CT-2016-015

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF certain conduct of Vancouver Airport Authority relating to the supply of in-flight catering at Vancouver International Airport;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*.

BETWEEN:

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE
FILED / PRODUIT
May 24, 2017
CT-2016-015
Jos LaRose for / pour
REGISTRAR / REGISTRAIRE
OTTAWA, ONT
87

COMMISSIONER OF COMPETITION

Applicant

—and—

VANCOUVER AIRPORT AUTHORITY

Respondent

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT (MOVING PARTY), VANCOUVER AIRPORT AUTHORITY

(Motion Challenging Adequacy and Accuracy of Summaries)

May 24, 2017

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PART I – STATEMENT OF FACTS

A. Overview

1. This motion is brought pursuant to the Direction to Counsel of Gascon J. issued May 8, 2017 following a case management conference.

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

3. As might be expected given the quantity of documents and information being withheld, the summaries are voluminous, running in excess of 200 pages and containing thousands of pieces of information.

4. However, although the summaries are divided into a number of thematic "chapters", the pieces of information contained therein are provided in manner so as to render them essentially meaningless. For example, any given chapter will have multiple pieces of information on a given topic, much of it contradictory or inconsistent, and all of it coming from an identically described source. Thus, multiple pieces of inconsistent or contradictory information are provided on the same topic, with each described as having been provided by

"an airline based in Canada". Other pieces of information on a different topic, again inconsistent or contradictory, with each described as having been provided by "an in-flight caterer". No indication is given as to whether any of the pieces of information were provided by the same source and, if so, which pieces of information were provided by one source and which by another.

5. As a further example, multiple pieces of information on the same topic are scattered, for no apparent reason, across multiple pages of a "chapter", intermixed with hundreds of other pieces of information on different topics. Moreover, no attempt appears to have been made to present the information in any kind of chronological order, with related pieces of information, scattered across a chapter, jumping backwards and forwards in time.

6. The result is a set of summaries that resembles nothing so much as an unsolvable jigsaw puzzle.

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

8. Both the summaries and the right to challenge them have been termed "safety valves" and "safeguards", necessary to ensure the fairness of proceedings before the Tribunal. Indeed, they are a key, integral element of the Tribunal's treatment of the Commissioner's public interest privilege. They ensure that the respondent has disclosure of all of the facts that are

known to the Commissioner; they assist the respondent in the preparation of its case; and they promote effective pre-trial preparation, ensuring that the trial will be conducted fairly and efficiently.

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

B. The Within Proceedings

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

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

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

12. In its Notice of Application, the Commissioner asserts that airlines purchase two bundles of catering-related products and services. The Commissioner has termed those two bundles

"Catering" and "Galley Handling". Together, "Catering" and "Galley Handling" make up "In-flight Catering" – all of which are defined terms in the Notice of Application.

13. The Commissioner defines "Catering" as follows:

> **Catering** consists primarily of the preparation of meals for distribution, consumption or use on-board a commercial aircraft by passengers and crew, and includes buy-on-board offerings and snacks.

Notice of Application, para. 12, Public Motion Record, Tab 7, pp. 64-65

14. The Commissioner defines "Galley Handling" as follows:

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

Notice of Application, para. 12, Public Motion Record, Tab 7, pp. 64-65

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

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

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

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

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

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

19. Among other things, VAA denies the Commissioner’s market definitions related to “Catering” and “Galley Handling”. Instead, VAA defines “Catering” as the preparation and loading onto aircraft of fresh meals and other perishable food offerings. And VAA defines “Galley Handling” as the provision and loading onto aircraft of non-perishable food and drink, as well as other items (such as duty free products).

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

20. VAA pleads that the demand for Catering (i.e., for the preparation and loading of perishable food offerings) declined significantly over the early years of the century. As a result of this shrinking demand, the revenues earned by Catering operations at the Airport declined.

The lack of demand led to the exit of one of the three companies offering Catering and Galley Handling services at the Airport, leaving two in operation.

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

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

> [T]he Authority is concerned that, if one or more new firms were permitted to provide Galley Handling services at the Airport, one or both of the existing firms – who provide both Catering and Galley Handling – would no longer be viable.

> Response of Vancouver Airport Authority, para. 75, Public Motion Record, Tab 8, pp. 98-99

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

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

Similarly:

> The Authority reasonably believes that the presence of Catering firms on-site at the Airport is important to ensure optimal levels of quality and

> service, which, in turn, are important to ensuring the efficient operation of the Airport as a whole, including achieving its public interest mandate, mission and vision.

