PM

**To:** Bernier, Andrée

**Cc:** Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC); Goldman, Calvin; Rosenthal, Julie; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)

**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Dear Ms. Bernier:

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Ms. Rosenthal sent the attached email at 1:41 pm objecting to our filing the Supplementary Motion Record.

We submit that the Tribunal should accept late filing of these materials and hear VAA's motion on Monday. The supplementary motion record contains an affidavit from a paralegal that only attaches correspondence between counsel related to the production of the reordered summaries. There should therefore be no issue with respect to the authenticity of the correspondence between us. In addition, the legal argument in the supplementary memorandum of fact and law, while it does cite one letter, relies principally on the reordered summaries. We have also provided the correspondence to demonstrate why we provided the reordered summaries. Therefore, accepting these materials will cause no prejudice to VAA.

Please let us know if the Tribunal will proceed with hearing this motion on Monday.

The attached materials from the Commissioner are Confidential Level B and should not be posted to the website.

Regards,

Jonathan

**Jonathan Hood**

**Counsel - Avocat**

Tel: (416) 954-5925 | Fax: (416) 973-5131

[jonathan.hood@canada.ca](mailto:jonathan.hood@canada.ca)

Department of Justice - Ministère de la Justice

Services juridiques - Bureau de la concurrence

Competition Bureau - Legal Services

151 Yonge Street, 3rd Floor, Toronto, Ontario. M5C 2W7

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**From:** Bernier, Andrée [<mailto:Andree.Bernier@tribunal.gc.ca>]

**Sent:** June-23-17 1:30 PM

**To:** Hood, Jonathan (IC); Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC)

**Subject:** FW: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Good afternoon Counsel,

I am writing to follow up on the Direction attached. The Commissioner was directed to serve and file his Supplementary Memorandum of Fact and Law, if any, by mid-day today. It seems that as of now, the Tribunal did not receive it. Would you please confirm that the Commissioner does not intend to file one. Or if yes, when are you expecting to submit it.

Please respond at your earliest convenience.

Andrée Bernier

A/Deputy Registrar/Registraire adjointe par intérim

Competition Tribunal / Tribunal de la concurrence

600-90 Sparks, Ottawa ON K1P 5B4

Tel.: 613-954-0857 Fax: 613-952-1123

**From:** Bernier, Andrée

**Sent:** June-16-17 3:07 PM

**To:** 'Rosenthal, Julie'; Hood, Jonathan (IC); Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC) ([katherine.rydel@canada.ca](mailto:katherine.rydel@canada.ca)); Koch, Michael

**Subject:** Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Good afternoon,

The attached direction was served to you electronically but our system isn't sending us a confirmation that you received it. Would you please acknowledge receipt of this email for the record.

Thank you.

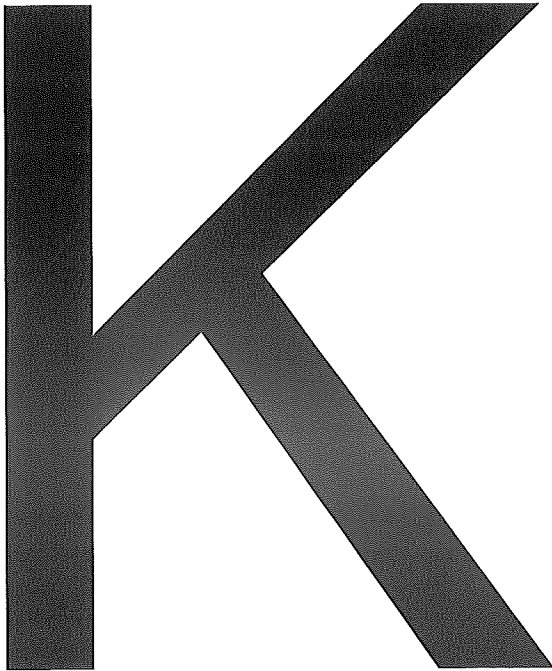
Andrée Bernier

A/Deputy Registrar/Registraire adjointe par intérim

Competition Tribunal / Tribunal de la concurrence

600-90 Sparks, Ottawa ON K1P 5B4

Tel.: 613-954-0857 Fax: 613-952-1123





This is Exhibit.....<sup>"K"</sup>.....**Public Version**  
affidavit of.....*Ryan Cookson*.....  
sworn before me, this.....*25<sup>th</sup>*.....  
day of.....*June*.....*2017*.....  
*R. Cookson*  
A COMMISSIONER FOR TAKING AFFIDAVITS

**Cookson, Ryan**

**From:** Rosenthal, Julie  
**Sent:** Friday, June 23, 2017 3:24 PM  
**To:** Hood, Jonathan (IC)  
**Cc:** Antonio Di Domenico (adidomenico@fasken.com); Rydel, Katherine (IC); Goldman, Calvin; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

You persist in unilateral communications with the Tribunal on contentious matters, which we reiterate is not proper. This is the email we intend to send to Ms. Bernier:

Ms. Bernier,

We do not believe it appropriate to engage in such a debate by means of emails with the Tribunal. We repeat our earlier request for an urgent case management conference to address whether the motion can proceed on Monday.

**From:** Hood, Jonathan (IC) [mailto:jonathan.hood@canada.ca]  
**Sent:** June-23-17 3:21 PM  
**To:** Rosenthal, Julie; Bernier, Andrée  
**Cc:** Antonio Di Domenico (adidomenico@fasken.com); Rydel, Katherine (IC); Goldman, Calvin; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Ms. Bernier.

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Jonathan

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**To:** Bernier, Andrée  
**Cc:** Antonio Di Domenico (adidomenico@fasken.com); Rydel, Katherine (IC); Goldman, Calvin; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC); Hood, Jonathan (IC)  
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## Public Version

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Regards,

Julie Rosenthal

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**From:** Hood, Jonathan (IC) [<mailto:jonathan.hood@canada.ca>]

**Sent:** June-23-17 3:02 PM

**To:** Bernier, Andrée

**Cc:** Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC); Goldman, Calvin; Rosenthal, Julie; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)

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Regards,

Jonathan

**Jonathan Hood**

**Counsel - Avocat**

Tel: (416) 954-5925 | Fax: (416) 973-5131

[jonathan.hood@canada.ca](mailto:jonathan.hood@canada.ca)

Department of Justice - Ministère de la Justice

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**From:** Bernier, Andrée [<mailto:Andree.Bernier@tribunal.gc.ca>]

**Sent:** June-23-17 1:30 PM

**To:** Hood, Jonathan (IC); Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC)

**Subject:** FW: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Good afternoon Counsel,

I am writing to follow up on the Direction attached. The Commissioner was directed to serve and file his Supplementary Memorandum of Fact and Law, if any, by mid-day today. It seems that as of now, the Tribunal did not receive it. Would you please confirm that the Commissioner does not intend to file one. Or if yes, when are you expecting to submit it.

Please respond at your earliest convenience.

Andrée Bernier

A/Deputy Registrar/Registraire adjointe par intérim

Competition Tribunal / Tribunal de la concurrence

600-90 Sparks, Ottawa ON K1P 5B4

Tel.: 613-954-0857 Fax: 613-952-1123

**From:** Bernier, Andrée

**Sent:** June-16-17 3:07 PM

**To:** 'Rosenthal, Julie'; Hood, Jonathan (IC); Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC) ([katherine.rydel@canada.ca](mailto:katherine.rydel@canada.ca)); Koch, Michael

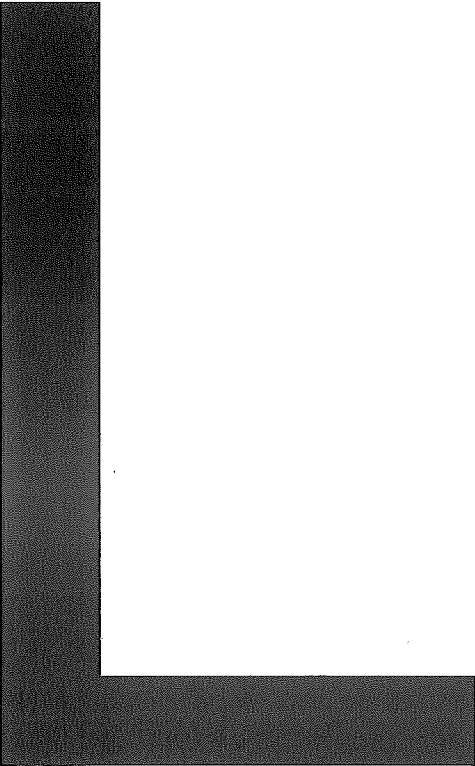
**Subject:** Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Good afternoon,

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Thank you.

**Andrée Bernier**  
**A/Deputy Registrar/Registraire adjointe par intérim**  
**Competition Tribunal / Tribunal de la concurrence**  
600-90 Sparks, Ottawa ON K1P 5B4  
Tel.: 613-954-0857 Fax: 613-952-1123



Cookson, Ryan

**Subject:** FW: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

**From:** Rosenthal, Julie [mailto:jrosenthal@goodmans.ca]  
**Sent:** June-23-17 3:25 PM  
**To:** Bernier, Andrée  
**Cc:** Antonio Di Domenico (adidomenico@fasken.com); Rydel, Katherine (IC); Goldman, Calvin; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC); 'Hood, Jonathan (IC)'  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Ms. Bernier,

We do not believe it appropriate to engage in such a debate by means of emails with the Tribunal. We repeat our earlier request for an urgent case management conference to address whether the motion can proceed on Monday.

