Public

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

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT

(Respondent's Motion Objecting to Certain Proposed Evidence)
(Returnable September 24, 2018)

September 10, 2018

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PART I – STATEMENT OF FACTS

A. Overview

1. The Vancouver Airport Authority ("VAA") brings this motion for an order ruling inadmissible certain evidence that the Commissioner proposes to tender at the trial of this matter. The evidence in question is objectionable for two reasons: first, it constitutes opinion evidence that does not meet the requirements for admissibility of lay opinions; and, second, it constitutes inadmissible hearsay.

2. The proposed evidence consists of statements by two non-expert witnesses, Ms. Barbara Stewart (a former Air Transat employee) and Ms. Rhonda Bishop (a Jazz employee), as to savings allegedly realized (or to be realized in the future) and as to increased expenses allegedly incurred (or to be incurred in the future) by Air Transat and Jazz, respectively. As such, the statements at issue constitute opinion evidence.

3. However, the statements are not admissible pursuant to the rules governing lay opinions, because Ms. Stewart and Ms. Bishop did not observe (and do not testify to) the facts upon which their respective opinions are purportedly based.

4. Moreover, while the two witnesses make conclusory statements as to aggregate savings realized and aggregate expenses incurred, neither witnesses indicates (or appears to have any knowledge as to) how those figures were calculated, nor do they indicate which data was used in those calculations. Rather, the two witnesses merely seem to be offering up conclusions arrived at by other people, based upon facts allegedly observed by other people.

5. Given that a lay witness may provide only those opinions that are based on facts that he or she actually observed, the proposed opinion evidence at issue is inadmissible.

6. In addition and in any event, the proposed evidence should be excluded on the basis that it is hearsay, in that the conclusions being offered up by Ms. Stewart and Ms. Bishop do not appear to be their own, but rather appear to be those of other persons, based upon calculations performed by persons unknown. While hearsay evidence is admissible, if it is necessary and reliable, the evidence in question does not meet those requirements.

7. Specifically, the evidence in question is not necessary, as there is no indication that the persons who actually performed the calculations (and thereby reached the conclusions at issue) are not available to testify. Nor is the evidence in question reliable, given that no explanation is provided as to how the conclusions at issue were arrived at, or as to how the calculations were performed. The evidence's unreliability is further highlighted by certain discrepancies between the opinions at issue and the opinions set out in the report of the expert witness to be called by the Commissioner.

8. For all of these reasons, VAA submits that the evidence at issue should be excluded.

B. The Within Proceedings

9. The Commissioner began this proceeding by Notice of Application, dated September 29, 2016, seeking relief against VAA pursuant to section 79 of the *Competition Act*.

10. Broadly speaking, the proceeding relates to VAA's decision to permit only two (and then three) inflight caterers to operate on-site at the Vancouver International 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".

> Notice of Application, para. 1 and 36-38, Motion Record of the Respondent, Tab 9

11. VAA delivered its Response on or about November 14, 2016. VAA pleaded that, to the best of its knowledge, the demand for inflight catering was not sufficient at that time to support additional entry and that, accordingly, the entry of additional catering firms would imperil the continued viability of the operations of the two then-existing catering firms at the airport, thereby adversely affecting VAA's ability to attract and retain flights in furtherance of its public interest mandate.

> Amended Response of Vancouver Airport Authority, para. 3-4, Motion Record of the Respondent, Tab 10

12. Thus, VAA pleaded that its decision not to permit additional catering firms to operate at the airport was not made for an anti-competitive purpose, but rather was (and is) motivated by its concern that, if new in-flight catering firms were permitted to operate at the airport, the operations of one or both of the existing firms would no longer be viable.

> Amended Response of Vancouver Airport Authority, paras. 75 and 78, Motion Record of the Respondent, Tab 10

13. VAA further pleaded that ensuring a competitive choice of freshly prepared meals is very important to its efforts to attract new airlines and routes and retain existing flights and

routes at the airport. VAA also denied that it substantially controls the relevant market and denied that its conduct has substantially lessened or prevented competition.

> Amended Response of Vancouver Airport Authority, para. 31-32, 66 and 81-82, Motion Record of the Respondent, Tab 10

14. VAA delivered an Amended Response on or about April 16, 2018. Among other things, VAA's Amended Response pleads that, in 2017, VAA reviewed the inflight catering market at the airport, with a view to determining whether there was sufficient demand to permit new entry without jeopardizing the existing level of service and competition among caterers operating at the airport. As a result of that review, VAA concluded that there was sufficient demand to permit new entry.

> Amended Response of Vancouver Airport Authority, para. 61, Motion Record of the Respondent, Tab 10

15. VAA further pleads that, following a request for proposals process, it entered into a 15-year licence agreement with a third caterer (dnata Catering Services Ltd.), which licence grants to dnata non-exclusive privileges to operate inflight catering services at the airport.

> Amended Response of Vancouver Airport Authority, para. 62, Motion Record of the Respondent, Tab 10

16. All of the foregoing allegations are expressly denied by the Commissioner.

> Reply of the Commissioner of Competition, para. 4, Motion Record of the Respondent, Tab 11

C. The Stewart and Bishop Witness Statements

17. Among the various witness statements that have been served by the Commissioner are:

(a) the witness statement of Barbara Stewart, a former employee of Air Transat, dated October 31, 2017; and

(b) the witness statement of Rhonda Bishop, a current employee of Jazz, dated November 10, 2017.