Response of Vancouver Airport Authority, para. 2 and 79, Public Motion Record, Tab 8, pp. 83 and 99

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

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

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

> The Authority further denies that it substantially or completely controls the market for Galley Handling. Because airlines can meet their Galley Handling needs through self-supply or double catering, the relevant geographic market for Galley Handling is broader than the Airport.

Response of Vancouver Airport Authority, para. 31-32 and 66, Public Motion Record, Tab 8, pp. 89-90 and 97

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

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

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

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

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

C. The Commissioner's Affidavit of Documents

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

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

(b) Schedule B, comprising relevant documents in the Commissioner's possession or control that the Commissioner is willing to produce (as the Commissioner is not

claiming privilege in respect thereof) but that the Commissioner asserts contain confidential information; and

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

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

29. Approximately five weeks later, on or about March 21, 2017, the Commissioner delivered an Amended Affidavit of Documents. The Amended Affidavit reflects the Commissioner's decision to waive privilege over approximately 8500 documents.

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

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

(a) price lists, invoices and related documents (approximately 7700 documents);

(b) flight schedules for various Canadian airports (approximately 150 documents); and

(c) financial documents, including profit and loss statements and forecasts, of various in-flight caterers (approximately 600 documents).

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

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

31. The Commissioner continues to assert public interest privilege over approximately 1200 documents. Those 1200 withheld documents include every single relevant memorandum, interview note, presentation, affidavit, note, letter and virtually every relevant email in the Commissioner's possession, as set out in the following chart.

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

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

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

33. At approximately the same time as the foregoing waiver, VAA brought a motion, heard by Gascon J. on March 22, 2017, in which it challenged the Commissioner's continued assertion

of public interest privilege over the remaining 1200 documents. That motion was dismissed by order of Gascon J. dated April 24, 2017, which order is under appeal.

34. On or about April 27, 2017, the Commissioner delivered a Supplemental Affidavit of Documents in which it purported to disclose additional relevant documents that were in the Commissioner's possession, power or control "for the period 1 January 2017 through 28 February 2017". That Supplemental Affidavit of Documents listed at Schedule B an additional 3900 confidential documents that the Commissioner was producing. Similar to the documents already produced, those documents comprised:

(a) price lists, invoices and related documents; and

(b) financial documents, including profit and loss statements and forecasts, of various in-flight caterers.

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

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

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

D. The Summaries Produced by the Commissioner

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

Order. The second contains information which the Commissioner claims as "Confidential – Level B" pursuant to the Confidentiality Order made by Gascon J. on March 20, 2017.

> Summary of Third Party Information – Confidential Level A, Confidential Motion Record, Volume II, Tab 5
>
> Summary of Third Party Information – Confidential Level B, Confidential Motion Record, Volume II, Tab 6

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

38. The two documents (referred to hereinafter as the "summaries") comprise thousands of snippets of information, provided in a jumbled, non-linear matrix, wholly divorced from context, in such a way as to render their content essentially meaningless and uninformative. As a result, and as is discussed more fully below, the summaries do not meet the requirements set out in the jurisprudence.

39. Upon learning of VAA's intention to challenge the adequacy and accuracy of the summaries, the Commissioner took the position that the within motion could not be brought until after the completion of examinations for discovery. That issue was considered on a case management conference held on May 4, 2017 before Gascon J. At that time, Gascon J. rejected the Commissioner's argument and held as follows:

> The principles of procedural fairness direct the Tribunal to allow a respondent to present such a motion before discoveries where the respondent claims, as is the case here, that the alleged inadequacy

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

40. It is pursuant to that Direction that the within motion is brought.

PART II – SUBMISSIONS

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

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

> [A] high degree of procedural protection is needed in Tribunal proceedings because of its court-like process. . . . The Tribunal resides very close to, if not at, the "judicial end of the spectrum", where the functions and processes more closely resemble courts and attract the highest level of procedural fairness.
>
> *The Commissioner of Competition v. Vancouver Airport Authority*, 2017 Comp. Trib. 6 at para. 169
>
> *Bell Canada v. Canadian Telephone Employees Assn*., 2003 SCC 36 at para. 21

B. The Extraordinary Public Interest Privilege Enjoyed by the Commissioner

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

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

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

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

(a) Are the documents in question relevant?

