

THE COMPETITION TRIBUNAL

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

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

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

BETWEEN:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT March 7, 2017 CT-2016-005 Andrée Bernier for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 42

COMMISSIONER OF COMPETITION

Applicant

– and –

VANCOUVER AIRPORT AUTHORITY

Respondent

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

PART I. GROUND ON WHICH THE MOTION IS OPPOSED

1. In this motion, Vancouver Airport Authority (“**VAA**”) seeks to have the Competition Tribunal (the “**Tribunal**”) overturn well-established law that recognizes a class-based public interest immunity, or privilege, in the context of matters under the *Competition Act*, R.S.C. 1985, c. C-34, as amended, (the “**Act**”). VAA’s motion is wholly without merit and, moreover, is premature.

Background

2. The Commissioner of Competition (“**Commissioner**”) applied to the Tribunal on September 29, 2016, seeking to remedy the abuse of a dominant market position by VAA in excluding and denying the benefits of competition to the in-flight catering marketplace at Vancouver International Airport.
3. Pursuant to the scheduling order of Justice Gascon dated December 20, 2016, as amended by further orders dated February 13, 2017, and February 16, 2017, the Commissioner served VAA with the Commissioner’s Affidavit of Documents on February 15, 2017 (the “**Commissioner’s Affidavit**”).
4. Schedule C to the Commissioner’s Affidavit lists 9,906 records over which the Commissioner asserts one or more claims of privilege, including public interest privilege. Of the records listed in Schedule C, 388 are internal records of the Competition Bureau, and the remaining 9,518 are records obtained from third parties.

VAA’s Motion is Premature

5. The Commissioner has stated his intention to VAA to waive privilege over 8,513 of the 9,518 third-party records listed in Schedule C to the Commissioner’s Affidavit, when an appropriate confidentiality order is in place, as even if privilege is waived, there are still confidentiality issues that must be dealt with.
6. In accordance with the Tribunal’s practice, the Commissioner will provide VAA with a summary of the information contained within the remaining 1,005 third-party records listed in Schedule C to the Commissioner’s Affidavit. This summary will contain information both

favourable and unfavourable to the Commissioner's position. VAA could, if it elects to do so, subsequently challenge the summary of third-party information and/or ask the Tribunal to override the Commissioner's public interest claim on these records.

7. VAA's motion is, therefore, premature. VAA's right to a fair hearing has not been, and is not, compromised.

VAA's Position is Contrary to Well-established Law

8. Numerous and recent decisions from the Federal Court of Appeal, provincial courts and the Tribunal recognize a class-based public interest immunity in the context of *Competition Act* matters.
9. Whether other investigative or enforcement agencies, if any, enjoy a class privilege is irrelevant. The courts have recognized that a class-based public interest immunity applies in the context of the Commissioner's particular mandate.
10. Contrary to VAA's claim, this type of class-based public interest immunity is not inconsistent with sections 37 and 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5.
11. The Commissioner seeks his costs of this motion.
12. Section 29 of the Act.
13. Such further and other grounds as counsel may advise and the Tribunal may permit.

PART II. DOCUMENTARY EVIDENCE TO BE USED AT THE HEARING

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7th DAY OF
MARCH, 2017

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