

Competition Tribunal confirms business justification is the paramount consideration in an abuse of dominance case

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Authors: [Shuli Rodal](#), [Kaeleigh Kuzma](#), [Michelle Lally](#), [Christopher Naudie](#), [Danielle Chu](#), [Chelsea Rubin](#), Peter Franklyn, Peter Glossop, Gajan Sathanathan

On October 17, 2019, the Competition Tribunal (Tribunal) rendered its decision in CT-2016-015 *Commissioner of Competition v. Vancouver Airport Authority* (Decision) [PDF], dismissing the Commissioner of Competition's (Commissioner) application. The Decision provides a comprehensive analysis of when an organization may be found to have engaged in a "practice of anti-competitive acts," which is a key element of an abuse of dominance finding. It also provides further insight into when an organization will be found to have "plausible competitive interest" in a market and to have engaged in anti-competitive conduct even where it does not directly compete with the party alleging to be harmed by the dominant organization's conduct. The Decision is also noteworthy in that it provides, for the first time, a detailed assessment of the potential application of the regulated conduct doctrine or defence (RCD) to shield conduct from scrutiny under the civil provisions of the *Competition Act* (Act).

The Commissioner has decided not to appeal the Tribunal's decision, stating in a [press release](#) that:

[a]lthough the Tribunal dismissed our application, the ruling provides valuable jurisprudence and helps to clarify certain aspects of the law. In particular, we are pleased that the Tribunal confirmed that not-for profit and regulated entities, such as VAA, are not exempt from complying with the abuse of dominance provisions of the Competition Act.

Facts of the case and decision summary

In September 2016, the Commissioner filed an application with the Tribunal for an order under section 79 of the Act seeking relief against the Vancouver Airport Authority (VAA) in respect of its decision to allow only two in-flight caterers to operate at Vancouver International Airport (YVR) and its refusal to grant licences to two new providers of in-flight catering services at YVR. In-flight catering, or "Galley Handling," involves the preparation of meals for passengers and crew on commercial aircraft and related handling services.

Before the Tribunal will make an order under section 79, the Commissioner must establish the following three elements: (1) a person or group of persons substantially or completely controls a market; (2) that person or group of persons has engaged in a practice of anti-competitive acts; and (3) the practice has had or is likely to have a substantial prevention or lessening of competition in a market.

In short, the Commissioner alleged that: VAA substantially or completely controlled the supply of Galley Handling services at YVR; VAA engaged in an anti-competitive practice by

limiting the number of providers of Galley Handling at YVR, thereby excluding additional firms from entry; and this practice had the effect of substantially preventing or lessening competition in Galley Handling at YVR. The Commissioner sought an order requiring VAA to authorize any firm that meets market requirements to participate in Galley Handling services in YVR.

The Tribunal held that although VAA had substantial control of Galley Handling services at YVR, VAA had not engaged in a practice of anti-competitive acts within the meaning of section 79 and that the VAA's exclusionary conduct did not have, nor was it likely to have, the effect of preventing or lessening competition *substantially* in a market. The Tribunal therefore dismissed the Commissioner's application and ordered the Commissioner to pay over \$1.3 million towards VAA's costs.

Guidance on the meaning of a practice of anti-competitive acts

In determining whether VAA engaged in a practice of anti-competitive acts by excluding two firms from the Galley Handling Market even though VAA does not directly compete in such market, the Tribunal applied two analytical screens. First, the Tribunal assessed whether VAA had a plausible competitive interest (PCI) in the Galley Handling market. In the absence of a PCI, the Tribunal indicated that a presumption arises that the conduct being challenged will not have the requisite anti-competitive purpose. Second, the Tribunal assessed whether the "overall character" of the impugned conduct was "anti-competitive, or rather reflected a legitimate overriding purpose."