Regards,

Julie Rosenthal

This is Exhibit..... "L" ..... referred to in the affidavit of..... Ryan Cookson ..... sworn before me, this..... 25<sup>th</sup> ..... day of..... June ..... 2017 .....  
*R. O. [Signature]*  
A COMMISSIONER FOR TAKING AFFIDAVITS

**From:** Hood, Jonathan (IC) [mailto:jonathan.hood@canada.ca]  
**Sent:** June-23-17 3:21 PM  
**To:** Rosenthal, Julie; Bernier, Andrée  
**Cc:** Antonio Di Domenico (adidomenico@fasken.com); Rydel, Katherine (IC); Goldman, Calvin; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Ms. Bernier.

There was nothing improper about our correspondence with the Tribunal as all parties were copied. The Commissioner's position is that this can be addressed on Monday. It is not new evidence or responding evidence. VAA has this correspondence and there is no question to its authenticity. It is simply correspondence between counsel to ensure that the Tribunal has a complete record. Cross examination is not required. The Tribunal can decide whether this material assists them on Monday but it should not delay the hearing of motion.

Regards,

Jonathan

**From:** Rosenthal, Julie [mailto:jrosenthal@goodmans.ca]  
**Sent:** June-23-17 3:17 PM  
**To:** Bernier, Andrée  
**Cc:** Antonio Di Domenico (adidomenico@fasken.com); Rydel, Katherine (IC); Goldman, Calvin; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC); Hood, Jonathan (IC)  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Ms. Bernier,

## Public Version

We object to Mr. Hood's correspondence below, of which we had no notice and which we believe to be improper. Furthermore, we object to the filing of the Commissioner's Motion Record – a position of which we advised the Commissioner and in respect of which we were awaiting his response, when we were copied on the email he sent to you, below.

We have advised Mr. Hood that, without prejudice to our position that the affidavit contained in the Motion Record (as well as the Supplemental Memo of Fact and Law that relies upon it) is improper, we require an opportunity to conduct a cross-examination on that affidavit and that, accordingly, an adjournment of Monday's motion will be required.

In the circumstances, it would appear that an urgent case management conference this afternoon would be the most efficient way to resolve the uncertainty. We apologise for the late notice. However, it was due entirely to the unilateral action of the Commissioner's counsel.

Regards,

Julie Rosenthal

\*\*\*\*\* Attention \*\*\*\*\*

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**From:** Hood, Jonathan (IC) [<mailto:jonathan.hood@canada.ca>]

**Sent:** June-23-17 3:02 PM

**To:** Bernier, Andrée

**Cc:** Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC); Goldman, Calvin; Rosenthal, Julie; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)

**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Dear Ms. Bernier:

The Commissioner will be seeking leave from the Tribunal on Monday to file the attached Supplementary Motion Record that includes our Supplementary Memorandum of Fact and Law. We sent the attached materials to VAA by email at 11:58 a.m. this morning.

Ms. Rosenthal sent the attached email at 1:41 pm objecting to our filing the Supplementary Motion Record.

We submit that the Tribunal should accept late filing of these materials and hear VAA's motion on Monday. The supplementary motion record contains an affidavit from a paralegal that only attaches correspondence between counsel related to the production of the reordered summaries. There should therefore be no issue with respect to the authenticity of the correspondence between us. In addition, the legal argument in the supplementary memorandum of fact and law, while it does cite one letter, relies principally on the reordered summaries. We have also provided the correspondence to demonstrate why we provided the reordered summaries. Therefore, accepting these materials will cause no prejudice to VAA.

Please let us know if the Tribunal will proceed with hearing this motion on Monday.

The attached materials from the Commissioner are Confidential Level B and should not be posted to the website.

Regards,

Jonathan

**Jonathan Hood**

**Counsel - Avocat**

Tel: (416) 954-5925 | Fax: (416) 973-5131

[jonathan.hood@canada.ca](mailto:jonathan.hood@canada.ca)

Department of Justice - Ministère de la Justice

Services juridiques - Bureau de la concurrence

Competition Bureau - Legal Services

151 Yonge Street, 3rd Floor, Toronto, Ontario. M5C 2W7

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**Sent:** June-23-17 1:30 PM

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**Subject:** FW: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Good afternoon Counsel,

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Please respond at your earliest convenience.

**Andrée Bernier**

**A/Deputy Registrar/Registraire adjointe par intérim**

**Competition Tribunal / Tribunal de la concurrence**

600-90 Sparks, Ottawa ON K1P 5B4

Tel.: 613-954-0857 Fax: 613-952-1123

**From:** Bernier, Andrée

**Sent:** June-16-17 3:07 PM

**To:** 'Rosenthal, Julie'; Hood, Jonathan (IC); Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC) ([katherine.rydel@canada.ca](mailto:katherine.rydel@canada.ca)); Koch, Michael

**Subject:** Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Good afternoon,



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Thank you.

**Andrée Bernier**  
**A/Deputy Registrar/Registraire adjointe par intérim**  
**Competition Tribunal / Tribunal de la concurrence**  
600-90 Sparks, Ottawa ON K1P 5B4  
Tel.: 613-954-0857 Fax: 613-952-1123

**M**

Cookson, Ryan

**Subject:** FW: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

**From:** Bernier, Andrée [mailto:Andree.Bernier@tribunal.gc.ca]

**Sent:** June-23-17 3:34 PM

**To:** Rosenthal, Julie; Antonio Di Domenico (adidomenico@fasken.com); Rydel, Katherine (IC); Caron, Ryan (IC); Goldman, Calvin; Koch, Michael; 'Hood, Jonathan (IC)'; Rushton, Kevin (IC); Bergeron, Francis (IC); Foster, Alicia (IC)

**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Good afternoon Parties,

This is further to the emails below. Please note that Justice Phelan directed that there will be no case conference, the matter is to proceed on Monday. Any objections can be dealt with on Monday.

Sincerely,

Andrée Bernier  
A/Deputy Registrar/Registraire adjointe par intérim  
Compétition Tribunal / Tribunal de la concurrence  
600-90 Sparks, Ottawa ON K1P 5B4  
Tel.: 613-954-0857 Fax: 613-952-1123

This is Exhibit..... "M" ..... referred to in the  
affidavit of..... Ryan Cookson .....  
sworn before me, this..... 25<sup>th</sup> .....  
day of..... June ..... 2017 .....  
*R. Olin*  
A COMMISSIONER FOR TAKING AFFIDAVITS

**From:** Rosenthal, Julie [mailto:jrosenthal@goodmans.ca]

**Sent:** June-23-17 3:25 PM

**To:** Bernier, Andrée

**Cc:** Antonio Di Domenico (adidomenico@fasken.com); Rydel, Katherine (IC); Goldman, Calvin; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC); 'Hood, Jonathan (IC)'

**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Ms. Bernier,

We do not believe it appropriate to engage in such a debate by means of emails with the Tribunal. We repeat our earlier request for an urgent case management conference to address whether the motion can proceed on Monday.

Regards,

Julie Rosenthal

**From:** Hood, Jonathan (IC) [mailto:jonathan.hood@canada.ca]

**Sent:** June-23-17 3:21 PM

**To:** Rosenthal, Julie; Bernier, Andrée

**Cc:** Antonio Di Domenico (adidomenico@fasken.com); Rydel, Katherine (IC); Goldman, Calvin; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)

**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

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Regards,

Jonathan

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**Sent:** June-23-17 3:17 PM

**To:** Bernier, Andrée

**Cc:** Antonio Di Domenico (adidomenico@fasken.com); Rydel, Katherine (IC); Goldman, Calvin; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC); Hood, Jonathan (IC)

**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

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We have advised Mr. Hood that, without prejudice to our position that the affidavit contained in the Motion Record (as well as the Supplemental Memo of Fact and Law that relies upon it) is improper, we require an opportunity to conduct a cross-examination on that affidavit and that, accordingly, an adjournment of Monday's motion will be required.

In the circumstances, it would appear that an urgent case management conference this afternoon would be the most efficient way to resolve the uncertainty. We apologise for the late notice. However, it was due entirely to the unilateral action of the Commissioner's counsel.

Regards,

Julie Rosenthal

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**From:** Hood, Jonathan (IC) [mailto:jonathan.hood@canada.ca]

**Sent:** June-23-17 3:02 PM

**To:** Bernier, Andrée

**Cc:** Antonio Di Domenico (adidomenico@fasken.com); Rydel, Katherine (IC); Goldman, Calvin; Rosenthal, Julie; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)

**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

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Please let us know if the Tribunal will proceed with hearing this motion on Monday.

The attached materials from the Commissioner are Confidential Level B and should not be posted to the website.