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

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

> *Khadr v. Canada(Attorney General)*, 2008 FC 807 at para. 48
>
> *Wang v. Canada(Minister of Public Safety and Emergency Preparedness)*, 2016 FC 493 at paras. 34-47
>
> *Canada(Attorney General) v. Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar*, 2007 FC 766 at para. 37

45. Thus, whenever any public official – other than the Commissioner of Competition – asserts that documents or information should not be disclosed owing to a public interest

privilege, the Crown bears the onus of identifying the public interest allegedly at risk and proving that disclosure of the information in question would have an adverse effect on that public interest. Discharging that onus requires specific, concrete evidence demonstrating how disclosure of the particular documents at issue would harm the asserted public interest; generalized assertions will not suffice:

> [T]he Court must guard against reliance on "generalized assertions of possible disadvantage to an ongoing investigation". . . . Rather, the onus is on the Minister to establish that the disclosure of the information in question would have a concrete deleterious effect on the ongoing investigation. [emphasis added]
>
> *Wang v. Canada(Minister of Public Safety and Emergency Preparedness)*, 2016 FC 493 at para. 35

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

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

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

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

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

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

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

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

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

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

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

49. The Commissioner alone enjoys an entirely different and infinitely more expansive type of public interest privilege. The Commissioner alone can assert public interest privilege not on a case-by-case basis (as applies to every other public official), but rather on a class basis. The

Commissioner alone is excused from the need to adduce specific, concrete evidence (or, indeed, any evidence) demonstrating that disclosure of the particular documents at issue would harm the asserted public interest. The Commissioner alone is excused from the need to prove that the interest in continued secrecy outweighs the respondent's interest in having access to the documents.

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

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

52. Of course, the respondent does not enjoy any analogous privilege. Accordingly, while the respondent is denied full rights of discovery, is faced with the prospect of selective, eve-of-trial disclosure, and is denied access to information that could help the respondent's case, the Commissioner does not labour under any such restrictions. Rather, the Commissioner is entitled to production – at virtually the outset of the proceedings – of all relevant documents in the respondent's possession or control (subject only to solicitor-client and litigation privilege). The Commissioner is granted full rights of examination for discovery to find out all information in the respondent's knowledge that relate to the matters in issue in the litigation. And the

Commissioner has all of this information months before he needs to prepare his witness statements.

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

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

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

54. Similarly:

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

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

> [T]he Tribunal has developed a process that protects procedural fairness in the context of the Commissioner’s important mandate, in the form of safeguard mechanisms which are closely attached to the recognition of the Commissioner’s public interest privilege . . .

> *The Commissioner of Competition v. Vancouver Airport Authority*, 2017 Comp. Trib. 6 at para. 161

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

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

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

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

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

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

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

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

59. As Gascon J. stated:

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

The Commissioner of Competition v. Vancouver Airport Authority, 2017 Comp. Trib. 6 at para. 161

60. Similarly:

> The Tribunal decisions have first established that the Commissioner should provide, prior to the start of examinations for discovery, complete summaries of the privileged information including not merely information which supports his case but also information which favours the respondent.

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

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

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

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

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

63. By ensuring that the respondent has disclosure of all of the facts that are known to the Commissioner, the summaries assist the respondent in the preparation of its case:

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

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

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

65. Thus, the summaries produced by the Commissioner must be sufficient to fulfill the foregoing purposes. In order to do so, the summaries must:

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

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

(c) promote effective pre-trial preparation by the respondent, including effective and efficient conduct of examinations for discovery, so as to ensure that the trial will be conducted smoothly and efficiently, with the issues narrowed and surprises eliminated as much as possible.

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

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

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

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

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

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

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

68. In the present case, the summaries provided by the Commissioner are wholly inadequate. They are needlessly confusing; they present information in a way that renders the information effectively meaningless; and they present a matrix that is impossible for counsel to

navigate by any objectively professional standard. The result is that they do not serve their intended purpose. The do not allow the respondent to know and evaluate the information gathered by the Commissioner. They do not present information in a manner that allows the respondent to understand and use that information in preparing its defence. And they do not promote effective pre-trial preparation, including efficient and effective conduct of the examination for discovery of the Commissioner's representative.

69. For example, with respect to any given topic, the summaries present numerous pieces of inconsistent and even contradictory information. However, because no context is given for the information, and because no indication is given as to whether any two or more pieces of information came from the same source, it is impossible to know how (or even whether) to reconcile those inconsistencies and contradictions.

70. In addition, any given "chapter" of the summaries (which chapters range in length from two pages to over 30 pages) contains multiple pieces of information relating to the same topic. However, rather than having all such related information presented sequentially, together in the chapter, the information will be scattered across the entire chapter, intermixed with hundreds of other unrelated pieces of information. Moreover, the related information is not organized chronologically. Instead, for no apparent reason, the summaries jump forwards and backwards in time. This jumbling of the information – both topical and chronological – further complicates any attempt to make sense of the information provided.

