



**Date:** November 5, 2018

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

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

Further to the completion of the evidentiary portion of the hearing, below is a list of more specific questions that the Tribunal invite counsel for both parties to address, as part of their final written and oral submissions in this matter. This list is not meant to be exhaustive and it is expected that counsel will address all elements of the test under section 79 of the *Competition Act* (“**Act**”) in their submissions.

Regulated conduct exemption

1. Does the regulated conduct doctrine apply to exempt allegedly anti-competitive unilateral conduct from the operation of section 79 of the Act? Does the rationale that has been applied in cases involving the criminal provisions of the Act apply in the context of section 79?
2. What specific aspect(s) of VAA’s mandate and of the regulatory regime under which VAA operates authorized or required it to refrain from licensing one or more additional in-flight caterers, based on concerns about the potential impact of a new entrant on the services provided by one or both of the incumbent caterers at YVR?
3. Why shouldn’t the Act and the regulatory regime under which VAA operates be interpreted in a manner that enables them to co-exist and thereby to achieve or largely achieve their respective objectives, particularly if the Tribunal finds that VAA has economic incentives which may not be fully aligned with those of the airlines and the travelling public?

Plausible competitive interest

4. How does VAA’s interest in the supply of in-flight catering services at YVR differ from the typical interest that any supplier has in a market into which it supplies its products or services?
5. If the Tribunal was to determine that VAA has at least a conceptual plausible competitive interest in pursuing action that may maintain the revenues that it receives from the incumbent in-flight caterers at YVR at a level that is higher than would otherwise be the case if additional caterers operated at YVR, should the Tribunal proceed to look at whether VAA actually had such an interest on the specific facts of this case? If so, how

could this screen be defined in a way that would not potentially eliminate a broad range of anti-competitive conduct from the potential scope of section 79?

#### Relevant product market

6. What is the evidentiary basis supporting the relevant product market definitions advanced by each party?

#### Legitimate business justification

7. What role, if any, should either a failure to take into account readily available information, or the conduct of a superficial analysis, play in determining the “overall character” of the alleged practice of anti-competitive acts?

#### Substantial prevention or lessening of competition

8. How does the evidence support, or fail to support, the proposition that the conduct in which VAA is alleged to have engaged has substantially “lessened” competition, or is likely to do so (i.e., by facilitating the exercise of new or increased market power by the incumbent in-flight caterers)?
9. How does the evidence support, or fail to support, the proposition that any prevention of competition was, is, or is likely to be, “substantial”?

Upon reflection, and in light of the above questions, the Tribunal will be open to final written submissions not exceeding 50 pages in length, if the parties feel that it is not reasonably possible to make submissions within the 40-pages limit identified by the Tribunal last Friday. As indicated last Friday, along with their respective written submissions, each party shall provide to the Tribunal a compendium (in electronic and paper format) containing the relevant excerpts of evidence it relies upon. The Tribunal expects that such compendium would fit in a single, modestly sized, binder.

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