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:

COMMISSIONER OF COMPETITION

Applicant

– and –

VANCOUVER AIRPORT AUTHORITY

Respondent

REPLY OF THE COMMISSIONER OF COMPETITION

I. OVERVIEW

1. To justify its abuse of dominance – dominance that has substantially harmed competition for Galley Handling at Vancouver International Airport – VAA attempts to cloak itself as acting in the "public interest". In seeking to do so, VAA ignores its obligation to comply with the *Competition Act*, a law of general application that has as its purpose to maintain and encourage competition in Canada, to the benefit of all Canadians.

2. VAA also makes the illogical argument it needs to *restrict* competition in the market for Galley Handling at the Airport to *preserve* competition. To try and support this argument, VAA makes allegations that have no evidentiary basis and also misapprehends the applicable legal test to evaluate VAA's abusive conduct.

3. The fact is that VAA has abused its dominant market position by excluding and denying the benefits of competition to the Galley Handling market at the Airport. It has no legitimate explanation to justify the substantial prevention or lessening of competition that has resulted in higher prices, dampened innovation and lower service quality. In these circumstances, an order of the Tribunal to grant the relief sought by the Commissioner is necessary and appropriate.

4. The Commissioner repeats and relies upon the allegations in the Notice of Application, Statement of Grounds and Material Facts and Concise Statement of Economic Theory (the "**Application**") and, except as hereinafter expressly admitted, denies each of the allegations in the Response of the Vancouver Airport Authority (the "**Response**"). Capitalized terms used herein are as defined in the Application.

II. THE *COMPETITION ACT* APPLIES TO VAA

5. Contrary to the allegations in the Response, section 79 of the Act applies to VAA's conduct. No "regulated conduct exemption" is available to VAA.

6. First, VAA is not a regulator. It is a corporation under the *Canada Not-for-profit Corporations Act* that has entered into a Ground Lease with the Minister of Transport to operate the Airport. The federal statute – *Airport Transfers (Miscellaneous Matters) Act* – that permits the Minister of Transport to enter into the Ground Lease does not confer a regulatory function on VAA.

7. Second, no provision in any Act of Parliament or any statutory instrument specifies that the *Competition Act* shall not apply, in whole or in part, to the activities of VAA. To the contrary, section 8.06.01 of the Ground Lease specifically requires VAA to observe and comply with any applicable law. VAA is a "person" within the meaning of section 79 of the Act, such that the Act's abuse of dominance provisions apply to VAA.

8. Third, there is no operational conflict or inconsistency between the application of the Act and VAA's operation of the Airport pursuant to the Ground Lease. VAA has the ability to carry out the operation of the Airport pursuant to the Ground Lease while simultaneously complying with the Act, and VAA's compliance with the Act would in no way frustrate the fulfillment of any Parliamentary intent.

9. VAA, by its conduct, acknowledges that its licensing of firms to access the Airport's airside is subject to the Act. Section 8.12 of VAA's standard-form "Ground Handling Licence" agreement specifically provides that nothing in that agreement applies or is enforceable to the extent it would be contrary to the Act.

III. NO LEGITIMATE BUSINESS JUSTIFICATIONS

10. To justify its abusive conduct, VAA relies on several alleged business justifications. As described below, VAA's explanations for its conduct in this case do not constitute legitimate business justifications for the purposes of section 79 of the Act. None of VAA's explanations are credible efficiency or pro-competitive rationales for VAA's Practice that are *independent* of the anti-competitive effects of its conduct. Even if credible justifications exist, which is denied, VAA's justifications are insufficient to outweigh VAA's clear subjective intent to exclude or the reasonably foreseeable or expected exclusionary effects of the Practice.

11. **First**, VAA's argument that new entry is not supported because of alleged shrinking demand is countered by the fact that airlines operating at the Airport wish to procure In-Flight Catering from new-entrant firms. At least three international airlines have written letters advocating for additional In-flight Catering competition at the Airport. These letters have been in VAA's possession while new-entrant firms were requesting (and continue to request) authorization to access the airside to provide In-flight Catering at the Airport.

12. Regardless of the size of the market, open competition should determine the number and identity of firms serving the In-Flight Catering marketplace at the Airport, not VAA. Markets are most efficient and consumers are best served when competing firms are free to decide how to compete.

13. **Second**, VAA claims that it is not desirable for In-flight Catering facilities to be located off-Airport, due to ground access issues arising from the Airport's location on an island, and because firms that make investments in facilities off-Airport are less committed to continuing to serve the Airport in the event of a business downturn.

14. Even if access issues exist, which is denied, In-flight Catering firms already operate in Canada from off-airport locations. Their level of service, including on-time performance, meets airline requirements, and is backstopped by level-of-service commitments, and penalties, in contracts with airlines. Whether located on- or off-airport, In-flight Catering firms make significant investments in establishing and maintaining their facilities, and firms located off-airport do not take lightly the commitments and investments they have made.

15. **Third**, VAA claims that after being contacted by new-entrant firms seeking authorization to access the airside to provide In-flight Catering at the Airport it conducted a careful review of the marketplace prior to making any decision. In fact, it was only after VAA had already rejected new entry did VAA conduct any kind of detailed analysis, and the analysis that VAA did conduct cannot, as a matter of fact, support the conclusions that VAA seeks to draw in this case.

IV. VAA'S ILLOGICAL ARGUMENT THAT A LESS COMPETITIVE MARKET IS IN FACT A MORE COMPETITIVE MARKET

16. VAA asserts that there can be no lessening or prevention of competition owing to "vigorous competition" between the incumbent providers of In-flight Catering at the Airport – Gate Gourmet and CLS. The test for a substantial prevention or lessening of competition for the purposes of section 79 of the Act is a relative rather than an absolute one; that there may be competition between Gate Gourmet and CLS is irrelevant to the assessment of whether the relevant market would be substantially more competitive but for VAA's ongoing practice of anti-competitive acts, which it would be in this case.

17. The Commissioner also rejects VAA's proposition that the absolute number of In-flight Catering firms operating at the Airport is indicative of

the competitiveness of the relevant market. That new entry may cause an incumbent firm to exit the market does not mean that the result is a less competitive market. To the contrary, vigorous competition in a market, participation in which is not blocked by a gatekeeper's refusal to permit access to a critical input, will deliver quality products and services to customers at competitive prices, including in this case.

18. Finally, airlines cannot exercise material countervailing buyer power at the Airport as VAA asserts. Countervailing buyer power only works if there is a free and contestable market that provides options to airlines for In-flight Catering. VAA's conduct in this case ensures that airlines are captive to the incumbents at the Airport and cannot exercise material countervailing buyer power.

V. CONCLUSION

19. VAA has engaged in and continues to engage in an abuse of a dominant market position relating to the supply of In-flight Catering at the Airport. As described in the Application, VAA has a competitive interest in the market for the supply of Galley Handling at the Airport, and in insulating the incumbent In-flight Catering firms at the Airport from new sources of competition. VAA's practice of anti-competitive acts has, and continues, to harm competition. Accordingly, the Commissioner respectfully requests the Tribunal to grant the relief sought in paragraph 59 of the Application.

DATED AT Gatineau, Quebec, this 28th day of November, 2016.

"John Pecman"

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Commissioner of Competition

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