71. In short, far from allowing the respondent to know and evaluate the information that the Commissioner has gathered, the summaries have turned that information into a kind of

unsolvable puzzle, obscuring the very facts that they are intended to reveal. As a result, they cannot fulfill their role as a crucial safeguard mechanism, helping to ensure the fairness of the within proceedings.

72. With respect to the specific changes needed to bring the summaries up to the standard required by the jurisprudence, certain suggestions are provided below. However, without access to the underlying documents and information (which access, of course, is denied to the respondent and its counsel by the assertion of the privilege), it is impossible for the respondent to provide an exhaustive or definitive enumeration of the required changes. Notwithstanding that limitation, suggestions are provided below as to how to remedy the summaries' shortcomings.

73. Of course, whether the implementation of the changes suggested below would be sufficient to meet the standard established by the jurisprudence can be known only to the Commissioner – who alone has access to the underlying documents and information. In that regard, it should be emphasized that there is no suggestion from the Commissioner that the implementation of such changes to the summaries in this case would undermine the privilege, by revealing the identity of the source(s) in question.

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

(i) Information Provided Relating to the Location of Caterers

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

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

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

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

77. This plea is denied by the Commissioner.

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

78. The issue has evidently been the focus of a considerable amount of the Commissioner's attention, as information related to this issue fills over seven pages of the Commissioner's summaries. The information has been gathered variously from catering firms, from one or more airlines "based in Europe" and from one or more airlines "based in Canada".

79. However, the information is presented in the summaries such a way as to obscure its meaning, rendering it completely useless to the respondent, and thereby defeating the very purpose of the summaries. More specifically, multiple pieces of information are presented – most of them inconsistent and contradictory, but all coming from an identically described source, namely, "an airline based in Canada". However, because no information is provided as to which pieces of information (if any) came from the same source, it is impossible to reconcile the inconsistencies.

80. Moreover, the pieces of information are, for no apparent reason, scattered across multiple pages, interspersed with dozens of other pieces of unrelated information. The reader is left to sift through the dozens of pieces of information, looking for the related information and then attempting, in vain, to reconcile the multiple inconsistences and contradictions.

81. Thus, by way of one example, the summaries tell us, at page 47, that:

> An airline based in Canada would consider having a caterer that was located in a city up to four hours away from the airport. . ."
>
> Summary of Third Party Information – Confidential Level B, p. 47, Confidential Motion Record, Volume II, Tab 6, p. 449

82. Then, on the next page, page 48, the summaries again provide information on this issue from "an airline based in Canada":

> An airline based in Canada stated that it would prefer an in-flight caterer with a kitchen on-site to deal with last minute changes to delivery. However, depending on the city's transportation, and in some locations, food travels for about 1.5 hours by truck.

> Summary of Third Party Information – Confidential Level B, p. 48, Confidential Motion Record, Volume II, Tab 6, p. 450

83. Then, on the next page, page 49, the summaries provide three more pieces of information from "an airline based in Canada":

> An airline based in Canada stated that for its first/business class cabin it prefers its in-flight caterer to have a kitchen at the airport.
> . . .
> An airline based in Canada indicated that airlines will always choose an in-flight catering firm with an airport kitchen over a kitchen somewhere else in the city that it has to transport from.
> . . .
> An airline based in Canada stated that whether the caterer is located on or off-airport has no bearing on anything; it does not know or take into consideration where its in-flight caterers are located . . .
>
> Summary of Third Party Information – Confidential Level B, p. 49, Confidential Motion Record, Volume II, Tab 6, p. 451

84. Then, on the following page, page 50, we find two further pieces of information, again from "an airline based in Canada":

> An airline based in Canada stated that it prefers for a caterer's kitchen to be as close to the airport as possible but its in-flight caterers are not located airside in every city.
> . . .
> An airline based in Canada stated that it would not want to accept an in-flight caterer located four hours driving time away from the airport.
>
> Summary of Third Party Information – Confidential Level B, p. 50, Confidential Motion Record, Volume II, Tab 6, p. 452

85. Thus, over four pages, the summaries provide seven different pieces of sometimes contradictory and inconsistent information on the identical topic, all from an identically

described source. The seven pieces of information indicate that “an airline based in Canada” stated that:

- it would accept having a caterer located up to four hours away from the airport;
- it would not accept having a caterer located up to four hours away from the airport;
- it would accept having a caterer located up to 1½ hours away, although it would prefer a caterer on-site;
- it would prefer having a caterer on-site at the airport;
- it does not care whether its caterer is located on-site at the airport or not;
- all airlines will always prefer having a caterer on-site at the airport; and
- it prefers for a caterer’s kitchen to be as close to the airport as possible but its in-flight caterers are not located airside in every city.