In the first stage of analysis, the Tribunal held that the word "plausible" should be interpreted to mean "reasonably believable" and that "to be reasonably believable, there must be some credible, objectively ascertainable basis in fact to believe that the respondent has a competitive interest in the relevant market." (emphasis in original) The Commissioner claimed that assessing whether there is a PCI was unnecessary in this situation because the impugned behaviour is "manifestly the exclusion of a competitor from a market." In the alternative the Commissioner argued that VAA has a PCI in the Galley Handling market as the competitive structure of the downstream market directly impacts the land rents and concession fees payable to VAA. In response, VAA argued that it could not have a PCI because it is not involved in, and has no commercial interest in the market as the revenue loss to VAA that might be avoided by preventing entry into the Galley Handling Market was too speculative, too small and too easily offset by marginal changes in concession fees. Despite this, the Tribunal found that VAA did have a PCI in the Galley Handling market as alleged by the Commissioner. The Tribunal's finding seems to indicate that the bar for the finding of a PCI is very low.

Having found that VAA had a PCI, the Tribunal proceeded to the second stage of analysis and reiterated the basic parameters of the analytical framework as, for the most part, described in the Tribunal's 2016 decision in *The Commissioner of Competition v The Toronto Real Estate Board (TREB)* [PDF]. The Tribunal affirmed that it must assess and weigh all relevant factors, including the "reasonably foreseeable or expected objective effects" of the conduct and any legitimate business justifications advanced by the respondent, in attempting to discern whether the "overall character" or "overriding purpose" of the conduct was anti-competitive in nature. The Tribunal provides a helpful summary of the types of business justifications that will likely negate a finding that the overriding purpose of the exclusionary conduct is anti-competitive. The Tribunal stated that a legitimate business justification must be a credible efficiency based on pro-competitive rationale that is linked to the respondent. This link can be established by demonstrating the types of efficiencies that are likely to be attained as a result of the conduct, showing how the conduct establishes improvements in quality or service, or otherwise explaining how the conduct is likely to assist the respondent to better compete in the market in which the respondent competes. The Tribunal added that "[t]he

business justification must also be independent of the anti-competitive effects of the impugned practice, must involve more than a respondent's self-interest, and must include more than an intention to benefit customers or the ultimate consumer."

The Tribunal also affirmed that the respondent has the burden of establishing, on a balance of probabilities, both the existence of one or more legitimate business justifications for its conduct and that such justifications "outweigh any exclusionary negative effect of the conduct on a competitor and/or the subjective intent of the act."

While the Tribunal agreed that VAA had purposefully engaged in exclusionary conduct, it found that the evidence demonstrated, on a balance of probabilities, that VAA was motivated to a greater degree by pro-competitive rather than anti-competitive considerations. These acceptable, pro-competitive considerations included preserving at least two full-service competitors for Galley Handling services at YVR; avoiding disruptive effects for airlines that it believed would be associated with the possible exit of an incumbent caterer were another caterer granted access; and avoiding harm to its reputation as an airport if a caterer were to exit. Contrasting the situation with the respondent's alleged privacy concerns in *TREB*, the Tribunal found that VAA's asserted legitimate justifications "were not a pretext or an after-the-fact fabrication." The Tribunal considered that VAA's business justifications conferred important, pro-competitive benefits to YVR and "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." Therefore, the Tribunal concluded that the "overall character" of VAA's conduct was "legitimate, and not anti-competitive, in nature."

RCD: Application to section 79 of the *Competition Act*

The RCD is a principle of statutory interpretation that has been applied to shield a party engaging in certain conduct from criminal liability where such conduct was required or authorized by a validly enacted Act of Parliament or a provincial legislature. While the availability of the RCD to shield a person from the application of the criminal conspiracy provisions of the Act is well established (see, for example, [the Ontario Court of Appeal's decision in *Hughes v Liquor Control Board of Ontario*](#)), and indeed is now codified in these provisions, the application of the RCD to shield conduct from scrutiny under the civil provisions of the Act has not, until now, been addressed in detail. The Decision provides, for the first time, a comprehensive assessment of the application of the RCD to section 79 of the Act.