18. Each of those witness statements contains proposed financial-related evidence to which VAA objects. The witness statements will be considered in turn.

(i) The Stewart Witness Statement

19. According to Ms. Stewart's witness statement, she was the Senior Director, Procurement, for Air Transat for four years, until her retirement in June 2017. Ms. Stewart is the only Air Transat employee (or former employee) to provide evidence in this matter.

20. Ms. Stewart's witness statement includes information related to, among other things, a request for proposals process that Air Transat conducted in 2015 with respect to its inflight catering needs at eleven different airports across the country. Further to that RFP process, Air Transat entered into two contracts for inflight catering services. The first contract was entered into with Optimum Strategies Inc. and relates to ten of the eleven airports that were the subject of the 2015 RFP. The second contract was entered into with Gate Gourmet and relates to the remaining airport that was the subject of the 2015 RFP, namely, YVR.

Stewart Witness Statement, paras. 21-23 and 32, Motion Record of the Respondent, Tab 2

Stewart Witness Statement, para. 32, Motion Record of the Respondent, Tab 2

21. Ms. Stewart states that Air Transat only contracted with Gate Gourmet because it "had no choice", due to the fact that Air Transat's preferred service provider – Optimum Strategies (or, more accurately, Sky Café, which was to subcontract with Optimum for the loading and unloading of Air Transat's planes) – could not secure the requisite catering licence from VAA.

> Stewart Witness Statement, paras. 32-34, Motion Record of the Respondent, Tab 2

22. Ms. Stewart goes on to provide a number of statements as to the financial implications of the contracts entered into as a result of the 2015 RFP. Those statements can be conveniently categorized into two groups:

(a) statements as to how much money Air Transat is projected to save as a result of contracting with Optimum, as compared to Gate Gourmet, at the relevant airports across the country; and

(b) statements as to the increased expenses Air Transat is projected to incur as a result of contracting with Gate Gourmet, as compared to Optimum, at YVR.

23. With respect to the savings that Ms. Stewart alleges Air Transat will realize as a result of contracting with Optimum instead of Gate Gourmet at 10 airports across the country, Ms. Stewart states as follows:

> [I]n 2015, Air Transat completed a request-for-proposal process for inflight catering. This is expected to result in Air Transat realizing cost savings of approximately [redacted] over [redacted] years by switching away from the incumbent provider at 10 airports in Canada and contracting with Optimum Strategies Inc.

Stewart Witness Statement, para. 5, Motion Record of the Respondent, Tab 2

For other virtually identical statements see Stewart Witness Statement, para. 29 and 42, Motion Record of the Respondent, Tab 2

24. And with respect to the increased expense that Air Transat will allegedly incur at YVR as a result of contracting with Gate Gourmet instead of Optimum, Ms. Stewart states:

> As a result of Air Transat's inability to switch to a new-entrant provider at YVR, today Air Transat pays approximately [redacted]% more for inflight catering on an annualized basis at YVR. . .

Stewart Witness Statement, para. 5, Motion Record of the Respondent, Tab 2

For other virtually identical statements see Stewart Witness Statement, paras. 35 and 42, Motion Record of the Respondent, Tab 2

25. These statements as to the alleged [redacted] cost savings and the alleged [redacted] increased expenses are repeated, verbatim, a number of times over the length of Ms. Stewart's witness statement. However, no indication is provided either as to how those figures were calculated or as to the facts upon which those conclusions were based, nor are any documents that might provide such an indication attached to the witness statement. In fact, Ms. Stewart does not attach to her witness statement any documents whatsoever setting out the kind of detailed financial information that might have been used to calculate those figures.[1]

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[1] Furthermore, such documents are not to be found in the Commissioner's productions. Transcript of Examination for Discovery of Kevin Rushton, December 13, 2017, p. 70-72, Q. 171-177, Motion Record of the Respondent, Tab 5

Answers to Undertakings Given on the Examination for Discovery of Kevin Rushton, December 13, 2017, Answers provided on December 18, 2017, Item #52, Motion Record of the Respondent, Tab 6F

Transcript of Continued Examination for Discovery of Kevin Rushton, May 17, 2018, p. 403-405, Q. 1201-1202; p 409, Q. 1208; p. 411, Q. 1211; Motion Record of the Respondent, Tab 7

And see Answers to Undertakings Given on the Continued Examination for Discovery of Kevin Rushton, May 17, 2018, Item #49, Motion Record of the Respondent, Tab 8A

> For the repeated statements, see Stewart Witness Statement, paras. 29, 33, 35 and 42, Motion Record of the Respondent, Tab 2
>
> In addition, Ms. Stewart also makes a similar, albeit more general statement "Optimum's bid for YVR was superior to that of Gate Gourmet from both a price and service perspective", Stewart Witness Statement, para. 33, Motion Record of the Respondent, Tab 2

26. Moreover, it does not appear that Ms. Stewart even had any involvement in calculating these figures and thereby coming to the purported conclusions set out in her witness statement.

27. Accordingly, Ms. Stewart's statements with respect to alleged superiority of Optimum's bid, the alleged cost savings that Air Transat will realize, and the alleged increased expenses that Air Transat will incur are merely bald conclusions, without any of the underlying facts that would be necessary to support such conclusions. Moreover, the conclusions do not even appear to be her own. Rather, they appear to be conclusions drawn by others.

