YVR MAKES SAFE LANDING: COMPETITION BUREAU ABUSE OF DOMINANCE CASE AGAINST THE VANCOUVER AIRPORT AUTHORITY IS DISMISSED

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A. Thumbnail Summary

On October 17, 2019, the Competition Tribunal released its decision in the *Vancouver Airport Authority* case.[1] In the case, the Competition Bureau alleged that the Vancouver Airport Authority's (VAA) decision to authorize only two firms to provide in-flight catering and galley handling services and therefore to exclude other providers at the Vancouver International Airport (YVR) constituted abuse of dominance under section 79 of the *Competition Act*. The Tribunal agreed with the Bureau that VAA had substantial or complete control of the market for galley handling services through its control of airside access at the airport and also agreed that VAA had a "plausible competitive interest" in the market for galley handling services. However, the Tribunal sided with VAA in concluding that VAA's conduct did not constitute a practice of anti-competitive acts because it had other overriding legitimate business justifications for the conduct and that the conduct did not have the effect of substantially preventing or lessening competition in respect of galley handling services. The Tribunal also awarded costs in favour of VAA. These issues are explored in somewhat greater depth below.

B. Background

In 2016 the Competition Bureau brought an abuse of dominance application under section 79 of the *Competition Act* against VAA. The Bureau's allegation focused on VAA's decision to authorize only two firms to provide in-flight catering or galley handling services ("galley handling services") at the YVR. The Bureau alleged that VAA's practice effectively excluded other third-party suppliers of inflight catering services, including new entrant firms, which substantially prevented or lessened competition in respect of galley handling services (i.e., the loading and unloading of food on airplanes) at YVR. Unlike most abuse of dominance cases, the allegedly dominant firm, VAA, was not itself a competitor in the business affected (galley handling services) nor was it an association or organization representing those in the business (as was the situation in the *Toronto Real Estate Board* case[2]). Rather VAA was, in effect, a landlord trying to make sure airline operators had access to the services. As outlined below, the Tribunal's reasoning in respect of this relationship offers important guidance as

to the applicability of the abuse of dominance doctrine in cases where the conduct affects a market in which the allegedly dominant firm does not compete.

Pursuant to the abuse of dominance provision in section 79 of the *Competition Act,* in order to succeed in its application against VAA the Bureau was required to show that (a) VAA substantially or completely controlled a class or species of business (typically described as a market), (b) VAA engaged in a practice of anti-competitive acts (typically acts undertaken with a predatory, disciplinary or exclusionary intent aimed at a competitor), and (c) the practice substantially prevented or lessened competition in a market (that is, but for the conduct, competition would have been substantially more vigorous). Typically this is demonstrated by showing that the conduct has the effect of preserving, enhancing or entrenching the dominant firm's market power. The Tribunal considered each of these elements in turn in the *VAA* case, and also considered whether the regulated conduct defence might have been applicable in the case.

C. Substantial or Complete Control of a Market

"Substantial or complete control of a market" is traditionally treated as synonymous with a substantial degree of market power.[3] The *TREB* case expanded this concept to include firms that do not themselves compete in a market but nonetheless substantially control the market.[4] In that case, the Toronto Real Estate Board, a trade association of residential real estate brokers, did not directly compete for the supply of real estate brokerage services but was nonetheless found to substantially control the market for those services in the Greater Toronto Area through its policies and rules governing its members.

In the *VAA* case, the Tribunal concluded that VAA substantially or completely controlled the market for galley handling services by virtue of its control over airside access at YVR, which is a critical input into that market.[5] This was, of course, not a surprising conclusion, since VAA controls its own facilities, as does any owner of a facility, such as a shopping mall, and controls who may enter onto or supply services at or from such facilities. However, the fact that the owner of a facility will be found to have dominance or market power with respect to products supplied from that facility may, it is submitted, significantly broaden the concept of what a dominant firm may be, at least in some cases.[6]