Regards,

Jonathan

**Jonathan Hood**

**Counsel - Avocat**

Tel: (416) 954-5925 | Fax: (416) 973-5131

[jonathan.hood@canada.ca](mailto:jonathan.hood@canada.ca)

Department of Justice - Ministère de la Justice

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**From:** Bernier, Andrée [<mailto:Andree.Bernier@tribunal.gc.ca>]

**Sent:** June-23-17 1:30 PM

**To:** Hood, Jonathan (IC); Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC)

**Subject:** FW: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Good afternoon Counsel,

## Public Version

I am writing to follow up on the Direction attached. The Commissioner was directed to serve and file his Supplementary Memorandum of Fact and Law, if any, by mid-day today. It seems that as of now, the Tribunal did not receive it. Would you please confirm that the Commissioner does not intend to file one. Or if yes, when are you expecting to submit it.

Please respond at your earliest convenience.

Andrée Bernier  
A/Deputy Registrar/Registraire adjointe par intérim  
Competition Tribunal / Tribunal de la concurrence  
600-90 Sparks, Ottawa ON K1P 5B4  
Tel.: 613-954-0857 Fax: 613-952-1123

**From:** Bernier, Andrée  
**Sent:** June-16-17 3:07 PM  
**To:** 'Rosenthal, Julie'; Hood, Jonathan (IC); Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC) ([katherine.rydel@canada.ca](mailto:katherine.rydel@canada.ca)); Koch, Michael  
**Subject:** Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Good afternoon,

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Thank you.

Andrée Bernier  
A/Deputy Registrar/Registraire adjointe par intérim  
Competition Tribunal / Tribunal de la concurrence  
600-90 Sparks, Ottawa ON K1P 5B4  
Tel.: 613-954-0857 Fax: 613-952-1123

**N**

Cookson, Ryan

From: Rosenthal, Julie
Sent: Friday, June 23, 2017 3:42 PM
To: Hood, Jonathan (IC)
Cc: 'Antonio Di Domenico (adidomenico@fasken.com)'; 'Rydel, Katherine (IC)'; Goldman, Calvin; Koch, Michael; 'Rushton, Kevin (IC)'; 'Foster, Alicia (IC)'; 'Bergeron, Francis (IC)'; 'Caron, Ryan (IC)'
Subject: RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Jonathan,

We reiterate our request below for an opportunity to cross-examine Ms. Syed in advance of Monday's motion. Please advise as to when she is available.

Regards,

Julie

This is Exhibit "N" referred to in the affidavit of Ryan Cookson sworn before me this 25th day of June 2017. Signature of Commissioner for Taking Affidavits.

From: Rosenthal, Julie
Sent: June-23-17 3:16 PM
To: 'Hood, Jonathan (IC)'
Cc: 'Antonio Di Domenico (adidomenico@fasken.com)'; 'Rydel, Katherine (IC)'; Goldman, Calvin; Koch, Michael; 'Rushton, Kevin (IC)'; 'Foster, Alicia (IC)'; 'Bergeron, Francis (IC)'; 'Caron, Ryan (IC)'
Subject: RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Revised version of email we are going to send to Bernier below:

Ms. Bernier,

We object to Mr. Hood's correspondence below, of which we had no notice and which we believe to be improper. Furthermore, we object to the filing of the Commissioner's Motion Record - a position of which we advised the Commissioner and in respect of which we were awaiting his response, when we were copied on the email he sent to you, below.

We have advised Mr. Hood that, without prejudice to our position that the affidavit contained in the Motion Record (as well as the Supplemental Memo of Fact and Law that relies upon it) is improper, we require an opportunity to conduct a cross-examination on that affidavit and that, accordingly, an adjournment of Monday's motion will be required.

In the circumstances, it would appear that a case management conference would be the most efficient way to resolve the uncertainty. We apologise for the late notice. However, it was due entirely to the unilateral action of the Commissioner's counsel.

In addition, please advise as to when you can produce Amani Syed for cross-examination.

From: Rosenthal, Julie
Sent: June-23-17 3:12 PM
To: Hood, Jonathan (IC)
Cc: Antonio Di Domenico (adidomenico@fasken.com); Rydel, Katherine (IC); Goldman, Calvin; Koch, Michael; Rushton,



Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)

**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Jonathan,

We strenuously object to your unilateral correspondence below to the Tribunal below of which we had no notice and which we believe to be entirely improper.

We repeat our earlier position that the affidavit of Amani Syed is improper and should not form part of the record. We expressed our position to you and were awaiting your response. Rather than providing such a response, you chose to send unilateral correspondence to the Tribunal.

Without prejudice to our position that the affidavit is improper and should not be accepted as part of the record, the motion obviously needs to be adjourned so that we can conduct a cross-examination of the affiant and, if necessary, file a Supplementary Memo of Fact and Law. In those circumstances, the most expedient way to proceed would be for you to bring a motion for leave to file the Syed affidavit at the return of our motion with respect to the adequacy and accuracy of the summaries. If the Syed affidavit is admitted into evidence, then so too would be the cross-examination thereon and so too would be any Supplementary Memo of Fact and Law.

We intend to so advise the Tribunal as follows:

Ms. Bernier,

We object to Mr. Hood's correspondence below, of which we had no notice and which we believe to be improper. Furthermore, we object to the filing of the Commissioner's Motion Record – a position of which we advised the Commissioner and in respect of which we were awaiting his response, when we received a copy of the email sent to you, below.

We have advised Mr. Hood that, without prejudice to our position that the affidavit contained in the Motion Record (as well as the Supplemental Memo of Fact and Law that relies upon it) is improper, we require an opportunity to conduct a cross-examination on that affidavit.

In the circumstances, it would appear that a case management conference might be the most efficient way to resolve the uncertainty.

**From:** Hood, Jonathan (IC) [<mailto:jonathan.hood@canada.ca>]

**Sent:** June-23-17 3:02 PM

**To:** Bernier, Andrée

**Cc:** Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC); Goldman, Calvin; Rosenthal, Julie; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)

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Regards,

Jonathan

### **Jonathan Hood**

#### **Counsel - Avocat**

Tel: (416) 954-5925 | Fax: (416) 973-5131

[jonathan.hood@canada.ca](mailto:jonathan.hood@canada.ca)

Department of Justice - Ministère de la Justice

Services juridiques - Bureau de la concurrence

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151 Yonge Street, 3rd Floor, Toronto, Ontario. M5C 2W7

Gouvernement du Canada | Government of Canada

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**From:** Bernier, Andrée [<mailto:Andree.Bernier@tribunal.gc.ca>]

**Sent:** June-23-17 1:30 PM

**To:** Hood, Jonathan (IC); Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC)

**Subject:** FW: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

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Please respond at your earliest convenience.

Andrée Bernier

A/Deputy Registrar/Registraire adjointe par intérim

Competition Tribunal / Tribunal de la concurrence

600-90 Sparks, Ottawa ON K1P 5B4  
Tel.: 613-954-0857 Fax: 613-952-1123

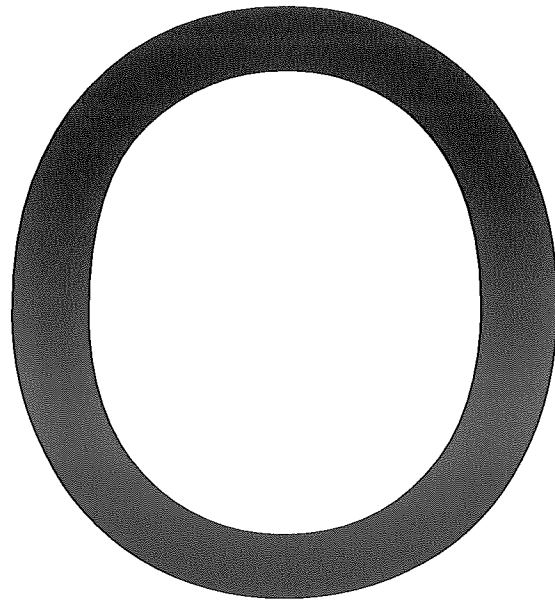
**From:** Bernier, Andrée  
**Sent:** June-16-17 3:07 PM  
**To:** 'Rosenthal, Julie'; Hood, Jonathan (IC); Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC) ([katherine.rydel@canada.ca](mailto:katherine.rydel@canada.ca)); Koch, Michael  
**Subject:** Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Good afternoon,

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Thank you.

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**Competition Tribunal / Tribunal de la concurrence**  
600-90 Sparks, Ottawa ON K1P 5B4  
Tel.: 613-954-0857 Fax: 613-952-1123



**Cookson, Ryan**

**Subject:** FW: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

**From:** Hood, Jonathan (IC) [mailto:jonathan.hood@canada.ca]  
**Sent:** June-23-17 3:52 PM  
**To:** Rosenthal, Julie  
**Cc:** 'Antonio Di Domenico (adidomenico@fasken.com)'; Rydel, Katherine (IC); Goldman, Calvin; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Julie:

Following the direction of the Tribunal, we can deal with this issue on Monday morning.