(ii) The Bishop Witness Statement

28. According to Ms. Bishop's witness statement, she is the Director, Inflight Services and Onboard Product of Jazz Aviation LP. Ms. Bishop is the only Jazz employee to provide evidence in this matter.

29. Among other things, Ms. Bishop's witness statement sets out information related to a request for proposals process that Jazz conducted in 2014 with respect to its inflight catering needs at nine airports across the country. Further to that RFP process, Jazz entered into the following three contracts for inflight catering services:

(a) with Newrest, relating to inflight catering services to be provided at three airports: Toronto, Montreal, and Calgary;

(b) with Sky Café, relating to inflight catering services to be provided at five airports: Edmonton, Regina, Winnipeg, Ottawa, and Halifax; and

(c) with Gate Gourmet, relating to inflight catering services to be provided at the Vancouver airport.

Bishop Witness Statement, paras. 49 and 51, Motion Record of the Respondent, Tab 3

30. Ms. Bishop goes on to make a number of statements as to the financial implications of the contracts entered into as a result of the 2014 RFP. Those statements can be conveniently categorized into two groups:

(a) statements as to how much money Jazz has allegedly saved (or how much Jazz believed in 2014 that it would save) as a result of contracting with Newrest and Sky Café instead of Gate Gourmet; and

(b) statements as to the increased expenses that Jazz allegedly incurred as a result of contracting with Gate Gourmet instead of Sky Café at YVR.

a. Ms. Bishop's Statements Related to Alleged Savings

31. With respect to the savings allegedly realized by Jazz as a result of contracting with Newrest and Sky Café (instead of Gate Gourmet) at eight airports, Ms. Bishop states:

> In 2015 alone, Jazz realized actual cost savings of $2.9 million or 16% on In-flight Catering, by switching away from Gate at eight airports in Canada and procuring the services of new providers, specifically, Newrest and Sky Café.
>
> Bishop Witness Statement, para. 4, Motion Record of the Respondent, Tab 3
>
> For another virtually identical statement, see Bishop Witness Statement, para. 50, Motion Record of the Respondent, Tab 3
>
> Ms. Bishop provides similar evidence, albeit of a more general nature, at paragraph 65 of her witness statement, where she states that Jazz could achieve "significant annual cost savings by switching to more competitive providers of In-flight Catering". Motion Record of the Respondent, Tab 3

32. In a similar vein, Ms. Bishop makes a statement as to how much Jazz estimated, in 2014, that it would save on an annual basis if it contracted with Sky Café instead of Gate Gourmet:

> [B]ased on the bids that each firm submitted using specifications provided by Jazz [redacted]), Jazz determined that it could save approximately [redacted] on its costs for In-flight Catering by switching away from Gate Gourmet at eight of the Nine Stations and continuing to use Gate Gourmet at YVR, in comparison to what it had been paying the incumbent, Gate Gourmet, in 2014.
>
> Bishop Witness Statement, para. 42, Motion Record of the Respondent, Tab 3

33. In that regard, Ms. Bishop attaches as Exhibit 10 to her witness statement a document that she describes as "a copy of Jazz's 2014 bid evaluation (adjusted to reflect [redacted] . . .)".

> Bishop Witness Statement, para. 42 and Exhibit 10, Motion Record of the Respondent, Tab 3 and 3(10)

34. Exhibit 10 is a one-page chart, which sets out what appear to be estimated inflight catering costs for each airport for each of four bidders (namely, Gate Gourmet, Newrest, Sky

Café, [redacted] as well as figures for each airport in respect of something referred to as [redacted]

35. However, Ms. Bishop provides no information as to who prepared Exhibit 10, or as to how the estimated costs set out in the document were calculated, or as to the specific data that were used to calculated those alleged estimated costs.[2] Moreover, it does not appear that Ms. Bishop even had any involvement in performing the calculations that resulted in the conclusions shown on Exhibit 10 or in preparing the document itself.

> When discussing the evaluation of the RFP bids to which Exhibit 10 purportedly relates, Ms. Bishop never indicates that she had any involvement in that evaluation. Instead, she repeatedly speaks of "Jazz" conducting the evaluation. See, e.g., Bishop Witness Statement, para. 41: "Jazz evaluated the bids…", Motion Record of the Respondent, Tab 3
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> And see Bishop Witness Statement, para. 42: "A copy of Jazz's 2014 bid evaluation is attached…", Motion Record of the Respondent, Tab 3

36. The same is true of the conclusions related to estimated and actual savings that are set forth in the body of Ms. Bishop's witness statement. Ms. Bishop does not explain what facts purportedly underlie those conclusions, nor does she explain how the conclusions were arrived at.

37. Moreover, Ms. Bishop does not appear to have had any role in performing the calculations that underlie the conclusions set forth in the body of her witness statement. Accordingly, the conclusions that Ms. Bishop sets out as to estimated and actual savings do not appear to be her own.

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[2] Indeed, the Commissioner was unable to provide such information on examination for discovery. See, in this regard, Transcript of Examination for Discovery of Kevin Rushton, December 13, 2017, p. 97-100, Q. 244-255.