D. Practice of Anti-Competitive Acts

i. The Alleged Anti-Competitive Acts

As noted above, in order to make a finding of abuse of dominant market position, the Tribunal had to find that VAA had engaged in a practice of anti-competitive acts. The Bureau alleged that VAA's decision to authorize only two operators at YVR (thereby excluding others, including new entrants from the market for galley handling services) constituted a practice of anti-competitive acts. According to the Bureau, the purpose of

VAA's practice "on its face" was to exclude competitors, as it was reasonably foreseeable that its practice would prevent competitors and entrants from competing for the supply of galley handling services. In response, VAA maintained that it had valid pro-competitive business justification for its conduct. This is explained below.

ii. Plausible Competitive Interest

In this case, because VAA was not itself engaged in the business of supplying galley handling services, the Tribunal had to consider whether VAA had a plausible competitive interest in that affected market. The notion of "plausible competitive interest" came from the Tribunal's decision in the TREB case, which established that if a dominant firm is found to have no plausible competitive interest in the allegedly affected market, its practices generally would not be considered an anti-competitive act under section 79.[7] Where the dominant firm does not compete in the allegedly affected market, the lack of a "plausible competitive interest" creates a presumption that the supplier does not have an anti-competitive purpose for the its conduct and that it will be able to demonstrate a legitimate business justification for the conduct.[8]

The Tribunal concluded that "plausible" means more than "possible", "conceivable", "imaginable", "thinkable" or "within the bounds of possibility", but less than "likely", "convincing", "persuasive" or "economically rational". It settled on "reasonably believable". To be reasonably believable, the Tribunal noted that there must be "some credible, objectively ascertainable basis in fact" to find that the dominant firm has a competitive interest.[9]

The two judicial members of the Tribunal's three-person panel (but not the lay economist member) concluded that VAA did have a "plausible competitive interest" in the galley handling services market, because of its interest in the concession fee revenues VAA receives from providers of galley handling services. By contrast, the lay economist member found that the potential concession revenue loss that VAA may have avoided by excluding entrants from the galley handling market was too small and too speculative to qualify as a plausible competitive interest.[10]

iii. Legitimate Business Justification

Following established jurisprudence, the Tribunal then focused on the purpose of the impugned conduct in seeking to determine whether it constituted an anti-competitive act or acts under section 79. The party that controls the market has to engage in the impugned conduct for an anti-competitive purpose, meaning an intended predatory, disciplinary or exclusionary effect on a competitor in the allegedly affected market.[11] If the act is motivated by some legitimate business justification it cannot be an anti-competitive act because it is not undertaken with an anti-competitive purpose. A legitimate business justification must provide a credible efficiency or pro‑competitive explanation, unrelated to an anti‑competitive purpose, for why the dominant firm engaged in the conduct alleged to be anti‑competitive.[12]

In this case, the Tribunal panel unanimously concluded that VAA had a legitimate business justification for engaging in the conduct that excluded other providers. The Tribunal accepted that VAA's concern was that allowing entry of additional providers (especially partial-service providers) might cause one or both of the incumbent full-service providers to exit the market at YVR without a comparable replacement.[13] The choice to limit the number of providers was not meant to limit competition, but to provide certainty that there would be at least two full-service providers rather than taking the risk of ending up with only one, which would have caused disruption to airlines and passengers at the airport and reputational harm to YVR. The Tribunal found that the risk of losing a full-service provider was the overarching, overriding purpose of VAA's refusal to authorize additional providers.[14] It further rejected the Bureau's objection that VAA did not consider the matter in sufficient depth or seek out sufficient advice or information. The Tribunal recognized that business people make many decisions with incomplete information. It was sufficient that VAA management made its decisions in good faith based on sufficiently robust information; they were not required to be as correct and thorough as the Bureau would have preferred.

Accordingly, the Tribunal concluded that VAA did not engage in a practice of anti-competitive acts. This finding was sufficient to dismiss the Competition Bureau's case.