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

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

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

87. Similarly, the meaning of the information would be quite different and the manner in which the respondent could use the information would be quite different if three different sources said that:

- they would accept having a caterer located up to four hours away from the airport;
- they would accept having a caterer located up to 1½ hours away; and
- they do not care whether its caterer is located on-site at the airport or not;

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

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

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

(ii) Information Provided Relating to "Self Supply"

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

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

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

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

92. The Commissioner has evidently gathered a quantity of information relating to this issue, the purported summary of which is contained in a chapter of the summaries entitled, “Self Supply”. However, as with the information relating to the location of caterers, this information is presented in such a way as to render it effectively meaningless to the reader. As before, multiple pieces of inconsistent and even contradictory pieces of information are presented and all of the information is described as coming from an identically described source, namely, “an airline based in Canada”. As before, because no indication is given as to which pieces of information (if any) came from the same source, it is impossible to reconcile the inconsistencies and impossible to make sense of the information provided.

93. Thus, the summaries state:

> An airline based in Canada stated that it would not be realistic for it to cater internally for its flights.

Summary of Third Party Information – Confidential Level B, p. 22, Confidential Motion Record, Volume II, Tab 6, p. 424

94. On the next page, the summaries contain three further pieces of related information, all provided by “an airline based in Canada”:

> An airline based in Canada stated that it is a bit of a hybrid; it self-supplies at certain bases in Canada and then uses in-flight caterers at other stations.
> . . .
> An airline based in Canada stated it has considered self-supplying, but never tried due to costs and logistics.
> . . .
> An airline based in Canada stated that it has looked at the costs and

> benefits of doing catering internally compared to outsourcing, and started to outsource.

> Summary of Third Party Information – Confidential Level B, p. 23, Confidential Motion Record, Volume II, Tab 6, p. 425

95. The following page contains three more related pieces of information:

> An airline based in Canada stated that it is very costly to enter self-supply, so it would only do it if volume warranted . . .
>
> . . .
>
> An airline based in Canada said it has not looked into its ability to provide in-flight catering services internally, but based on the actions of another airline, it stated that it may be possible.
>
> One airline based in Canada indicated that it has considered self-supplying its own catering, but that the cost of introducing a whole new labour group and the loss of flexibility in staffing were issues.

> Summary of Third Party Information – Confidential Level B, p. 24, Confidential Motion Record, Volume II, Tab 6, p. 426

96. Thus, the summaries present at least seven pieces of related, yet inconsistent, information, indicating that "an airline based in Canada" stated that:

- self supply is not realistic;
- it does self supply at some bases in Canada;
- it has considered self-supply, but has never tried to do so, as a result of costs;
- it has not considered the possibility of self-supply;
- it considered the costs of self-supply, and declined to do so;
- it is very costly to self-supply and it has not done so; and
- it has considered self-supply, but was concerned about costs and staffing.

97. It is impossible to make sense of these seven pieces of information – some of which plainly contradict others – without knowing, at a minimum, which (if any) pieces of information

were provided by the same source(s). The meaning of those seven pieces of information and the manner in which the respondent could use them would be quite different if:

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

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

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

(iii) Information Provided Relating to the Financial Performance of In-flight Caterers

99. In addition to the foregoing, the summaries include approximately 17 pages of information under the heading "Financial Performance of In-flight Caterers in Canada". However, the information provided in those seventeen pages is presented in the most confusing manner, jumping back and forth between different topics and different time periods, in such a way as to make the information impossible to comprehend. And, as with the information discussed above, the source of each piece of information is identified in an identical manner – "a firm that provides in-flight catering". However, once again, no indication is given as to which pieces of information come from the same source.

100. For example, at page 107, the summaries state:

> One firm that provides in-flight catering forecasted revenue for 2015 at YVR would be above budget, based on revenues for the first 10 months.
>
> Summary of Third Party Information – Confidential Level B, p. 107, Confidential Motion Record, Volume II, Tab 6, p. 509

101. Later on that same page, page 107, the summaries provide similar information, again from “a firm that provides in-flight catering”:

> One firm that provides in-flight catering forecasted revenue for 2016 at YVR would be above budget, based on revenues for the first 3 months.
>
> Summary of Third Party Information – Confidential Level B, p. 107, Confidential Motion Record, Volume II, Tab 6, p. 509