Regards,

Jonathan

This is Exhibit "O" referred to in the affidavit of Ryan Cookson sworn before me, this 25<sup>th</sup> day of June, 2017  
*R. Cookson*

**From:** Rosenthal, Julie [mailto:jrosenthal@goodmans.ca]  
**Sent:** June-23-17 3:42 PM  
**To:** Hood, Jonathan (IC)  
**Cc:** 'Antonio Di Domenico (adidomenico@fasken.com)'; Rydel, Katherine (IC); Goldman, Calvin; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)  
**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Jonathan,

We reiterate our request below for an opportunity to cross-examine Ms. Syed in advance of Monday's motion. Please advise as to when she is available.

Regards,

Julie

\*\*\*\* Attention \*\*\*\*

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**To:** 'Hood, Jonathan (IC)'  
**Cc:** 'Antonio Di Domenico (adidomenico@fasken.com)'; 'Rydel, Katherine (IC)'; Goldman, Calvin; Koch, Michael; 'Rushton,

Kevin (IC); 'Foster, Alicia (IC)'; 'Bergeron, Francis (IC)'; 'Caron, Ryan (IC)'

**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Revised version of email we are going to send to Bernier below:

Ms. Bernier,

We object to Mr. Hood's correspondence below, of which we had no notice and which we believe to be improper. Furthermore, we object to the filing of the Commissioner's Motion Record – a position of which we advised the Commissioner and in respect of which we were awaiting his response, when we were copied on the email he sent to you, below.

We have advised Mr. Hood that, without prejudice to our position that the affidavit contained in the Motion Record (as well as the Supplemental Memo of Fact and Law that relies upon it) is improper, we require an opportunity to conduct a cross-examination on that affidavit and that, accordingly, an adjournment of Monday's motion will be required.

In the circumstances, it would appear that a case management conference would be the most efficient way to resolve the uncertainty. We apologise for the late notice. However, it was due entirely to the unilateral action of the Commissioner's counsel.

In addition, please advise as to when you can produce Amani Syed for cross-examination.

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**Sent:** June-23-17 3:12 PM

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**Cc:** Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC); Goldman, Calvin; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)

**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Jonathan,

We strenuously object to your unilateral correspondence below to the Tribunal below of which we had no notice and which we believe to be entirely improper.

We repeat our earlier position that the affidavit of Amani Syed is improper and should not form part of the record. We expressed our position to you and were awaiting your response. Rather than providing such a response, you chose to send unilateral correspondence to the Tribunal.

Without prejudice to our position that the affidavit is improper and should not be accepted as part of the record, the motion obviously needs to be adjourned so that we can conduct a cross-examination of the affiant and, if necessary, file a Supplementary Memo of Fact and Law. In those circumstances, the most expedient way to proceed would be for you to bring a motion for leave to file the Syed affidavit at the return of our motion with respect to the adequacy and accuracy of the summaries. If the Syed affidavit is admitted into evidence, then so too would be the cross-examination thereon and so too would be any Supplementary Memo of Fact and Law.

We intend to so advise the Tribunal as follows:

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**Sent:** June-23-17 3:02 PM

**To:** Bernier, Andrée

**Cc:** Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC); Goldman, Calvin; Rosenthal, Julie; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)

**Subject:** RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Dear Ms. Bernier:

The Commissioner will be seeking leave from the Tribunal on Monday to file the attached Supplementary Motion Record that includes our Supplementary Memorandum of Fact and Law. We sent the attached materials to VAA by email at 11:58 a.m. this morning.

Ms. Rosenthal sent the attached email at 1:41 pm objecting to our filing the Supplementary Motion Record.

We submit that the Tribunal should accept late filing of these materials and hear VAA's motion on Monday. The supplementary motion record contains an affidavit from a paralegal that only attaches correspondence between counsel related to the production of the reordered summaries. There should therefore be no issue with respect to the authenticity of the correspondence between us. In addition, the legal argument in the supplementary memorandum of fact and law, while it does cite one letter, relies principally on the reordered summaries. We have also provided the correspondence to demonstrate why we provided the reordered summaries. Therefore, accepting these materials will cause no prejudice to VAA.

Please let us know if the Tribunal will proceed with hearing this motion on Monday.

The attached materials from the Commissioner are Confidential Level B and should not be posted to the website.

Regards,

Jonathan

**Jonathan Hood**

**Counsel - Avocat**

Tel: (416) 954-5925 | Fax: (416) 973-5131

[jonathan.hood@canada.ca](mailto:jonathan.hood@canada.ca)

Department of Justice - Ministère de la Justice

Services juridiques - Bureau de la concurrence

Competition Bureau - Legal Services

151 Yonge Street, 3rd Floor, Toronto, Ontario. M5C 2W7

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Le présent message et toutes les pièces jointes qui l'accompagnent peuvent contenir de l'information confidentielle ou protégée destinée uniquement à la personne ou à l'entité à laquelle elle est adressée. Toute diffusion, distribution, copie ou autre action concernant son contenu par une autre personne que son destinataire est strictement interdite. Si vous avez reçu ce message par erreur, veuillez m'en informer immédiatement à l'adresse ci-dessus et l'effacer. Merci.

**From:** Bernier, Andrée [<mailto:Andree.Bernier@tribunal.gc.ca>]  
**Sent:** June-23-17 1:30 PM  
**To:** Hood, Jonathan (IC); Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC)  
**Subject:** FW: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Good afternoon Counsel,

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Please respond at your earliest convenience.

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600-90 Sparks, Ottawa ON K1P 5B4  
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P

Cookson, Ryan

From: Rosenthal, Julie
Sent: Friday, June 23, 2017 3:53 PM
To: 'Hood, Jonathan (IC)'
Cc: 'Antonio Di Domenico (adidomenico@fasken.com)'; Rydel, Katherine (IC); Goldman, Calvin; Koch, Michael; Rushton, Kevin (IC); Foster, Alicia (IC); Bergeron, Francis (IC); Caron, Ryan (IC)
Subject: RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

I want the record to be clear. I take it that you are refusing to produce her for cross-examination in advance of Monday's hearing.

From: Hood, Jonathan (IC) [mailto:jonathan.hood@canada.ca]
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Subject: RE: Commissioner of Competition v. Vancouver Airport Authority (CT-2016-015)

Julie:

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Jonathan

Handwritten affidavit text: 'this is Exhibit... referred to in the affidavit of... Ryan Cookson... sworn before me. this... day of... June... 2017... R. [Signature]... A COMMISSIONER FOR TAKING AFFIDAVITS'

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**Jonathan Hood**

**Counsel - Avocat**

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[jonathan.hood@canada.ca](mailto:jonathan.hood@canada.ca)

Department of Justice - Ministère de la Justice

Services juridiques - Bureau de la concurrence

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151 Yonge Street, 3rd Floor, Toronto, Ontario, M5C 2W7

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Le présent message et toutes les pièces jointes qui l'accompagnent peuvent contenir de l'information confidentielle ou protégée destinée uniquement à la personne ou à l'entité à laquelle elle est adressée. Toute diffusion, distribution, copie ou autre action concernant son contenu par une autre personne que son destinataire est strictement interdite. Si vous avez reçu ce message par erreur, veuillez m'en informer immédiatement à l'adresse ci-dessus et l'effacer. Merci.

**From:** Bernier, Andrée [<mailto:Andree.Bernier@tribunal.gc.ca>]

**Sent:** June-23-17 1:30 PM

**To:** Hood, Jonathan (IC); Antonio Di Domenico ([adidomenico@fasken.com](mailto:adidomenico@fasken.com)); Rydel, Katherine (IC)

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Competition Tribunal / Tribunal de la concurrence

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Tel.: 613-954-0857 Fax: 613-952-1123

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Competition Tribunal / Tribunal de la concurrence

600-90 Sparks, Ottawa ON K1P 5B4

Q

**Cookson, Ryan**

---

**From:** Rosenthal, Julie  
**Sent:** Sunday, June 25, 2017 2:28 PM  
**To:** Cookson, Ryan  
**Subject:** FW: Commissioner of Competition v. Vancouver Airport Authority - Transcript re: CMC held on Thursday, May 4, 2017  
**Attachments:** VAA - CMC of May 4, 2017.mp3

**From:** Webster, Kelly-Ann  
**Sent:** May-09-17 2:26 PM  
**To:** Rosenthal, Julie  
**Subject:** FW: Commissioner of Competition v. Vancouver Airport Authority - Transcript re: CMC held on Thursday, May 4, 2017

Julie,

I received the attached transcription from Ms. Bernier.

I'll send it down to DPS for transcription. It's approximately 1 hour and 14 mins long. When would you require the document by?

Kelly

This is Exhibit....."Q".....referred to in the  
affidavit of.....Ryan Cookson.....  
sworn before me, this.....25<sup>th</sup>.....  
day of.....June, 2017.....  
*R. Cl...*  
A COMMISSIONER FOR TAKING AFFIDAVITS

R



**CASE MANAGEMENT CONFERENCE**

*The Commissioner of Competition v. Vancouver Airport Authority.*

**Thursday, May 4, 2017**

Yes. Good afternoon. This is in the matter of *The Commissioner of Competition v. Vancouver Airport Authority*. Justice D. Gascon is presiding. Present for this teleconference: For the Applicant – Calvin Goldman, Julie Rosenthal. For the Respondents – Jonathan Hood, Katherine Rydel, Ryan Caron, Antonio Di Domenico, accompanied by Kevin Rushton, Alicia Foster and Francis Bergeron, representatives.