(b) Ms. Bishop's Statements Related to Alleged Increased Expenses

38. Turning next to the increased expenses that Jazz allegedly incurred as a result of contracting with Gate Gourmet at YVR, Ms. Bishop first describes Jazz's estimate, prepared in 2014, as to the increased expenses it expected to incur as a result of contracting with Gate Gourmet at YVR:

> Based on evaluating the bids received in response to the 2014 RFP, Jazz estimated that it could save approximately [redacted] per year on its In-flight Catering costs at YVR, had Jazz been able to select a competitive new-entrant alternative at the airport instead of the incumbent provider, Gate Gourmet Canada Inc.
>
> Bishop Witness Statement, para. 4, Motion Record of the Respondent, Tab 3
>
> For virtually identical statements, see Bishop Witness Statement, para. 45 and 52, Motion Record of the Respondent, Tab 3
>
> Ms. Bishop also provides similar evidence, albeit in a more general manner, in paragraphs 6 and 51 of her witness statement, where she states that Jazz incurred increased "costs of operations" and "incurred significant additional costs to remain with Gate Gourmet, whose bid at YVR was not competitive". Motion Record of the Respondent, Tab 3

39. Ms. Bishop also makes a statement as to the alleged increased expenses that Jazz actually incurred over the first 27 months of its contract with Gate Gourmet at YVR:

> Multiplying Jazz's actual flight volumes at YVR between 1 January 2015 and 31 March 2017 by the 2014 RFP pricing proposed by [redacted] and comparing it with Gate Gourmet's actual pricing for the period, Jazz was forced to pay approximately [redacted] more for In-flight Catering at YVR.
>
> Bishop Witness Statement, para. 54, Motion Record of the Respondent, Tab 3
>
> For virtually identical statements, see Bishop Witness Statement, para. 5 and 65, Motion Record of the Respondent, Tab 3

40. Ms. Bishop goes on to attach as Exhibit 13 to her witness statement a document that she describes as "Jazz's pricing analysis in this regard".

> Bishop Witness Statement, para. 54, Motion Record of the Respondent, Tab 3
>
> Exhibit 13 to the Bishop Witness Statement, Motion Record of the Respondent, Tab 3(13)

41. Exhibit 13 is a two-page document that sets out what appear to be expenses incurred in respect of certain catering services provided by Gate Gourmet from January 1, 2015 through March 31, 2017. It also sets out what appear to be the expenses that would have been incurred by Jazz if those same services had been provided by [redacted] over that same time period.

42. However, as with Exhibit 10, Ms. Bishop does not provide and information as to who prepared Exhibit 13, or as to when it was prepared, or as to how the expenses were calculated, or as to the specific data that were used to calculated those alleged expenses.[3]

43. Moreover, it does not appear that Ms. Bishop even had any involvement in performing the calculations that resulted in the conclusions shown on Exhibit 13, or in preparing the document itself.

> In that regard, it should be noted that, when discussing Exhibit 13, Ms. Bishop merely refers to it as "Jazz's pricing analysis". See Bishop Witness Statement, para. 54, Motion Record of the Respondent, Tab 3

44. The same is true of the conclusions related to the alleged increased expenses that are set out in the body of Ms. Bishop's witness statement. Ms. Bishop does not explain what facts

[3] Indeed, the Commissioner was unable to provide such information on examination for discovery. See, in this regard, Transcript of Examination for Discovery of Kevin Rushton, December 13, 2017, p. 109-112, Q. 269-277

purportedly underlie those conclusions (and she certainly does not provide any evidence establishing the truth of such facts), nor does she explain how the conclusions were arrived at.

45. Moreover, as with the conclusions related to alleged cost savings, Ms. Bishop does not appear to have had any role in performing the calculations that underlie the conclusions she presents related to alleged increased expenses. Accordingly, as with the conclusions related to alleged cost savings, the conclusions that Ms. Bishop sets out as to increased expenses (both estimated and actual) do not appear to be her own.

46. As is discussed more fully below, the foregoing evidence that Ms. Bishop and Ms. Stewart propose to give is objectionable for two main reasons:

(a) it is improper opinion evidence; and

(b) it is inadmissible hearsay.

PART II – LAW AND ARGUMENT

A. Opinion Evidence Is Only Admissible In Limited Circumstances

47. There are many qualifications to the general rule that all relevant evidence is admissible. One of those qualifications relates to opinion evidence. Generally speaking, witnesses may only testify as to the facts that they have perceived; they may not testify as to the opinions that they have drawn from those facts. As the Supreme Court stated in *White Burgess Langille Inman v. Abbott and Haliburton Co.*:

> Witnesses are to testify as to the facts which they perceived, not as to the inferences – that is, the opinions – that they drew from them. As one

> great evidence scholar put it long ago, it is "for the jury to form opinions, and draw inferences and conclusions, and not for the witness".
>
> *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 14

48. Similarly in *R. v. D.D.*, Major J. stated:

> A basic tenet of our law is that the usual witness may not give opinion evidence, but [may] testify only to facts within his knowledge, observation and experience. This is a commendable principle since it is the task of the fact finder, whether a jury or judge alone, to decide what secondary inferences are to be drawn from the facts proved.
>
> *R. v. D.D.,* 2000 SCC 43 at para. 49
>
> See also *R. v. K. (A.)*, [1999] O.J. No. 3280 at para. 71 (C.A.)
>
> And see A.W. Mewett and P.J. Sankoff, *Witnesses* (1991+) at p. 16-4

49. There are two main exceptions to this general exclusionary rule:

(a) a properly qualified expert may draw inferences from proven facts, providing his or her opinion on matters requiring specialized knowledge or skill; and

(b) a non-expert may offer opinion evidence if the following criteria are met:

(i) the opinion is one that a person of ordinary experience could have drawn;

(ii) the facts upon which the witness based his or her opinion were observed by the witness and are too fleeting to be remembered or too complicated to be separately described; and

(iii) the witness has the requisite experience to form the opinion.

