



Date: March 9, 2017

Subject: CT-2016-015 - The Commissioner of Competition v.
Vancouver Airport Authority

Direction to Counsel (from Mr. Justice Gascon, Chairperson)

Further to the request for a case management conference made by Vancouver Airport Authority (“VAA”) to deal with the scheduling of the hearing and the exchange of materials for VAA’s notice of motion filed with the Tribunal on February 28, 2017 and challenging the Commissioner of Competition’s (the “Commissioner”) claim of privilege in his Affidavit of Documents (the “VAA Motion”), and to the case management conference held on March 9, 2017, Justice Gascon (Chairperson) directs the following direction:

- (1) I have not been persuaded that the date for the hearing of the VAA Motion, already set out in the Scheduling Order issued by the Tribunal on December 20, 2016, as amended on consent by further orders issued on February 13 and 16 and on March 7, 2017 (the “Scheduling Order”), should be modified;
- (2) The Scheduling Order expressly provides that the “[h]earing of any motions arising from Affidavits of Documents and/or productions and/or in respect of the scope of examinations for discovery” shall be on March 22, 2017, and one day has been set aside for the hearing of such motions;
- (3) I point out that this date of March 22, 2017 incorporated in the Scheduling Order echoes what was jointly proposed by the parties in the draft scheduling order they had submitted to the Tribunal on December 8, 2016;
- (4) I further note that, as contemplated by the Scheduling Order, the VAA Motion was filed on February 28, 2017, thus allowing the parties to complete the steps leading to the hearing of the motion on March 22, 2017 within the timeframes contemplated by the *Competition Tribunal Rules*, SOR/2008-141 (the “Rules”) for motions. More specifically, pursuant to Rule 85, the Commissioner was to serve its response by March 7, 2017, which he did. Pursuant to Rule 87, the parties now have until March 17, 2017 to serve each other with their respective supplementary affidavits and memoranda of fact and law;
- (5) Rule 139 provides that the dates and other requirements established by case management orders like the Scheduling Order are firm, and that “compelling reasons” must exist for a change in such orders;

- (6) In issuing my direction, I am also guided by the principles set out in sub-section 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd supplement) (the “Act”) and in Rule 2, which direct the Tribunal to deal with all matters as informally and expeditiously as the circumstances and considerations of fairness permit;
- (7) Having heard the oral submissions made by counsel for both parties at the March 9, 2017 case management conference, I am not satisfied that compelling reasons exist to change the March 22, 2017 date contemplated for the hearing of the VAA Motion. I am ready to acknowledge that the VAA Motion raises serious and important issues relating to the Commissioner’s claims of public interest privilege, and that the decision of the Tribunal on the merits of the VAA Motion could therefore be of material significance for one or both parties in these proceedings. However, I am not deciding the merits of the VAA Motion today. I observe that the motion deals with a specific and well-defined legal question, as reflected in VAA’s notice of motion. Having read VAA’s notice of motion and heard the arguments ably presented by counsel for VAA at the case management conference, I am not convinced that an extension of time for the hearing of the VAA Motion is needed in the circumstances, that VAA will not have sufficient time to adequately prepare its written and oral submissions for such motion, or that going ahead with the scheduled hearing date of March 22, 2017 will be unfair or prejudicial to VAA;
- (8) I also note that moving the scheduled March 22, 2017 date for the hearing of the VAA Motion could require the parties and the Tribunal to revisit the balance of the dates currently set out in the Scheduling Order for the other pre-hearing steps in these proceedings;
- (9) In the circumstances of this case, and considering the Act, the Rules and the Scheduling Order already in place, I therefore find no reasons justifying a change to the March 22, 2017 hearing date;
- (10) For greater certainty, and in conformity with the applicable Rules referred to above, I hereby direct the parties to file and serve each other with their respective supplementary affidavits and memoranda of fact and law by the end of day on March 17, 2017;
- (11) At the case management conference, counsel for the Commissioner has suggested that the parties could also provide and exchange their respective books of authorities ahead of the March 22, 2017 hearing as this could help the parties (and the Tribunal) to prepare and to speed up the hearing. I agree, and I hereby direct counsel to file their books of authorities with the Tribunal by Monday March 20, 2017 at noon, and to serve each other in the same timeframe;
- (12) VAA also requested that the scheduling of discoveries be dependent on the outcome of the VAA Motion and the date of the Commissioner’s productions. I am mindful of the fact that the Tribunal’s decision on the merits of the VAA Motion, and the date of its issuance, could indeed have an impact on the discovery process to follow in these proceedings and could raise further issues. These will be addressed in due course. However, and without determining or disposing of this request from VAA, I consider

that, at this stage, it is premature and that it does not need to be dealt with until the Tribunal has issued its decision on the VAA Motion;

- (13) I understand that the Commissioner has stated his intention to waive privilege over a significant number of records listed in the Commissioner's Affidavit of Documents, and that counsel for the parties are currently in discussions in that respect and with regard to a confidentiality order in relation thereto. Counsel for the parties are strongly encouraged to try to finalize these discussions prior to the March 22, 2017 hearing in order to narrow the issues to be addressed at the hearing, and I hereby direct counsel for the parties to report to the Tribunal on the status of these discussions when they will file their memoranda of fact and law on March 17, 2017.

Andrée Bernier
A/Deputy Registrar
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