102. Then two pages later, on page 109, the summaries return to the topic of catering revenues earned at YVR, again related to an undefined “firm that provides in-flight catering”. However, for reasons that are unclear, the summaries appear to be moving backwards in time. Whereas the previous bullets moved from 2015 to 2016, on page 109, the summaries have slipped back to the last two months of 2015:

> One firm that provides in-flight catering indicated its revenues at YVR for November and December 2015 were above budget . . .
>
> Summary of Third Party Information – Confidential Level B, p. 109, Confidential Motion Record, Volume II, Tab 6, p. 511

103. Then, further down on that same page, the summaries move forward in time once again to 2016 YVR:

> One firm that provides in-flight catering forecasted revenue for 2016 would be above budget, based on revenues for the first 9 months.
>
> Summary of Third Party Information – Confidential Level B, p. 109, Confidential Motion Record, Volume II, Tab 6, p. 511

104. That same topic resurfaces yet again – but not until eight pages later. And once again, the summaries are temporally jumbled, as they appear to have jumped back in time by three years, to 2013:

> One firm that provide in-flight catering reported sales that were higher than expected for its YVR location . . . [2013]
>
> Summary of Third Party Information – Confidential Level B, p. 117, Confidential Motion Record, Volume II, Tab 6, p. 519

105. Then, five pages after that, more information is provided about catering revenues at YVR, but the summaries have moved backwards yet again, this time to 2012:

> One firm that provides in-flight catering reported its revenues at YVR were above budget. . . .[2012]
>
> Summary of Third Party Information – Confidential Level B, p. 122, Confidential Motion Record, Volume II, Tab 6, p. 524

106. Two further bullets related to revenues earned at YVR in 2012 appear on the following page, page 123:

> One firm that provides in-flight catering reported that food revenue at YVR was lower than budget . . . The firm reported that handling revenue was higher than budget . . . [2012]
> . . .
> One firm that provides in-flight catering reported that in August 2012 at its YVR station the firm's food revenue was below budget while the firm's handling revenue was above budget.
>
> Summary of Third Party Information – Confidential Level B, p. 123, Confidential Motion Record, Volume II, Tab 6, p. 525

107. We thus have eight bullets of information, each of which relates to revenues earned at YVR, and whether those revenues were above or below budget. However, the eight bullets are scattered across sixteen pages of information, which sixteen pages contain in excess of 150 bullets of other unrelated information. Moreover, the information jumps backwards and forwards in time for no apparent reason – from 2015 to 2016 back to 2015 to 2016 again and then backwards in time to 2013 and then a further jump backwards to 2012.

108. That same "chapter" of the summaries also contains information with respect to total revenues earned by one or more "firms that provide in-flight catering". The information begins on page 108, where two bullets provide information related to revenues in 2012:

> One firm that provides in-flight catering in Canada reported that its year-to-date revenues through the first 10 months of 2012 were down relative to 2011 . . .
> . . .
> One firm that provides in-flight catering in Canada reported that its year-to-date revenues through the first 11 months of 2012 were slightly lower than the previous year.
>
> Summary of Third Party Information – Confidential Level B, p. 108, Confidential Motion Record, Volume II, Tab 6, p. 510

109. That topic resurfaces five pages later, contained in four bullets which disclose information from 2014 and 2015:

> One firm that provides in-flight catering in Canada reported that forecasted revenue for the last three months of 2014 would be down from the previous year.
> . . .
> One firm that provides in-flight catering reported that revenue was 3% higher than budgeted in June 2015 across its Canadian stations.
> . . .
> One firm that provides in-flight catering reported that year-to-date

> revenue was behind budget in April 2015 across its Canadian stations.
> . . .
> One firm that provides in-flight catering reported in August 2015 that its Canadian operations year-to-date revenue is above budget. . .
>
> Summary of Third Party Information – Confidential Level B, p. 113, Confidential Motion Record, Volume II, Tab 6, p. 515

110. The following page, page 114, sees one further bullet related to Canada-wide revenue:

> One firm that provides in-flight catering reported that revenue was 3% higher than budgeted in July 2015 across its Canadian stations.
>
> Summary of Third Party Information – Confidential Level B, p. 114, Confidential Motion Record, Volume II, Tab 6, p. 516

111. One page later, page 115, provides a further bullet related to Canada-wide revenue. However, this bullet has moved backwards in time by three years, back to 2012:

> One firm that provides in-flight catering reported that its revenues were behind budget in 2012 . . .
>
> Summary of Third Party Information – Confidential Level B, p. 115, Confidential Motion Record, Volume II, Tab 6, p. 517