So Justice Gascon, the ?? is now yours.

**Justice Gascon:**

Good afternoon everyone. Thank you for making yourself available for this case management conference at this time. I understand that the case management conference is convened at the request of the parties, so I take it then Miss Rosenthal or Mr. Goldman that you will be indicating to the Tribunal what is being sought in this case management conference.

**Cal Goldman:**

Yes Justice Gascon. It's Cal Goldman, and if you're fine with our speaking to the matter where we are requesting a direction as to the scheduling of the motion, that's in essence what we're focused on today, that we're bringing before you, and I would propose to make our submissions as effective as possible that my colleague Julie Rosenthal will present the main submissions, I'll have some supplementary remarks I anticipate at the end, but that will be most effective from our perspective Justice Gascon.

**Justice Gascon:**

That is fine with me.

**Cal Goldman:**

Thank you.

**Julie Rosenthal:**

Alright. So, it's Julie Rosenthal here. As Cal pointed out, we asked for this case conference to address the question of scheduling a motion to challenge the adequacy of the third party summaries, and just to give you a brief state of the bidding, we believe the motion should be brought and heard before we conduct our examination for discoveries of the Commissioner's representative. My friend Mr. Hood says it should wait until after that examination for discovery has been conducted, and so that is the question in which we seek the Tribunal's direction. And I

- 2 -

think it might be helpful before I get into my submission as to why we say the motion should be heard before just to bring you up to date as to where we stand in the proceeding. So you will recall that although the Commissioner originally claimed privilege, a with interest privilege, over about 9,500 documents, he did waive privilege over most of those. Following the waiver, there remained about 1,200 documents that the Commissioner continued and continues to this day to withhold solely on the basis of public interest privilege. And just to give you a sense of what was withheld as compared to what was produced, what was withheld was every single letter, memo, notebook, interview note, presentation and virtually every email in the Commissioner's possession that relate to the matters in issue in this proceeding. Almost 500 of such documents, all of them have been withheld on the basis of privilege. We did get disclosure of 8,500 documents as I alluded to a moment ago. Those consist virtually exclusively of what I would characterize as financial documents. Invoices, menus, price lists, delivery slips, as well as some financial documents, forecasts and P&Ls, that type of document. So that's where we stood with the documentary production. After the hearing of the privilege motion before you, the parties discussed scheduling of discoveries and we got to the point to where we had agreed to hold to set aside certain dates, but we were very clear with my friends that we could not commit to discovery dates until we've had a chance to review the third party summaries, which at that time had not yet been produced. They were ultimately delivered. The summaries were delivered on April 13<sup>th</sup>. And as the Tribunal recognized in its Reasons on the recent privilege motion, the provision of complete, adequate and accurate summaries containing not only information that supports the Commissioner's case, but also the information that favours the Respondent, the provision of such summaries prior to discovery is a key safeguard mechanism, and I'll remind you of your own words which are very helpful in paragraph 82 of your Reasons on the privilege motion, and this is a light paraphrase but it is almost a direct quote:

“The summaries constitute a special mechanism put in place to address legitimate concern about the search for truth and the right to a fair hearing that are raised by the limit imposed on sole disclosure by the assertion of public interest privilege.”

So the safeguard mechanism, these summaries, are a key element in the Tribunal's treatment of public interest privilege as was recognized in your Reasons. As your Reasons further recognized, the summaries are

crucial in protecting the right to a fair hearing and ensuring a proper level of disclosure. And in that regard, at paragraph 174 of your Reasons, you note that the limited disclosure resulting from privilege claims has been tempered through the safeguard mechanisms, including the summaries, and I would primarily including the summaries, developed to alleviate it's adverse impact on the search for truth and the right of the respondents to know the case against them and present a full defence. Though it is against that legal framework that we reviewed the summaries, and it became immediately apparent to us upon review of what had been given to us that they are wholly deficient and wholly inadequate. They do not fulfil their purpose. They are incapable of serving the role, the crucial role we would say, of a safeguard mechanism. We immediately advised my friend of our view and the Commissioner's response was that any motion challenging the adequacy of the summaries should wait until after we have conducted our examination for discovery of the Commissioner's representative. We disagreed. We noted that there was nothing, nothing in the case law that we had seen that suggests that this motion could only be brought after discovery. Nothing in Southam or Hillsdown or any of the cases that were put to you, for example, on the privilege motion. Nothing in the jurisprudence to suggest the motion should wait until after discovery. And moreover, in our view, the position that was being taken by the Commissioner simply did not make sense. The cases are clear that the summaries must be adequate and complete. The cases are also clear that the summaries must be provided before examinations for discovery. It follows as a matter of logic that if the summaries are wholly inadequate, if they cannot be meaningfully deployed as a respondent conducts its examination for discovery, if they cannot assist in preparation of the examination and cannot assist counsel in determining what questions need to be asked and what additional information needs to be gathered through the examination for discovery process, then surely that inadequacy should be addressed before the examinations take place. And I would note the only case that we have been able to find that even touches on the proper timing for the bringing of such a motion, and I have to be perfectly clear, it really only touches on it tangentially, but the only case even to touch on it suggests that the motion should be brought, as we propose to do, before examinations for discovery. And that's set out in the *Washington* case. I sent a copy to the Registrar late this morning. I don't know if it's been put before you Justice Gascon.

**Justice Gascon:**

Yes, I have it before me.

**Julie Rosenthal:**

Alright. Well, if I could direct your attention please to paragraph 11 of that decision. This was a motion on refusal. A motion brought after the examinations for discovery. And the motion was dismissed in part because the Tribunal viewed the motion, viewed the refusal as in effect an attack on the adequacy of the summary, and this is set out in paragraph 11. "We consider that these questions by the respondent are in effect an indirect attack on the adequacy of the summaries" and then the next sentence is what I want to emphasize. "Any such challenge should have been brought directly and in a timely fashion rather than through the more convoluted process of questions and refusals on discovery." So the only comment in the jurisprudence on timing is this one and what I want to underline is the comment about the motion should have been brought in a timely fashion, which suggests a view of the Tribunal, at least in that case, that bringing such a motion after examinations for discovery was not timely and was therefore not the preferable course of procedure. Now, perhaps in some cases where the complaints about the summaries are, I'll call them minor, discreet, it may well be that those shortcomings, those kinds of minor shortcomings, can be more efficiently addressed through clarification questions on discovery, and in those situations it may well make more sense to defer the bringing of any motion until after discovery because it may obviate the need for such a motion entirely, but that is not our case. We do not have here minor, discrete problems with the summaries, small isolated examples of information that's unclear. What we have here is summaries that are so wholly inadequate that they simply do not fulfil their function. They will not enable us to conduct a meaningful examination for discovery of the Commissioner's representative. But I need to give just a flavour for why we say the summaries are so inadequate as to warrant the bringing of the motion beforehand. And I expect to hear from my friend how can the Vancouver Airport Authority say these summaries are inadequate. They're 200 pages long, they're organized by topic. How could they be any better? But in my submission, such an assertion really would not provide an accurate representation of the summaries. What the summaries consist of, and I'll take you to an example in a moment, is a series, a very long, lengthy series, of bullet points which are presented in a wholly jumbled fashion, jumping around from one source to another, devoid of all context, in such a way as to make it impossible for us to make any sense of them. They are virtually useless and they make it impossible for my clients to

know the case it has to meet.

So, to go to the example to just provide an illustration of the inadequacy of the summaries, I need to set a bit of background for you. One of the issues in the case, and it goes to the question of whether the Authority acted with an anti-competitive purpose in limiting the operation of the airport to two caterers, as part of its defence, the Authority says, and this is taken from paragraph 2 from our responding pleading, it says that in order to ensure delivery of high quality fresh meals on a timely and flexible basis, it is necessary that catering firms be located at the airport. So that's one of the issues in the proceeding and that allegation is denied by the Commissioner. And there's no question that the issue is obviously of interest to the Commissioner because the Commissioner and his staff seem to have gathered a fair bit of information about this issue, and there are about seven pages of the summaries devoted to that very question, but do those seven pages even approach the standard that is required of the summaries? Do they convey to us the information in the Commissioner's knowledge in such a way to permit meaningful discovery on the issue? May answer is no, they do not. And if I can ask you to turn just to the start, to page 47 of the Level B summary. This is a longer summary marked "Confidential Level B".