White Burgess Langille Inman v. Abbott and Haliburton Co., 2015 SCC 23 at para. 15 and 19

R. v. Graat, [1982] S.C.J. No. 102 at p. 14QL

Lockridge v. Ontario (Director, Ministry of the Environment), 2012 ONSC 2316 at para. 106-107 (Div. Ct.)

50. The second exception – that applicable to non-expert witnesses – was discussed by the Supreme Court in *R. v. Graat*. In that case, Dickson C.J.C. endorsed the following as a correct statement of the law relating to lay witness opinion:

> When . . . the facts from which a witness received an impression were too evanescent in their nature to be recollected, or too complicated to be separately and distinctly narrated, a witness may state his opinion or impression. He was better equipped than the jury to form it, and it is impossible for him to convey an adequate idea of the premises on which he acted to the jury . . .

R. v. Graat, [1982] S.C.J. No. 102 at p. 14QL

Canada (Commissioner of Competition) v. Toronto Real Estate Board, 2017 FCA 236 at paras. 78-80

See also *R. v. Collins*, [2001] O.J. No. 3894 at para. 17 (C.A.)

E.G. Ewaschuk, *Criminal Pleadings & Practice in Canada*, 2d ed. (2002), p. 246-247, as quoted in *R. v. Ilina*, 2003 MBCA 20 at para. 77

51. However, even where the type of opinion is one that could be provided by a lay witness, the opinion is only admissible if it is based on facts that were actually observed by the witness in question:

> While . . . a lay witness may give "opinion evidence" that is within his or her personal knowledge and experience, that opinion must be based on "observed facts" . . .

Lipcsei v. Trafalgar Insurance Co. of Canada, [2006] O.J. No. 748 at paras. 23 and 24 (Div. Ct.)

52. Thus, in *Canada (Commissioner of Competition) v. Imperial Brush Co.*, the Tribunal noted that lay opinion evidence may be admissible, if the "witness' testimony is founded on personal knowledge". [emphasis added]

Canada (Commissioner of Competition) v. Imperial Brush Co., 2007 Comp. Trib. 22 at para. 10 and 11

And see *Toronto Dominion Bank v. Cambridge Leasing Ltd.*, 2006 NBQB 134 at para. 7

And see *R. v. Pal*, [1998] O.J. No. 3980 at paras. 9 and 11 (Gen. Div.)

53. Similarly, in *R. v. Cuming*, the Ontario Court of Appeal stated:

> Non-expert opinion evidence on such matters as identification is admissible but, as with any opinion evidence, there must be some basis for the opinion before it can be given any weight . . .

R. v. Cuming, [2001] O.J. No. 3578 at para. 21 (C.A.)

And see *R. v. Brown,* 2012 ONSC 6565 at para. 28

54. As is discussed more fully below, the impugned statements contained in both the Stewart Witness Statement and the Bishop Witness Statement constitute lay opinion evidence that does not meet the foregoing requirements for admissibility. Specifically, neither Ms. Stewart nor Ms. Bishop purports to have any knowledge of the facts upon which their respective opinions are allegedly based.

B. The Stewart Witness Statement Contains Improper Opinion Evidence

55. As discussed above, the Stewart Witness Statement contains a number of statements relating to:

(a) the amount of money that Air Transat expects to save as a result of switching from Gate Gourmet to Optimum at airports across Canada; and

(b) the additional expense that Air Transat expects to incur as a result of continuing to obtain inflight catering services from Gate Gourmet at YVR, instead of obtaining such services from Optimum.

56. Those statements are not statements as to facts that Ms. Stewart observed. Ms. Stewart did not – and, indeed, could not – have observed savings that Air Transat expects to realize in the future. Nor could she have observed additional incremental expenses that Air Transat expects to incur in the future.

57. Rather than testifying as to facts that she has observed, Ms. Stewart is providing conclusions purportedly drawn from facts. Thus, Ms. Stewart's evidence in that regard is opinion evidence.

58. Of course, Ms. Stewart is not being tendered as an expert. Accordingly, her opinion evidence can only be admissible if it meets the requirements for admissibility of a lay opinion. For several reasons, her evidence does not meet those requirements.

59. First and most importantly, even assuming that the opinions offered by Ms. Stewart are based on facts (which is disputed, since there is no indication as to what those facts might be),

those facts were (as far as can be ascertained from the Stewart Witness Statement) not observed by Ms. Stewart. That is, there is no evidence that Ms. Stewart observed or has knowledge of any of the facts upon which these conclusions are purportedly based.

60. For example, while she provides conclusions as to the savings that Air Transat expects to realize as a result of contracting with Optimum instead of Gate Gourmet at the relevant airports across the country, there is no evidence that she herself has any knowledge as to amounts paid to Optimum under the current contract. Nor is there evidence that she has any knowledge as to amounts that would have been paid to Gate Gourmet for those same services.