E. Substantial Lessening or Prevention of Competition

The Tribunal also unanimously concluded that the conduct in question did not and was not likely to prevent or lessen competition substantially in the market for galley handling services at the airport. The Tribunal found that the Commissioner did not show, on a balance of probabilities, that the conduct did or would be likely to have a substantial effect on prices or non-price aspects of competition. In particular, the Tribunal was not persuaded that, "but for" VAA's conduct, there would have been materially lower prices or materially improved innovation in the galley handling market.

F. Regulated Conduct Defence

In addition to the argument (successful, as it transpired) that the Bureau had not demonstrated that VAA's conduct met the test for abuse of dominance, VAA also argued that it was acting pursuant to legal authorization, such that its conduct was insulated from challenge pursuant to the Regulated Conduct Defence (RCD).

Historically, the RCD was developed as a principle of statutory interpretation, whereby courts read down the conspiracy provisions of the prevailing competition law to avoid criminalizing a regulatory body exercising its authority under a validly enacted provincial legislation or the regulated person proceeding in accordance with such provincial regulation.[15] Courts have occasionally applied the RCD in the context of federal legislation.[16] Given the historically criminal nature of Canadian competition law, courts have indicated that conduct

engaged pursuant to a valid legislation could not involve criminal intent.[17] In addition, courts also relied on "leeway language" in the relevant provisions, such as "public interest" or "undue", as the necessary indicia of Parliament's intent for permitting the RCD to apply.[18] When the conspiracy provisions of the *Competition Act* were substantially amended a decade ago to eliminate the term "unduly", the applicability of the RCD was retained by express statutory language.[19]

There had been debate as to whether the RCD could apply to reviewable conduct at all. This point has been considered[20] but has not been definitively adjudicated by any court. In the LSUC case,[21] a lower court applied the RCD to the reviewable conduct provisions of the Act, but did not expressly consider or decide the issue, as the court simply proceeded based on the parties' agreement (including the Bureau's agreement) that RCD applied to all parts of the *Competition Act*.

In its 2010 *"Regulated" Conduct* bulletin, the Bureau noted that the reviewable conduct provisions do not contain any criminal intent element and do not have any leeway language like "unduly" (preventing or lessening competition) or "public interest". In this context, the Bureau took the position that it "[could not] responsibly limit its statutory mandate by the general application of the RCD to the reviewable matters provisions of the Act."[22]

In the *VAA* case, the Tribunal concluded that VAA could not rely on the RCD as a shield from the application of abuse of dominance provision in section 79. The Tribunal confirmed that the RCD could apply in a case where the impugned conduct was subject to a federal legislation or regulatory scheme, as is the case in the *VAA* case. However, on the facts, it found that VAA's conduct was not specifically required, directed, mandated or authorized by any validly enacted statute, regulation or other subordinate legislative instrument. That is a necessary ingredient of the RCD. Therefore, the RCD was not available to the VAA even if the Tribunal had found it applicable to section 79.[23]

In addition to the finding that the VAA's challenged conduct was not authorized by relevant legislation and therefore could not benefit from the RCD, the Tribunal found that, as a matter of law, the RCD does not apply to section 79 (or, indeed, any of the reviewable conduct provisions). The Tribunal observed that section 79 as a civil reviewable practice provision does not require any criminal intent element and therefore the traditional criminal law rationale for RCD does not apply.[24] The Tribunal found that section 79 does not contain the necessary leeway language that would permit the application of RCD. In particular, the word "substantially" in the phrase "preventing or lessening competition substantially" (s. 79(1)(c)) does not constitute the necessary leeway language. The Tribunal did not find the word "substantially" in section 79 comparable to the word "unduly" in the old Act, which was considered sufficient leeway language for the RCD to apply.[25] Therefore, on the logic of the Tribunal's reasoning, and somewhat surprisingly, it appears that the RCD could never apply to defeat an allegation of abuse of dominance under section 79 or allegations under any other reviewable

conduct provisions of the *Competition Act*.[26]

Because of the Tribunal's factual finding, including the findings that VAA did not engage in a practice of anti-competitive acts that substantially lessened or prevented competition, the Tribunal's legal finding that the RCD does not apply to section 79 may be considered *obiter dicta*. We may have to wait for the issue to be more central to a decision in a case in order to have the matter definitively resolved. If the VAA case is appealed, that also may provide an opportunity for more authoritative guidance on the point.