VAA submitted that it should be shielded from the application of section 79 because it was broadly authorized to engage in the impugned conduct, both as part of its public interest mandate and pursuant to its specific authority to control access to the airside at YVR. In response, the Commissioner argued that RCD does not apply to the non-criminal provisions of the Act and, in particular, was not contemplated in the language of section 79. The Commission further argued that VAA's conduct was not required, directed or authorized by any regulatory instrument.

The Tribunal reasoned that there are two preconditions to the application of RCD. First, Parliament must have indicated, either expressly or by necessary implication, a clear intention to grant "leeway" to those acting pursuant to a valid provincial regulatory scheme such that conduct that otherwise would be subject to the federal legislation would not be subject to scrutiny under such legislation. The required "leeway" language has been found in prior cases to have been provided by words in the legislation such as "in the public interest" or "unduly." Once the first precondition is satisfied, the analysis then turns to the assessment of whether the conduct that would otherwise be subject to scrutiny under the Act was specifically required, compelled, mandated or authorized by validly enacted provincial legislation.

With regard to the first precondition, the Tribunal concluded that the RCD was not available to shield conduct from scrutiny under section 79 of the Act because section 79 does not include the required qualifying or “leeway” language to signal that Parliament intended that conduct be shielded from scrutiny where such conduct was required or authorized by a valid regulatory scheme. The reasoning is noteworthy as it characterizes the phrase used in the former criminal conspiracy provisions of the Act “to prevent or lessen, competition, unduly” as providing the necessary leeway language for the application of RCD and the phrase used in the abuse of dominance provisions (as well as most of the other civil provisions of the Act) “preventing or lessening competition substantially” as not. With regard to the second precondition, the Tribunal found that there “is no merit to VAA’s argument that its general public interest mandate can serve to shield it from the application of section 79” as VAA’s legislated mandate could be carried out without engaging in exclusionary conduct. The Tribunal further found that the criminal law rationale underlying the development of the RCD (“the idea that individuals could be guilty of a criminal offence for engaging in conduct specifically mandated to them by a legislature was not one which the courts were willing to accept”) did not apply in these circumstances.

In reaching its conclusion on the particular facts, the Tribunal has left open that conduct authorized or required by a valid regulatory scheme could nevertheless be scrutinized as an abuse of dominance where there is evidence of a predominantly anti-competitive motive. The Tribunal did note, however, that complying with a specific statutory or regulatory *requirement* may nonetheless constitute a legitimate business justification under section 79(1)(b) of the Act.

More generally in terms of the potential application of the RCD to the other civil provisions of the Act, such as mergers, exclusive dealing, refusals to deal, price maintenance or civil agreements between competitors, the Tribunal did not need to make any finding but made some interesting remarks. It reasoned that when the competitor agreement provisions of the Act were amended in 2009 to divide the formerly criminal provision into two separate provisions – one criminal *per se* provision and one civil reviewable practice – Parliament elected to codify the continued application of the RCD solely to the criminal conspiracy provisions. No similar language codifying the RCD was added to the new civil provision in section 90.1 of the Act, which governs collaborations between competitors and is subject to a competitive effects test (prevention or lessening of competition substantially). Based on the differing treatment of the two provisions, the Tribunal reasoned that Parliament’s intent was not to provide for the application of the RCD to the civil provision in section 90.1.

While not explicitly stated in the Decision, the Tribunal’s view that the word “substantially” does not provide evidence of the necessary “leeway” intent and the importance placed on the absence of a codification of the RCD to one of the civil provisions strongly suggests that, in the Tribunal’s view, the RCD would not be available to shield conduct from scrutiny under any of the civil reviewable practices provisions of the Act. It remains to be seen whether this interpretation will be further clarified in future cases.