**Justice Gascon:** Yes, let me get that.

**Julie Rosenthal:** At page 47.

**Justice Gascon:** Yes.

**Julie Rosenthal:** Alright. So you'll see there's a heading there, [REDACTED].

**Justice Gascon:** Yes.

**Julie Rosenthal:** If I can direct you first, the second to last bullet on that page, it's [REDACTED].

**Justice Gascon:** Yes.

**Julie Rosenthal:** [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]



[REDACTED] [REDACTED]  
 [REDACTED] And as noted, part of the purpose of the summaries is so that my client can know the case against it. Do these bullet points assist my client in knowing the case against it? All that my client knows is that [REDACTED]

[REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]

[REDACTED] But we simply have no way of knowing, no way of weighing this evidence or of understanding the strength of the case against us based on the summaries. And then just to give you a further illustration of why we say the summaries are inadequate and therefore why we want the motion to be heard before we proceed to examine the Commissioner's representative. As I noted earlier, the summaries jump around from one source to another and from one topic to another, back and forth. So if I can direct you back to page 47. [REDACTED]

[REDACTED]  
 [REDACTED]  
 [REDACTED] [REDACTED]  
 [REDACTED]

[REDACTED] and [REDACTED]  
 [REDACTED]  
 [REDACTED] and [REDACTED]  
 [REDACTED]

[REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]

[REDACTED] Possibly, if the summaries were much shorter, if the withheld information was much more limited, it's possible that we could muddle our way through and make some sense of it, but the volume of information that was withheld and consequently the volume of the summaries provided makes that path

impossible. So, beyond knowing, let me back up. What do the summaries tell us? [REDACTED]

[REDACTED]

Now, that was our thinking until when we received your Reasons on the privilege motion, we noted a suggestion, for example at paragraph 85 and paragraph 176 of your Reasons, a suggestion that the motion with respect to the adequacy of the summaries should be brought after discoveries have been completed. But of course, the issue of timing of a motion about the adequacy of summaries wasn't before you, it wasn't argued, but in light of the comment made in your Reasons, that is why we are before you today to seek your guidance as to the timing and the schedule for our motion. Our submission is that there is no direction in the case law to say that such a motion must be brought after examinations for discovery. The only case where it appears to have arisen on the merits was the *Washington* case and that suggests that such a motion should actually be brought before, otherwise it would not be timely. And in our submission, where the allegation is as it is here, where the Respondent's allegation is that the summaries are wholly inadequate and therefore do not fulfil and cannot fulfil their intended purpose, then such a motion should clearly be heard before discovery. It



would ensure that we can conduct a meaningful discovery, that we can prepare our questions properly, that we can no what additional information we need to seek from the Commissioner's representative, and that is of course exactly what examinations for discovery are intended to do. If, on the other hand, we have to wait until after the examination was done, it would produce a situation that was entirely inefficient. We would effectively have to conduct half of our discovery at the first instance, then we would bring our motion on the summary, then we would get the better summaries, as my position is borne out, then we would have to go back and conduct the remainder of the discovery. In my submission, that is not an efficient way to proceed. It certainly is not the most expeditious way to proceed and it simply would not be in the interests of justice. Any my final point is this: to the extent that there is any concern about throwing off the schedule, we don't believe that there is any need for such concern. There is a fair bit of flexibility built into the scheduling order as it stands, particularly in July and August. We do not believe this should imperil the schedule. It certainly in our view will not imperil the mediation date and so for that reason, we're asking for the Tribunal's direction that the motion be heard before we conduct our examination for discovery of the Commissioner's representative.

**Cal Goldman:**

So, a few supplementary points to Julie Rosenthal's more detailed outline Justice Gascon. First, in your Reasons on the public interest privilege motion at paragraph 84, after you discuss, start discussing the safeguard mechanisms, you also make it clear of the Tribunal decisions have established that the Commissioner should provide prior to the start of the examinations for discovery complete summaries of the privileged information, including not merely information that supports the case, but also information which favours the Respondent. I point to that and I also point to what you said in paragraph 176 of your Reasons, ??? say like taking, you know, ??? with respect, I think pointing to these two paragraphs is relevant in 176, the third sentence, you state before oral discovery, BAA will therefore have a complete listing of documents and communications over which public interest privilege is asserted by the Commissioner as well as summaries of their contents. A complete listing of documents and communications as well as summaries of their contents, and then of course there is the statement of after reviewing, you have the option of applying post discovery, but as Julie Rosenthal has pointed out, there is no case precedent that stipulates that timing. The more important points, respectfully, is your statement that before

oral discovery, there will be a complete listing of all documents and communications as well as the summaries of their contents. The matrix that we have been given, the volume of it, is absolutely impossible for any counsel to work with that has done discoveries in litigation. It cannot satisfy the standard that you Justice Gascon and the other cases have stipulated in these circumstances. [REDACTED]

[REDACTED]

[REDACTED] The other point I want to note is that in these cases and particularly in the cases before you Justice Gascon, there really is a great deal of interest in the bar, in the private and public sector, in following how the Tribunal is going to balance the scales to ensure a fair process, the kind of stringent requirements of procedural fairness that the Tribunal is of course obligated to adhere to that we discussed the public interest privilege motion and there is a great deal of interest in how that is going to be done. In fact, yesterday's CVA Civil Reviewable Matters Round Table which Mr. Hood attended, and colleagues of mine from Goodmans attended as well, Mr. Koch, there were questions about this case. There was also a great deal of interest in the CVA Fast Track Working Group about how, in order to expedite the hearing process and even possible mediation should that occur as it has happened in now two cases, the need for timely, early disclosure of material facts to facilitate discovery and assessment of the strengths, the merits and issues, including weaknesses, of each side's respective case, but particularly from the perspective of the respondents that have not had the benefit of Section 11 examinations, have not had the benefit of any parallel discovery that the Commissioner had had and then are faced with a very broad assertion of public interest privilege and minimalist summaries creates a ??? scale that our system of justice really does need respectfully to be balanced at the earliest possible stage. It's a view that I make respectfully in these submission to you that is widely held across the bar and I just wanted to underline that because this process if one of great interest to our colleagues in the competition bar Justice Gascon, and I'll leave it at that. Thank you.

**Justice Gascon:** Well, thank you very much Mr. Goldman and Miss Rosenthal. Just one question. So I understand that the, what you're, the motion you're looking for is with respect to the adequacy and accuracy of the summaries, and so does that mean that it would be a motion to be heard by a judicial member not sitting on the merits of this case?

**Julie Rosenthal:** Well, I would look to the Tribunal for guidance on that issue. We believe given that the summaries are in our submissions inadequate on their face, we don't believe that it is necessary for the purposes of our motion for the underlying documents to be reviewed. So our submission is that it is not necessary to have a non-sitting member. We recognize that to have a non-sitting member review 1,200 documents and compare them against the summary would be extraordinarily time consuming. We do not believe that is necessary now. We believe it would be sufficient simply for the summaries to be reviewed on their face and if the Tribunal were to agree with us that they are inadequate, then the direction would be given to the Commissioner to go back and prepare adequate summaries and then we would go from there.

**Justice Gascon:** So your submission is that a judicial member would be in a position to assess whether or not the summaries are adequate and accurate without having to look at, or at least, at least some, or to look at least in part, to the underlying documents?

**Julie Rosenthal:** We certainly believe that the Tribunal could assess the adequacy of the summaries simply by looking at the summaries. With respect to the accuracy of the summaries, that, I suppose, is a little more difficult to assess, but our primary submission is that the summaries are inadequate. We can't even judge whether we should challenge their accuracy because they're so jumbled. So we think that the first step is for summaries to be produced that are adequate and that we can understand, and then to the extent that we have concerns about the accuracy, then it may be necessary, I certainly hope not, but it may be possible be necessary, for a further motion at a later stage that would need a non-sitting judicial member to review the underlying documents. We don't believe that is necessary now.

**Justice Gascon:** Because I'm thinking in terms of these because you alluded rightly to the issue of efficiency and expediency of the process. Would it be preferable in those circumstances to have a non-sitting judicial member being able to look at all of those elements at once?

**Julie Rosenthal:** We're in the Tribunal's hands on that issue.

**Justice Gascon:** Yes.

**Julie Rosenthal:** We're operating from a bit of a disadvantage not having had experience with this type of motion and obviously never having reviewed summaries against the underlying documents. So, you have our main concern which is that the summaries on their face are inadequate and we aren't in a position to know whether we even have a concern about accuracy. It may be that it would be more efficient to get it all done at once. I was simply concerned about the imposition on a non-sitting member of going through 1,200 documents at this stage, but as I said, we're in your hands.

**Cal Goldman:** And Justice Gascon, we are prepared to do everything we can, as we've indicated to Mr. Hood, to proceed with the Commissioner's examination of the representative of VAA which is scheduled for May 25 and 26. Reluctantly so, but we've given that commitment and we will produce, even while this issue of adequacy and complete summaries is before the Tribunal. We're not going to hold that up. We do think it's critically necessary for the examination of the Commissioner's representative that would follow. We're also going to do everything that we possibly can to adhere to the scheduling orders and mediation dates regardless.

**Justice Gascon:** You mentioned the dates of the discovery of the VAA representative. What about, have you agreed on a tentative date for the discovery of the Commissioner's representative?

**Julie Rosenthal:** So the tentative date that we had discussed back in the first week of April, before we saw the summaries, was May 31<sup>st</sup> through June 2<sup>nd</sup>. In light of our view of the summaries, that date is not going to work if our motion is permitted to be brought before the examination for discovery. But as I noted earlier, there is flex time built into the scheduling order as it stands in July and August.