61. Similarly, while she provides conclusions as to the increased expenses that Air Transat expects to incur as a result of contracting with Gate Gourmet instead of Optimum at YVR, there is no evidence that she herself has any knowledge as to amounts paid to Gate Gourmet under the current contract. Nor is there evidence that she has any knowledge as to amounts that would have been paid to Optimum for providing those same services.

62. Moreover, there is no evidence that she was involved in, or supervised, or has knowledge of, any calculations that were purportedly done in order to arrive at the opinions that she provides as to these alleged savings and alleged increased costs.

63. On that basis alone, Ms. Stewart's opinion evidence should be excluded.

64. Indeed, not only is there no evidence as to the predicate facts upon which the opinions might be based, the evidence before the Court is that it is not possible to perform the calculations necessary to form the opinions provided by Ms. Stewart, based on the information

that is available. To explain, Dr. Gunnar Niels, the expert witness who is to be called to testify on behalf of the Commissioner, states in his expert report that, as a result of limitations in the data, it is not possible accurately to determine the amounts (if any) that Air Transat has saved as a result of switching from Gate Gourmet to Optimum. Dr. Niels states:

> I have not been able to conduct a meaningful analysis of the gains that Air Transat made from these switches to Optimum due to data-related issues.
>
> Expert Report of Dr. Gunnar Niels, dated July 4, 2017, para. 4.50

65. He goes on to provide an explanation as to the limitations in the data and the effect that those limitations have on his ability to calculate the savings (if any) realized by Air Transat as a result of contracting with Optimum:

> Air Transat's previous arrangement with Gate Gourmet included a [redacted]. The Gate Gourmet and Optimum data account for Air Transat's [redacted] in different ways. While Gate Gourmet's [redacted], Optimum's data [redacted] This means that it is difficult to ensure that any analysis of the gains from switching is comparing like with like.
>
> I therefore cannot carry out an analysis of the gains from switching for Air Transat similar to the one for Jazz.
>
> Expert Report of Dr. Gunnar Niels, dated July 4, 2017, paras. 4.52-4.53, Motion Record of the Respondent, Tab 4

66. Accordingly, Ms. Stewart's opinions are:

(a) based upon alleged facts in respect of which she has no knowledge;

(b) based upon calculations in respect of which she has no knowledge; and

(c) based upon calculations that, according to the Commissioner's expert, are impossible to perform, given the data that is available.

67. Therefore, it is submitted that Ms. Stewart's evidence does not meet the requirements for the admissibility of lay opinion evidence and should be, accordingly, excluded.

C. The Stewart Witness Statement Contains Inadmissible Hearsay

68. There is still a further reason to exclude Ms. Stewart's opinion evidence – it appears to constitute hearsay. As discussed above, the nature of the opinions offered make it clear that some calculations must have been performed in order to arrive at the figures provided by Ms. Stewart. However, it does not appear that Ms. Stewart performed these calculations herself. Accordingly, it would appear that, in providing the opinions, she is merely providing hearsay – repeating the results of calculations performed by someone else at Air Transat (although she provides no information as to who that might have been).

69. Of course, the reasons for excluding hearsay evidence are well established by the jurisprudence. Hearsay is presumptively inadmissible because, by its nature, it is presumptively unreliable. That unreliability stems from the fact that the opposing party is denied the opportunity effectively to cross-examine in respect of the hearsay evidence, because the original declarant is not before the court. The Supreme Court explained in *R. v. Bradshaw*:

> [Hearsay] is presumptively inadmissible because – in the absence of the opportunity to cross-examine the declarant at the time the statement is made – it is often difficult for the trier of fact to assess its truth. Thus,

> hearsay can threaten the integrity of the trial's truth-seeking process and trial fairness.
>
> *R. v. Bradshaw*, 2017 SCC 35 at para. 1
>
> And see *Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.*, [2009] C.C.T.D. No. 6 at para. 84

70. Hearsay is only admissible if it meets the criteria of necessity and reliability.

> *R. v. Bradshaw*, 2017 SCC 35 at para. 1
>
> And see *Canada (Commissioner of Competition) v. CCS Corp.*, 2012 Comp. Trib. 14 at para. 148

71. Thus, for example, in *Canada (Commissioner of Competition) v. Imperial Brush Co.*, the Tribunal struck certain hearsay evidence on the basis that it did not meet the requirements of reliability and necessity, noting that to admit such hearsay would work an unfairness on the opposing party:

> It is unfair to the Applicant that it not have the opportunity to question the persons making the statement, the reliability of which is in question.
>
> *Canada (Commissioner of Competition) v. Imperial Brush Co.*, 2007 Comp. Trib. 22 at para. 13

72. In the present case, Ms. Stewart's opinion evidence does not meet either of the two criteria of necessity and reliability. It does not meet the criteria of necessity, because there is no suggestion that the person who actually performed the calculations is not available to testify.

73. And it does not meet the criteria of reliability for three reasons:

(a) First, no details have been provided as to how the requisite calculations were performed, nor has the source documentation or data upon which the calculations were purportedly based been produced.

(b) Second, no information has been provided as to who actually performed the calculations. Accordingly, there is no way to evaluate whether that person had the necessary skill to perform the calculations.