G. Conclusion

This reflects some important developments in the Canadian abuse of dominant market position jurisprudence. In particular, the Tribunal (a) found the owner of a facility (VAA) to have market power with respect to services supplied from that facility; (b) clarified, to some degree, the concept of "plausible competitive interest" in cases where the allegedly dominant firm does not compete in the affected market; (c) explored the concept of legitimate business justifications in assessing the anti-competitive purpose of the impugned conduct; and (d) found that the Regulated Conduct Defence does not apply to the abuse of dominance provisions of the Act found in section 79.

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[1] *Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 [VAA].[ps2id id='1' target='/]
[2] *Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp Trib 7, affirmed 2017 FCA 236 [TREB].[ps2id id='2' target='/]
[3] *TREB*, at para 173.[ps2id id='3' target='/]
[4] *Commissioner of Competition v Toronto Real Estate Board,* 2014 FCA 29.[ps2id id='4' target='/]
[5] *VAA,* at para 421.[ps2id id='5' target='/]
[6] *VAA*, at paras 446-455.[ps2id id='6' target='/]
[7] *TREB*, at paras 279-282.[ps2id id='7' target='/]
[8] *VAA*, at para 460.[ps2id id='8' target='/]
[9] *VAA*, at paras 464-465.[ps2id id='9' target='/]
[10] *VAA*, at para 506.[ps2id id='10' target='/]
[11] While the conduct has to be aimed at a competitor, it need not be a competitor of the firm alleged to be abusing its dominant market position, but rather may be any competitor in the marketplace. *TREB*, at para 275-277.[ps2id id='11' target='/]
[12] *Canada (Commissioner of Competition) v. Canada Pipe Co.*, [2007] 2 FCR 3, 2006 FCA 233.[ps2id id='12' target='/]
[13] *VAA*, at para 582.[ps2id id='13' target='/]

[14] *VAA*, at paras 631-623.[ps2id id='14' target='']
[15] See *Hughes v Liquor Control Board of Ontario,* 2019 ONCA 305; A.G. Can. v. Law Society of B.C., [1982] 2 SCR 307.[ps2id id='15' target='']
[16] For example, *Society of Composers, Authors and Music Publishers of Canada v. Landmark Cinemas of Canada Ltd.* (1992), 45 C.P.R. (3rd) 346 (F.C.T.D.); *Eli Lilly et al. v. Apotex Inc.*, [2005] F.C.J. No. 1808.[ps2id id='16' target='']
[17] *R. v. Canadian Breweries Ltd.*, (1960) O.R. 601; *A.G. Can. v. Law Society of B.C.*, [1982] 2 SCR 307.[ps2id id='17' target='']
[18] *Garland v Consumers' Gas Co*, 2004 SCC 25, at para 77.[ps2id id='18' target='']
[19] See s. 45(7) of the *Competition Act*.[ps2id id='19' target='']
[20] *Alex Couture Inc. v. Canada (Procureur général)* (1991), 38 C.P.R. (3d) 293.[ps2id id='20' target='']
[21] *Law Society of Upper Canada v. Canada (Attorney General)* (1996), 134 D.L.R. (4th) 300. [LSUC][ps2id id='21' target='']
[22] Competition Bureau, "Regulated" Conduct bulletin (September 27, 2010).[ps2id id='22' target='']
[23] *VAA,* at paras 263-289.[ps2id id='23' target='']
[24] *VAA,* at para 230.[ps2id id='24' target='']
[25] *VAA*, at para 222.[ps2id id='25' target='']
[26] Whether a person complying with a regulatory requirement could successfully argue that it did not have an anti-competitive intent in undertaking the conduct, but rather that its intent was to conduct itself in accordance with the applicable regulatory scheme and therefore the conduct is not an anti-competitive act, is an issue which was briefly considered in the case, but not in depth. The Tribunal did say that, in the right case, compliance with a regulatory scheme could be a legitimate business justification.[ps2id id='26' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.