

INFORMATION NOTE*

A decision was issued on October 17, 2019 by the Competition Tribunal in *The Commissioner of Competition v Vancouver Airport Authority* (CT-2016-015). The Tribunal panel was composed of the Honourable Justice Denis Gascon (Chairperson of the Tribunal), the Honourable Chief Justice Paul Crampton, and Dr. Donald McFetridge.

Summary:

The Tribunal dismissed the application brought by the Commissioner of Competition (“**Commissioner**”) against the Vancouver Airport Authority (“**VAA**”) pursuant to section 79 of the *Competition Act*, RSC 1985, c C-34, as amended (“**Act**”), commonly known as the abuse of dominance provision of the Act. The application concerns VAA’s decision to authorize only a limited number of in-flight caterers to operate at the Vancouver International Airport (“**YVR**”). In the Commissioner’s view, in-flight catering comprises the sourcing and preparation of the food served to passengers on commercial aircraft (“**Catering**”) as well as the loading and unloading of such food on the airplanes (“**Galley Handling**”).

In brief, the Commissioner claimed that, by limiting the number of providers of in-flight catering services at YVR, and thereby excluding new-entrant firms, VAA had engaged in a practice of anti-competitive acts that have prevented or lessened competition substantially, and are likely to continue to do so. In his application, the Commissioner sought an order prohibiting VAA from directly or indirectly engaging in its exclusionary practices and requiring VAA to authorize airside access, on non-discriminatory terms, to any in-flight catering firm that meets customary health, safety, security and performance requirements, for the purposes of supplying Galley Handling services.

The Tribunal first concluded that, in the circumstances of this case, the regulated conduct doctrine (“**RCD**”) does not shield VAA from the application of section 79 to its impugned conduct. The Tribunal found that, as a matter of law, the RCD does not apply to section 79, because (i) that provision does not contain the “leeway” language required to allow the doctrine to be invoked, and (ii) the two rationales which supported the development of the doctrine do not apply in the particular circumstances of this case. Furthermore, the Tribunal determined that, as a matter of fact in this case, no validly enacted statute, regulation or subordinate legislative instrument required, directed, mandated or authorized VAA, expressly or by necessary implication, to engage in the impugned conduct.

Turning to the elements of section 79, the Tribunal found that VAA substantially or completely controls the supply of Galley Handling services at YVR, within the meaning of paragraph 79(1)(a) of the Act. With respect to paragraph 79(1)(b), the Tribunal first considered whether VAA, which does not itself compete in the Galley Handling market at YVR, has a plausible competitive interest (“**PCI**”) in that market. The two judicial members of the panel found that VAA does in fact have a PCI in that market. However, the Tribunal proceeded to unanimously conclude that VAA had and continues to have a legitimate business justification for engaging in the impugned exclusionary conduct. In brief, the Tribunal found that VAA’s justifications were more important in its decision-making process than any subjective or deemed anti-competitive

intent, or any reasonably foreseeable anti-competitive effects of its conduct. Accordingly, the overall character, or overriding purpose, of VAA's conduct was not anti-competitive, as contemplated by paragraph 79(1)(b). This finding was sufficient to dismiss the Commissioner's application.

The Tribunal also concluded that the Commissioner has not established that VAA's conduct has prevented or lessened competition substantially, or that it is likely to do so in the future, as contemplated by paragraph 79(1)(c), in the market for Galley Handling services. The Tribunal reached that conclusion after finding that VAA's impugned conduct has not materially reduced the degree of price or non-price competition in the supply of Galley Handling services at YVR, relative to the degree of competition that would likely have existed in the absence of such conduct.

The Commissioner's application was therefore dismissed with costs.

The Tribunal's reasons are confidential at this time in order to protect properly confidential evidence. A public version of the decision will issue as soon as possible after a determination has been made as to what information must remain confidential.