

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

February 28, 2017
CT-2016-005

Jos LaRose for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT

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COMMISSIONER OF COMPETITION

Applicant

—and—

VANCOUVER AIRPORT AUTHORITY

Respondent

NOTICE OF MOTION

(Respondent's Motion Challenging Claim of Privilege)

TAKE NOTICE that the Respondent, Vancouver Airport Authority ("VAA"), will make a motion to the Competition Tribunal, at a date and time to be set by the Tribunal. The estimated duration of the motion is one day.

THIS MOTION IS FOR:

1. an Order requiring the Applicant, the Commissioner of Competition (the "Commissioner"), to produce to VAA all of those documents listed in Schedule C of the Commissioner's Affidavit of Documents in respect of which the only privilege claimed is public interest privilege;
2. VAA's costs of this motion; and
3. such further and other relief as the Tribunal deems just.

THE GROUNDS FOR THE MOTION ARE:

1. VAA brings this motion in order to address a fundamental unfairness in the Commissioner's approach to the within proceeding. The Commissioner has taken the position that he can withhold from production virtually every relevant document on the basis of public interest privilege. Of the 12,000 relevant documents in his possession or control, the Commissioner has claimed public interest privilege over almost 10,000 of them (with almost all of the remaining 2000 being VAA's own documents that it previously delivered to the Commissioner pursuant to a section 11 order issued July 29, 2015).
2. The Commissioner takes this position without regard to the adverse effect that this claim of privilege will have on the fairness of the proceeding and on VAA's right to make full answer and defence, and without weighing any alleged need for continued secrecy against the right to a fair hearing and the need for full disclosure of all relevant facts.

3. As is made clear by the approach taken by the Commissioner in the within case, the Tribunal should no longer recognize a public interest privilege (such as that asserted by the Commissioner herein) on a class basis. Rather, any claim to public interest privilege should be evaluated on a case-by-case basis, consistent with the approach taken under the *Canada Evidence Act*, R.S.C. 1985, c. C-5, and at common law.

The Proceedings

4. The Commissioner began this proceeding by Notice of Application, dated September 29, 2016, seeking relief against VAA pursuant to section 79.

5. 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".

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

7. VAA delivered its Response on or about November 14, 2016. Among other things, VAA asserts that, given the small (and declining) market for in-flight catering of fresh meals, the

entry of additional catering firms would imperil the continued viability of the operations of the two existing catering firms at the Airport, thereby adversely affecting its ability to attract and retain flights in furtherance of its public interest mandate.

The Commissioner's Affidavit of Documents

8. On or about February 15, 2017, the Commissioner delivered his Affidavit of Documents, which purported to list all of the documents relevant to 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 are three Schedules.

9. Schedule A to the Commissioner's Affidavit lists those relevant documents in the Commissioner's possession or control that do not contain confidential information and over which the Commissioner does not claim privilege. Schedule A lists 146 documents.

10. Schedule B to the Commissioner's Affidavit lists those 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. All of the documents listed in Schedule B are VAA's own documents (produced to the Commissioner pursuant to the Commissioner's investigative authority and, more specifically, pursuant to the section 11 order referenced above), or are communications between the Bureau and VAA, or are communications on which VAA was copied. Schedule B lists 1619 documents.

11. Schedule C to the Commissioner's Affidavit lists those relevant documents in the Commissioner's possession or control in respect of which the Commissioner claims privilege and, therefore, is refusing to produce. Schedule C lists 9906 documents.

12. Some of the documents listed in Schedule C are subject to a claim of litigation privilege. Others are subject to a claim of solicitor-client privilege. And some are subject to multiple privilege claims. However, of the 9906 documents in respect of which the Commissioner is claiming privilege, approximately 9500 are being withheld from production solely on the basis of a claim of public interest privilege. The within motion pertains to the production of these 9500 documents.

13. The Commissioner has indicated an intention to waive privilege over approximately 85% of those 9500 documents. However, no waiver has yet been made and, in any event, no explanation has been given as to the need to maintain privilege over the documents that will continue to be withheld, which according to the Commissioner will still number in excess of 1000 documents.

The Commissioner's Claim of Public Interest Privilege Should Be Rejected

14. It would appear that the sole basis for the Commissioner's claim of public interest privilege is the Commissioner's assertion that the documents in question were gathered by the Commissioner from third parties – pursuant to section 11 orders and otherwise – in the course of his investigation.

15. The public interest privilege as asserted by the Commissioner is wholly inconsistent with the jurisprudence regarding other types of public interest privilege in relation to law enforcement (and otherwise), including those privileges asserted pursuant to sections 37 and 38 of the *Canada Evidence Act*.

16. The public interest privilege as asserted by the Commissioner is not justified by any special policy rationale. Other similarly situated investigative/enforcement agencies do not enjoy any analogous privilege.

17. The public interest privilege as asserted by the Commissioner is inconsistent with VAA's right to a fair hearing, conducted in accordance with the rules of natural justice.

18. While such a privilege has, in the past, been recognized by the Tribunal in cases such as *Canada (Director of Investigation and Research) v. Southam Inc.*, [1991] C.C.T.D. No. 16 and *Canada (Commissioner of Competition) v. United Grain Growers Ltd.*, [2002] C.C.T.D. No. 31, those decisions should no longer be followed, having regard to recent jurisprudence in both the Federal Court and provincial superior courts across the country in closely-related areas of the law. Specifically, the Tribunal should no longer recognize a "class privilege" attaching to the Commissioner's investigation under the *Competition Act*, but should instead consider public interest privilege on a case-by-case basis, taking into account such factors as:

- (a) whether the document (or group of documents) in question is relevant;
- (b) the nature of the public interest sought to be protected;
- (c) the particular contents of the document(s) in question;

- (d) the public interest in maintaining the secrecy of the document(s); and
 - (e) the need of producing the document(s) in the particular case.
19. Such further and other grounds as counsel may advise.

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

- (a) the affidavit of Kelly-Ann Webster, sworn February 28, 2017;
- (b) the pleadings and proceedings herein; and
- (c) such further and other evidence as counsel may advise and the Tribunal may permit.

DATED at Toronto, Ontario this 28th day of February, 2017



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