(c) Third, the Commissioner's own expert says that, due to limitations in the available data, he was unable to form the very opinion that Ms. Stewart purports to provide in her witness statement.

74. Accordingly, it is submitted that Ms. Stewart's opinion evidence should also be excluded on the basis that it is inadmissible hearsay.

D. The Bishop Witness Statement Contains Improper Opinion Evidence

75. Like the impugned evidence given by Ms. Stewart, that given by Ms. Bishop is similarly objectionable on the basis that it is improper opinion evidence.

76. As discussed above, Ms. Bishop provides evidence as to:

(a) the amount of money that Jazz allegedly saved as a result of contracting with Newrest and Sky Café at a number of airports across the country, instead of with Gate Gourmet; and

(b) the additional expenses allegedly incurred by Jazz as a result of contracting with Gate Gourmet at YVR, instead of with Sky Café.

77. Of course, that evidence does not relate to facts that Ms. Bishop observed. Ms. Bishop did not observe (and indeed could not have observed) Jazz's expected and actual savings. Nor could she have observed Jazz's expected and actual expenses. Rather than testifying as to facts that she observed, Ms. Bishop is testifying as to conclusions purportedly drawn from facts. Thus, Ms. Bishop's evidence is opinion evidence.

78. Like Ms. Stewart, Ms. Bishop is not being tendered as an expert. Accordingly, her evidence can only be admissible if it meets the requirements for admissibility of lay opinion evidence. However, as with Ms. Stewart's evidence, Ms. Bishop's evidence does not meet those requirements.

79. First and most importantly, even assuming that the opinions offered by Ms. Bishop are based on facts (which is disputed), those facts were not observed by Ms. Bishop. That is, there is no evidence that Ms. Bishop observed the facts upon which her proffered conclusions are purportedly based.

80. For example, while she provides conclusions as to the savings that Jazz allegedly realized as a result of contracting with Newrest and Sky Café, there is no evidence that Ms. Bishop herself has any knowledge as to amounts that Jazz has paid to Newrest and Sky Café under the relevant contracts. Nor is there evidence that she has any knowledge as to amounts that would have been paid to Gate Gourmet for those same services.

81. Similarly, while she provides conclusions as to the increased expenses that Jazz allegedly incurred over the period from January 1, 2015 to March 31, 2017 as a result of contracting with Gate Gourmet instead of Sky Café at YVR, there is no evidence that she herself has any knowledge as to amounts paid to Gate Gourmet under the current contract over that time period. Nor is there evidence that she herself has any knowledge as to the amounts that would have been paid to Sky Café over that same period.

82. Moreover, there is no evidence that she was involved in, or supervised, or has knowledge of, any calculations that were purportedly done in order to arrive at the opinions that she provides as to the savings that Jazz allegedly realized as a result of contracting with Newrest and Sky Café across the country, or as to the increased costs that Jazz allegedly incurred as a result of contracting with Gate Gourmet at YVR.

83. Accordingly, Ms. Bishop's opinions are:

(a) based upon alleged facts in respect of which she has no knowledge; and

(b) based upon calculations in respect of which she has no knowledge.

84. Accordingly, Ms. Bishop's opinion evidence should be excluded.

E. The Bishop Witness Statement Contains Inadmissible Hearsay

85. As with the impugned evidence in the Stewart Witness Statement, the opinion evidence contained in the Bishop Witness Statement should also be excluded on the basis that it is hearsay that does not meet the criteria of necessity and reliability.

86. It does not meet the criterion of necessity, because there is no reason to believe that the person who prepared the calculations upon which Ms. Bishop's opinions are purportedly based is not available to testify.

87. It does not meet the criterion of reliability, because, without information as to how the calculations were performed and without the specific data upon which the calculations were based, there is no reason to believe they are accurate. This lack of reliability is made abundantly clear by the fact that Ms. Bishop's opinion as to the annual cost savings allegedly realized by Jazz as a result of switching to Newrest and Sky Café differs significantly from that of the Commissioner's own expert. No explanation is provided that might explain or reconcile this discrepancy.

> See in that regard, Expert Report of Dr. Gunnar Niels, dated July 4, 2018, para. 4.58, Motion Record of the Respondent, Tab 4, where Dr. Niels provides his opinion that, "across the eight airports where Jazz switched providers, it saved approximately [redacted] in the year following the switch" [i.e., in 2015]. Dr. Niels' opinion is that Jazz's annual cost savings amounts to [redacted] of the amount stated in Ms. Bishop's opinion.

Exhibits 10 and 13 Constitute Inadmissible Hearsay

88. Moreover, both Exhibits 10 and 13 (which appear to be the source of most of the conclusions set out in the body of Ms. Bishop's witness statement) are objectionable on the basis that they constitute inadmissible hearsay.

89. The two documents are being tendered to prove the truth of their respective contents. They are accordingly being tendered as hearsay. In order to be admissible, they must qualify as an exception to the ordinary rule excluding hearsay. The only possible exception that might apply is that relating to the admissibility of business records, which can be admissible either

pursuant to section 30 of the *Canada Evidence Act* or pursuant to the common law rules governing business records.

> *Canada Evidence Act*, R.S.C. 1985, c. C-5, as amended, s. 30
>
> And with respect to the common law rule, see *R. v. Laverty*, [1979] O.J. No. 442 at paras. 11-13 (C.A.)