**Justice Gascon:** Okay. Thank you very much for your submission. Mr. Hood?

**Jonathan Hood:** Thank you Justice Gascon. Our position briefly is that VAA's motion should be heard after the discovery of the Commissioner's representative for three reasons. First, it's premature and, as you've already alluded to, it's not an efficient use of the Tribunal or party resources. While we recognize that VAA has the right to challenge the summary, it should be done after the examination of the

Commissioner's representative. The examination of the Commissioner's representative will allow VAA to ask questions about, among other topics, the third party summary to clarify any information in the summary VAA may believe to be deficient. Now you've heard from submissions from my friend that they can't possibly do that, except for in making those submissions, they in fact revealed that it is distinctly possible as they are posing the types of questions that normally get asked on the discovery of the Commissioner's representative. After the examination is complete and we've answered undertakings, if VAA feels that a further and better summary is required, then that motion will be heard on July 17<sup>th</sup> pursuant to the scheduling order. VAA will not suffer prejudice because if a better summary is ordered, then VAA will be afforded the opportunity to re-examine the Commissioner. Right now, what VAA is essentially asking for is two kicks at the can. They want to challenge the summary now and then upon receiving further summaries, presumably after discoveries, they'll be right back at it depending on the information that comes at discoveries and we'll be dealing with this issue yet again. So that's the first point. That it is premature and not an efficient use of Tribunal resources.

Second, the procedure that we have proposed is consistent with Tribunal practice and jurisprudence. I know Justice Gascon, it's already been mentioned, that in the decision on the tip motion, it states twice, both in paragraphs 85 and 176, and it's your own decision so I'm not going to quote it back to you, but both paragraphs indicate that it's after the receipt of summaries and discoveries and this is consistent with the way that the practice has recently developed with respect to the Tribunal. Now my friends have pointed you to the *Washington* case, but that is distinguishable for many reasons. As three come, actually four reasons come to mind. First, in the *Washington* matter, it appears that the summaries were brief. Now I'm going to address my friend's submissions about the adequacy of the summary in my third point, but one thing that is clear on the face is that what we have provided to the VAA is a summary that is not brief. It is, in fact, comprehensive. Second, this is case from the early days, before the Commissioner was even the Commissioner and the rules and practice were different and have evolved. Third, in that case it appears that this issue was coming up for the first time and they were saying you should deal with it before discoveries. What we have in the present case Justice Gascon is a situation where we're saying and acknowledging that VAA can challenge the summary after discoveries. And the final thing I would

note about the *Washington* decision is that no summaries were provided of the actual documents and in fact, in *Washington*, they concluded that summaries of the documents themselves need not be provided, and that you can find at paragraph 21 of the decision. We are so far from the facts and situation that existed in *Washington* because in this case we've actually summarized the documents. We've gone beyond what even the Tribunal was suggesting in *Washington*, and so to sum up our second point, the practice and the jurisprudence all support having this discovery heard, or having this motion heard after the discoveries of the Commissioner's representative.

My third...

**Justice Gascon:**

Mr. Hood. You referred to the practice, and you say the practice and the case law. Miss Rosenthal is mentioning that she hasn't come across any cases referring to the timing of such a motion after or before discovery. Do you have any case law on that?

**Jonathan Hood:**

The practice is, and it's alluded to in the case law, would be, I guess, *Air Canada* and *Direct Energy* and it's not directly addressed, but I would turn you to paragraph 53 of your own decision where it says, "in *Direct Energy*, Mr. Justice Remy found that the Commissioner's summaries of privileged documents were sufficient," and this was being done after *Direct Energy* had obtained a thorough discovery of the Commissioner's representative, and it's the same procedure that was followed in *Air Canada* and has been followed in every case that I've been involved in. I'd also just note before I move off of paragraph 53 that the summary that Justice Remy was reviewing is of the same type and form and in fact isn't nearly as long as the summary that we've provided to VAA in this case, which actually brings me back to my third point which is that given the Commissioner has produced over 200 pages of summaries, organized by topic, there can be no question that there is more than adequate material for discovery of the Commissioner's representative to occur. I don't rule out the possibility that you can envision a hypothetical situation where a summary is so deficient that discovery could not proceed, but this is so far from the case here. As I said before, at 200 pages, it's by far the longest and most detailed of the five summaries that have been filed with the Tribunal where I've been involved. In this case, we've spent well over 1,000 hours working on this summary and we're obviously confident that it's complete and sufficient. Notwithstanding that, we recognize that VAA has the right to challenge this, but it should be done so after it has gathered information

[REDACTED]

[REDACTED] So, with all due respect the summary that has been provided on its fact is clearly adequate and more than enough for discoveries to proceed. If after discoveries they want to exercise their right to challenge its adequacy and accuracy, we do not dispute that. They are more than welcome to try and bring that motion, but what we have here is more than enough for discoveries to proceed, which is my

third point, and those are my submissions.

**Julie Rosenthal:**

If I may, I have a few points to make in reply.

**Justice Gascon:**

Yes, go ahead.

**Julie Rosenthal:**

So, first, Mr. Hood objects to our proposed method of proceeding because he said it will give my client two kicks at the can he says. With respect, I don't understand that submission. If we bring our motion as we propose before we conduct the examination for discovery and it is adjudged to be inadequate, we will be given an adequate summary and we will then conduct our examination for discovery and that will be that. So I don't understand how it becomes two kicks at the can at all.

Second point. Mr. Hood said it would be much more efficient to wait until after the examinations for discovery are completed. In my submission, that is entirely incorrect. It will be the most inefficient examination for discovery imaginable. We will have to spend not 3 days, but 5 or perhaps 10 days going through, merely on the summary points, 200 pages of bullets asking questions such as, [REDACTED]

[REDACTED] It will be unmanageable, and to suggest that that is an efficient way of proceeding in my submission is entirely incorrect.

My third point. The submission made by Mr. Hood was that the practice that has evolved, and he pointed to the *Air Canada* case and the *Direct Energy* case, the practice that has evolved is that motions for adequacy of summaries have been brought after examination for discovery. That may well be. The point I wanted to make was that there is nothing in the case law to suggest that that is the only time at which they must be brought, and I didn't hear anything in my friend's submission to the contrary.

The last point I wish to make. Mr. Hood said to you, how can it be said that these summaries are inadequate. [REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

And those are my submissions in reply.

**Justice Gascon:**

Thank you Miss Rosenthal. Just to come back on the issue of efficiency and frankly to move things expeditiously. I understand that this motion could be brought after discovery, but just to come back to the point that you were mentioning Mr. Hood. If it is held after discovery and what is being contemplated at this stage in terms of the motion arising after examinations for discovery or the motions arising from answers to undertakings and refusals, but here if we're having this motion after, that would be another round, I mean, and let's assume that we have additional summaries, then there would be another round of discovery leading itself to another round of potential motions arising from answers to undertakings and refusals further that second set of summaries. Correct?

**Jonathan Hood:**

Justice Gascon, the way I envision it is that, and what's traditionally happened, is that motion date will deal with answers to undertakings and advisements, but typically what ends up happening is the adequacies of the summaries are also considered, but it's considered in light of the examination that has just occurred, and there is a lot of useful information that is provided during the examination which will narrow down any potential issues in dispute, which in fact then makes the motion for answers and undertakings far more efficient than doing what my friends are proposing, which is to have a run at the summary now, and let's assume for the moment that the summary is found to be adequate, they will still be asking a number of questions, they'll be probing the accuracy of the summary. Unless they're willing to say that they're going to waive their right to challenge the summary again, it'll just come up again once we have that motion for answers to undertaking in discovery, like it traditionally does. But the reason why we submit it's more efficient to use the process...

- Justice Gascon:** I mean if ??? rules that a summary is adequate...
- Jonathan Hood:** That's right because they're not even asking you to go in behind the documents right now. All they're saying is on its face, it's completely inadequate, and so that's ....
- Justice Gascon:** Well that's why I was asking does it make sense to hear such a motion without having the judicial member or giving the judicial member the opportunity to look at the underlying documents.
- Julie Rosenthal:** Well and that, sorry, if I may Justice Gascon, that is why we put ourselves in the Tribunal's hands. We do not have experience, as the Tribunal would, and frankly as Commissioner's staff would in comparing the summary to the underlying documents, so we're in your hands as to whether it's the most efficient at the outset to have a non-sitting member and if the Tribunal deems that to be the most efficient way of proceeding, we'll of course be very happy with that.
- Cal Goldman:** It's done once, respectfully.
- Justice Gascon:** If we take the scenario that the Tribunal looks at the or that a judicial member looks at the documents and the summaries and concludes that it is adequate, I hardly see how after discovery VAA could come back and say that they are not. If on the face of the document and the summary they are deemed to be adequate, I don't see how another motion could be brought or could be successfully brought I should say because I'm not saying that the motion could not be attempted, but to say that after we've seen discovery, then, after we've conducted discoveries that the summaries become inadequate. Conversely, if the Tribunal finds that having reviewed the documents and the summaries that they are not adequate, then new summaries would be provided, you would be going into discovery and the issue of the inadequacy of the summaries would not come back.
- Cal Goldman:** We agree with that Justice Gascon.
- Jonathan Hood:** I have two submissions. Sorry, go ahead.
- Cal Goldman:** I was just going to say, respectfully, we agree with the way you have just positioned it Justice Gascon. It's done once, it's done effectively, and that resolves the issue in advance so there is a decision and a fulsome and appropriate discovery.