112. Three pages further, page 118, provides one more bullet and continues to move backwards in time, this time to 2011:

> One firm that provides in-flight catering in Canada stated that its revenues in 2011 were 1.5% ahead of its budget . . .
>
> Summary of Third Party Information – Confidential Level B, p. 118, Confidential Motion Record, Volume II, Tab 6, p. 520

113. Yet another bullet is provided with respect to 2011. However, it does not appear until page 120:

> One firm that provides in-flight catering in Canada provided an income statement from November 2011 that showed it received $3.1 million in revenue above budget . . .
>
> Summary of Third Party Information – Confidential Level B, p. 120, Confidential Motion Record, Volume II, Tab 6, p. 522

114. And the final bullet is found at page 122, this time related to revenues from 2012:

> One firm that provides in-flight catering indicated that its March 2012 revenues were 1.7% below budget . . .
>
> Summary of Third Party Information – Confidential Level B, p. 122, Confidential Motion Record, Volume II, Tab 6, p. 524

115. We thus have 11 bullets of information, each of which relates to revenues earned in Canada, and whether those revenues were above or below budget. However, the 11 bullets are scattered across 14 pages of information, which 14 pages contain in excess of 140 bullets of other unrelated information. Moreover, the bullets related to revenues earned in Canada jump back and forth across time for no apparent reason – from 2012 to 2015 back to 2012, then further back to 2011 and then forward to 2012.

116. As with the information discussed in the preceding section, there is no way, by any objective professional standard, for the respondent's counsel to know which (if any) of the information came from the same source(s). Accordingly, there is no way of knowing, for example, if one, two, three or four different caterers experienced below-budget revenues in

Canada in 2012. What is clear is that, because the information is not organized by source, it is impossible to make any sense of it.

117. In addition, there does not appear to be any reason why this information should be scattered across a dozen-plus pages, nor does there appear to be any reason why it should jump backwards and forwards in time.

118. As with the information related to the location of in-flight caterers, there is no way to make sense of this financial information as it has been presented. The summaries thus do not permit the respondent to know the information that has been gathered by the Commissioner and they cannot be used to assist in preparation for a meaningful examination for discovery of the Commissioner's representative, or in preparation of a defence.

(iv) Information Provided Relating to Operational Performance of In-flight Caterers

119. A further example of the shortcomings of the summaries is found in the portion of the summaries entitled "Operational Performance of In-Flight Caterers in Canada". That "chapter" contains a number of pieces of information related to something referred to in the summaries as "lost time days" (or alternative "time lost days") and "time loss accidents".

120. The first bullet relates to 2015 and states:

> One firm that provides in-flight catering experienced 159 lost time days and 17 time loss accidents year to date at YVR. [2015]
>
> Summary of Third Party Information – Confidential Level B, p. 125, Confidential Motion Record, Volume II, Tab 6, p. 527

121. Later on that same page is a further bullet dealing with the same topic, albeit relating to 2014:

> One firm that provides in-flight catering reported 126 time lost days as of August 13, 2014 at YVR.
>
> Summary of Third Party Information – Confidential Level B, p. 125, Confidential Motion Record, Volume II, Tab 6, p. 527

122. The next page provides a further bullet and continues to move backwards in time, to 2013:

> One firm that provides in-flight catering experienced 8 time loss accidents with 47 lost days in 2013 as of July 23 at YVR.
>
> Summary of Third Party Information – Confidential Level B, p. 126, Confidential Motion Record, Volume II, Tab 6, p. 528

123. Two pages later provides a further bullet, this one moving forward in time to 2016:

> One firm that provides in-flight catering experienced 12 time loss accidents and 124 lost time days from January to May 10, 2016 at YVR.
>
> Summary of Third Party Information – Confidential Level B, p. 128, Confidential Motion Record, Volume II, Tab 6, p. 530

124. The next page on provides two more bullets, these two moving backwards chronologically to 2015 and then to 2014:

> One firm that provides in-flight catering experienced 69 lost time days and 12 time loss accidents year to date at YVR. [2015]
> . . .
> One firm that provides in-flight catering experienced 44 time loss days in 2014 as of April 7 at YVR.

Summary of Third Party Information – Confidential Level B, p. 129, Confidential Motion Record, Volume II, Tab 6, p. 531

125. The summaries thus provide six bullets of information, each of which relates to incidents variously referred to as "lost days", "time lost days", "time loss days" and "lost time days", as well as to "time loss accidents" at the Vancouver Airport. The six bullets are scattered across six pages, and do not appear in chronological order, as the time period moves from 2015 to 2014 to 2013 then forward to 2016 and then back to 2015 and 2014.

126. Once again, there is no way of knowing if the information was provided by more than one source and, if so, which information was provided by one source and which by another.