90. Under both the *Canada Evidence Act* and the common law, the party tendering the evidence must prove that the document in question was created in the "usual and ordinary course of business".

> *Boroumand v. Canada*, 2016 FCA 313 at para. 6
>
> *R. v. Laverty*, [1979] O.J. No. 442 at paras. 11-13 (C.A.)

91. For example, in *Boroumand v. Canada*, the Federal Court of Appeal affirmed that, absent evidence establishing that documents were created in the "usual and ordinary course of business", the documents were not admissible pursuant to section 30 of the *Canada Evidence Act*:

> Despite assertions by the appellant that the money exchange documents were created in the usual and ordinary course of business of the money exchange enterprise, these assertions were unsupported by evidence.
>
> *Boroumand v. Canada*, 2016 FCA 313 at para. 6

92. Similarly, in *R. v. Laverty*, the Ontario Court of Appeal considered the common law rule related to business records and excluded a document on the basis that the creator of the document had not been under a business duty to create the document. The Court explained that such a duty imbues the business record with the requisite indicia of reliability:

> In the view of the common law a declaration made or a record kept pursuant to a duty had a certain circumstantial guaranty of authenticity which is not present when the record or declaration falls outside the duty.
>
> *R. v. Laverty*, [1979] O.J. No. 442 at para. 13 (C.A.)
>
> See also *R. v. Wilcox*, [2001] N.S.J. No. 85 at para. 49-52 (C.A.)
>
> And see *R. v. Monkhouse*, [1987] A.J. No. 1031 at p. 5QL (C.A.)

93. In the present case, no evidence has been provided as to who created either Exhibit 10 or Exhibit 13. Certainly, neither appears to have been prepared by Ms. Bishop. Moreover, no evidence has been provided as to the circumstances under which either Exhibit 10 or Exhibit 13 was created. Thus, no evidence has been provided that could establish that either document was created in the usual and ordinary course of business, or that the creator of either document (whoever that might be – as his or her identity is not established) was under a duty to create the document in question.

94. Accordingly, neither Exhibit 10 nor Exhibit 13 qualifies as a business record and accordingly neither can be admitted pursuant to the business records exception to the hearsay rule.

95. For these reasons, it is submitted that the statements contained in the Bishop Witness Statement related to alleged cost savings and alleged increased expenses, along with Exhibits 10 and 13, should be excluded on the basis that they are inadmissible hearsay.

PART III– ORDER SOUGHT

96. In light of the foregoing, VAA seeks:

(a) an Order ruling inadmissible the impugned statements in the Stewart Witness Statement, the particulars of which statements are listed in paragraph 1 of the Notice of Motion herein;

(b) an Order ruling inadmissible the impugned statements in the Bishop Witness Statement, the particulars of which statements are listed in paragraph 2 of the Notice of Motion herein;

(c) an Order ruling inadmissible Exhibits 10 and 13 to the Bishop Witness Statement;

(d) VAA's costs of this motion; and

(e) such further and other relief as the Tribunal deems just.

DATED at Toronto, Ontario this 10th day of September, 2018

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PART IV – LIST OF AUTHORITIES AND STATUTES REFERRED TO

Jurisprudence	
1	*Boroumand v. Canada*, 2016 FCA 313
2	*Canada (Commissioner of Competition) v. CCS Corp*., 2012 Comp. Trib. 14
3	*Canada (Commissioner of Competition) v. Imperial Brush Co*., 2007 Comp. Trib. 22
4	*Canada (Commissioner of Competition) v. Toronto Real Estate Board*, 2017 FCA 236
5	*Lipcsei v. Trafalgar Insurance Co. of Canada*, [2006] O.J. No. 748 (Div. Ct.)
6	*Lockridge v. Ontario (Director, Ministry of the Environment)*, 2012 ONSC 2316 (Div. Ct.)
7	*Nadeau Poultry Farm Ltd. v. Groupe Westco Inc*., [2009] C.C.T.D. No. 6
8	*R. v. Bradshaw*, 2017 SCC 35
9	*R. v. Brown*, 2012 ONSC 6565
10	*R. v. Collins*, [2001] O.J. No. 3894 (C.A.)
11	*R. v. Cuming*, [2001] O.J. No. 3578 (C.A.)
12	*R. v. D.D.*, 2000 SCC 43
13	*R. v. Graat*, [1982] S.C.J. No. 102
14	*R. v. Ilina*, 2003 MBCA 20
15	*R. v. K. (A.)*, [1999] O.J. No. 3280 (C.A.)
16	*R. v. Laverty*, [1979] O.J. No. 442 (C.A.)
17	*R. v. Monkhouse*, [1987] A.J. No. 1031 (C.A.)
18	*R. v. Pal*, [1998] O.J. No. 3980 (Gen. Div.)
19	*R. v. Wilcox*, [2001] N.S.J. No. 85 (C.A.)
20	*Toronto Dominion Bank v. Cambridge Leasing Ltd.*, 2006 NBQB 134
21	*White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23
Statutes	
22	*Canada Evidence Act*, R.S.C. 1985, c. C-5, as amended, s. 30
23	*Competition Act*, R.S.C. 1985, c. C-34, s. 79
Other Sources	
24	A.W. Mewett and P.J. Sankoff, *Witnesses* (1991+), p. 16-4