**Jonathan Hood:**

Justice Gascon, I have two reasons why in fact I don't believe that's the way it's going to play out. My friends have already told you that what they are challenging is the adequacy of the summary. That can be done on the face of the document by taking a look. I've pointed to you the number of indicia which would indicate that this is in fact an adequate summary. It's something that Justice Remy did both on *Direct Energy* and *Air Canada* after the discoveries and the reason why it becomes more effective and efficient if what we're talking about is the adequacy is because all of the questions that my friends have raised that they have about this will be answered on discovery and so the Tribunal will have the full and complete record about adequacy in order to judge whether or not the summaries are adequate. What my friends are talking about right now is not going in behind the summaries. They're saying, look at it upon its face. It's clearly inadequate. Our submission is, like I said, I have two points. One, all of the contextual information and questions that will come out on discovery will be absent and two, as happened in *Direct Energy* and also *Air Canada*, the Tribunal, the sitting member can look at the face of the summaries to determine whether or not they're adequate.

**Cal Goldman:**

Let me just respond. We are prepared to have it all done now. The adequacy in the Tribunal's hands. One decision to have the adequacy, the accuracy done and more appropriate by a non-sitting member, then this is the time to have it resolved once and for all so that we can then proceed. And frankly, the way it's been done in a few cases has not, has not been written stone and has not allayed the concerns that I as someone who has practiced 30 years in this area or longer and other members of the bar ???, and feel is in any way a balanced approach to justice in these matters. That's why the bar is so concerned, that's why we are so concerned. This would be a very good precedent to have the adequacy and accuracy resolved once before discoveries and then there's a fulsome discovery in a normative fashion on both sides and it may lead to hopefully a more expedited process to the hearing, possibly the mediation.

**Justice Gascon:**

I was going to say that, and I take it that in a sense you've answered the question Mr. Goldman, that this motion is not only about the adequacy, it's also about the accuracy of the summaries. I believe that that's how it's been presented to the Tribunal in the email.

**Julie Rosenthal:**

Yes.

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- Cal Goldman:** Yes Justice Gascon. We think it's probably better in these circumstances, more time effective, more efficient, more fair, to have it all done at once.
- Justice Gascon:** And Mr. Hood, as to the question from Miss Rosenthal, if it is a motion challenging the adequacy and accuracy of summaries, do you have a position as to whether it should be heard by a judicial member who would not be sitting on the merits of this case?
- Jonathan Hood:** This appears to be a bit of a moving target because it's changed from just talking about the adequacy and not looking at the documents in behind to a motion where they're challenging the adequacy and the accuracy. I have a few comments about that. If what we're talking about is a motion to challenge the accuracy, we'd like the opportunity to make submissions on exactly what that test should be and what evidence. It's not something that you should be able to pull the trigger on just because. Essentially it's a fishing expedition. We would submit you need to have some evidence and of course that evidence of the adequacy and the accuracy is going to come through the discovery of the Commissioner's representative, which is why we believe the more efficient way to deal with this is to have the discovery of the Commissioner's representative. They'll ask all of the questions they want to ask to challenge the adequacy and the accuracy so they have that evidence and then we can have a motion in front of the Tribunal to argue whether or not that's enough such that considerable judicial resources should be expended to have a sitting member, a non-sitting member, excuse me, take a look at the documents and verify whether or not they're accurate. So it's changed over the course of this call. If what they're talking about is a non-sitting member looking at the documents, that's a very different situation than just seeing whether or not discovery can go ahead. If it's about whether or not discovery can go head, it's a decision that you Justice Gascon can make based on your review of the third party summary that we have provided to you.
- Julie Rosenthal:** Julie Rosenthal here. If I may, Mr. Hood just told you that it's a moving target, that this is the first he's heard that we're challenging the accuracy of the summaries. I'll direct the Tribunal's and Mr. Hood's attention to our draft Notice of Motion that we delivered last Friday afternoon. The relief we're seeking, an Order requiring the Commissioner to produce to VAA complete, adequate and accurate summaries, so this is nothing new. There's no moving target. The relief we want is the relief set out in our Notice of Motion. So I don't understand his submission about

things changing on the fly. Nothing is changing. We're in the Tribunal's hands as to the most efficient method of proceeding. The relief we're seeking is the same as the relief set out in our Notice of Motion.

**Justice Gascon:** Okay, we're talking about, still talking about 1,200 documents being covered by the summaries, correct?

**Jonathan Hood:** That's correct.

**Justice Gascon:** Can you give the Tribunal an indication of how many pages that means Mr. Hood. Ballpark?

**Jonathan Hood:** The pages of the document that represents? I don't have that number with me right now. It would certainly be more than 1,000 pages.

**Justice Gascon:** Yeah, I would have assumed that.

**Jonathan Hood:** Sorry, more than 1,200 pages. It's certainly a lot more. It's a not insignificant task and there's a lot of procedure issues just along with that that you'd have to think about because obviously a lot of care and thought has gone into the way that those summaries have been provided in terms of protecting information and we'd have to develop a procedure by which we could somehow communicate with the non-sitting member about why a particular piece of information may or may not have made its way into the summary.

**Julie Rosenthal:** If I may.

**Justice Gascon:** I mean, the documents in such a case, they would be only looked at and considered by the non-sitting judicial member.

**Jonathan Hood:** Yeah. If we were talking about challenging the accuracy, but then I go back to my initial comment that if that's what we're talking about, then we'd like the opportunity to make submissions about the threshold of evidence that should be required before that trigger could be pulled, but what we...

**Justice Gascon:** But, I mean, the issue today is the scheduling of that motion. I mean that's my understanding and I think it's, I mean this is how the Notices of Motion is labeled. It's a motion challenging adequacy and accuracy.

**Julie Rosenthal:** Correct. This call was just about the scheduling of the motion. We

proposed a way, I'm sorry ....

**Justice Gascon:**

Mr. Hood, you will be able to make submissions whenever that motion is heard as to what are the criteria that the judicial member looking at that has to factor in in terms of assessing whether it is adequate or accurate.

**Jonathan Hood:**

But it's not just the scheduling of that motion. It's whether or not the discovery of the Commissioner's representative should proceed before or after that motion.

**Justice Gascon:**

Yeah, okay, but I mean the timing of the ....

**Jonathan Hood:**

Well, I think it's a very important issue because obviously a lot of evidence is going to come out through the discovery about the third party summary and that goes to our point of efficiency that the discovery should happen and then we should have the motion heard after that.

**Justice Gascon:**

Yeah, but yeah, I understand the point on the efficiency from your standpoint, but there's also the efficiency that you may be creating two or adding another step in the process that has already been contemplated.

**Jonathan Hood:**

And that's my point, is they're adding another step into the process that has already been contemplated, and the question is whether or not you can direct the motion to be heard after based on whether or not on its face our summaries are so inadequate such that discovery of the Commissioner's representative can't occur and of course you heard our submissions on why .....

**Julie Rosenthal:**

Sorry, with respect Mr. Hood, your submission is not fair. Our motion does not relate to whether the discovery of the Commissioner should proceed. Our motion is for production of adequate summaries and there's no second or extra step being contemplated here. Justice Gascon, as you very rightly pointed out, if we follow Mr. Hood's preferred course of proceeding, we will go to examinations for discovery, we will ask questions, we will have refusals, we will bring our motion on the adequacy of the summaries, and assuming we are right, we will be given an additional summary and as you pointed out, we will then go back for discovery. I suppose it creates a third round because what the Tribunal will have found, given that we didn't have adequate summaries, is that we effectively didn't have a full right to conduct examinations for discovery at the outset, so we will have a

further attendance for discovery with further refusals and further motions. So it creates an entire additional round of discoveries and refusals which, in my view, is wholly inefficient.

**Cal Goldman:** And we are prepared to still make the representative of the VAA available for discovery at the end of May as arranged with Mr. Hood regardless. We're trying to move forward on a fair basis, but we just can't do the examination of the Commissioner's representative without adequate and accurate summaries. That's the proposed middle ground that we think makes eminent sense in these circumstances that are at hand.

**Justice Gascon:** Anything else from either you Mr. Hood or you Miss Rosenthal and Mr. Goldman?

**Cal Goldman:** Not from our end at this time Justice Gascon. Thank you very much.

**Jonathan Hood:** Nothing else from our end either Justice Gascon.

**Justice Gascon:** Okay, I'll reflect very quickly on that and issue a direction on...

**Julie Rosenthal:** Thank you.

**Cal Goldman:** Thank you.

**Justice Gascon:** ...on the hearing of VAA's motion.

**Cal Goldman:** Thank you Justice Gascon.

**Jonathan Hood:** Thank you.

**Justice Gascon:** Thank you very much.

**Jonathan Hood:** Thank you very much.