127. Thus, once again, the information is conveyed in a way as to render it meaningless and effectively useless.

(v) Information Provided Related to Financial Performance of In-flight Caterers in Canada

128. One final illustrative example is provided by the portion of the summaries designated as "Confidential – Level A", which contains a chapter entitled "Financial Performance of In-flight Caterers in Canada". That chapter is eight pages long and consists of bullet after bullet of information related to "EBITDA" and "EBITDAM ratios". Each piece of information is identified as coming from an identically named source, specifically, "one firm that provides in-flight catering in Canada". Once again, the information jumps backwards and forwards in time. Once again, related pieces of information are scattered, intermixed with unrelated information. And, once again, no indication is given as to which pieces of information came from the same source.

129. The first five bullets on page 10 provide an example of the manner in which the summaries jump, from one bullet to the next, back and forth between EBITDAM ratios, EBITDA ratios and EBITDAM margins, as well as back and forth in time and back and forth between different airports:

> One firm that provides in-flight catering had a year-to-date EBITDAM ratio of 8.4% in August 2013 at YYZ while at YVR, its EBITDAM ratio was 9.8%. [2013]
>
> One firm that provides in-flight catering had an EBITDAM ratio at an airport in Canada other than YVR of -19.9% in 2011, -5.7% in 2012 and a forecasted EBITDAM ratio of 2.5% in 2013. [2012]
>
> One firm that provides in-flight catering in Canada had a budgeted EBITDA ratio of 5.6% in 2012, 8.4% in 2013, 8.8% in 2014, and 9% in 2015. [2012]
>
> One firm that provides in-flight catering reported its year-to-date EBITDAM ratio was 8.4% through the first 9 months of 2013 . . . [2013]
>
> One firm that provides in-flight catering in Canada expected to earn an EBITDA ratio of 6.98% in 2014, 7.94% in 2015, 7.16% in 2016, 6.6% in 2017 and 6.24% in 2018. [2014]
>
> One firm that provides in-flight catering in Canada had an EBITDAM margin of 4.0% in March of 2012. . . .
>
> Summary of Third Party Information – Confidential Level A, p. 10, Confidential Motion Record, Volume II, Tab 5, p. 392

130. Because there is no way of knowing which of the bulleted pieces of information came from one source and which from another (or whether they all came from the same source), it is impossible to make any sense of the information. Was the in-flight caterer with the EBITDAM ratio of 8.4% through the first nine months of 2013 the same as the in-flight caterer with the EBITDAM margin of 4.0% in March 2012? Or were those two different in-flight caterers? Was

the in-flight caterer with the EBITDAM ratio of 8.4% through the first nine months of 2013 the same as the in-flight caterer who had budged at EBITDA ratio of 8.4% for that same year? Or were those two different caterers? Without knowing that, it is impossible to derive any meaning from the hundreds of bullets of financial information.

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

131. The examples discussed above are provided merely as representative samples of the entirety of the Commissioner's summaries. The remaining 200+ pages are equally jumbled and equally incomprehensible. They contain thousands of pieces of disparate information, provided with no indication as to which information came from the same source and no attempt at organization in a manner that would help to convey meaning to the respondent.

132. The result is a set of summaries that falls far short of the standard set by the jurisprudence. These summaries cannot assist the respondent in the preparation of its case. They cannot to promote effective pre-trial preparation. And they do not convey to the respondent the facts that the Commissioner has gathered.

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

134. In the present circumstances, given the volume of information over which privilege is claimed by the Commissioner (and the resulting volume of information that the summaries are intended to convey), and given the nature of that information (particularly the fact that it

comprises a large amount of detailed financial information), it is submitted that revisions must be made to the summaries in order for them to fulfill their intended purpose and for these proceedings to move forward fairly and efficiently.

135. As noted above, because neither the respondent nor its counsel has access to the privileged documents and information, it is impossible for VAA or its counsel to provide any definitive statement as to the specific changes that are needed for the summaries to meet the standard established by the case law. However, it is submitted that consideration should be given to the following, at a minimum:

(a) identifying which pieces of information came from one source, and which came from a different source (of course, without revealing the identity of the source in question);

(b) imposing some coherence on the chronological organization of the information contained within any given "chapter" of the summaries; and

(c) imposing some coherence on the topical organization of the information contained within any given "chapter" of the summaries.

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

Commissioner's representative and, more broadly, will help to ensure the fair and efficient conduct of the proceeding as a whole.

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

PART III– ORDER SOUGHT

137. VAA seeks:

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

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

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

DATED at Toronto, Ontario this 24th day of May, 2017

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

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