Goodmans LLP Update

Goodmans LLP Successful in Vindicating Vancouver Airport Authority Before Competition Tribunal

The Competition Tribunal today released its lengthy reasons for dismissing an application brought by the Commissioner of Competition (the "**Commissioner**") against Vancouver Airport Authority ("**VAA**") under the abuse of dominance provision of the *Competition Act*. Following a four-week trial, the Tribunal found that VAA's decision to limit the number of in-flight caterers operating at the Vancouver International Airport did not constitute anti-competitive conduct. Accordingly, it dismissed the Commissioner's application and awarded VAA costs in excess of $1 million.

The decision is significant for several reasons, including:

- it clarifies the extent to which the abuse of dominance provision applies to a firm who does not compete in the relevant market;
- it holds that the abuse of dominance provision may not be excluded by the operation of other federal or provincial laws; and
- it follows on an earlier decision in the same case that redefined the law of privilege in Canadian competition law litigation.

Background

VAA is a not-for-profit corporation established to manage and operate the Vancouver airport in a safe and efficient manner for the general benefit of the public, pursuant to a ground lease with the Government of Canada. All of the revenues generated by VAA – whether from landing fees, airport improvement fees, or otherwise – are used to fund ongoing operations, with any excess being reinvested into the airport.

The Commissioner's application, filed in September 2016, concerned the market for in-flight catering services at the airport, and in particular VAA's decision to limit the number of licences it grants to caterers seeking access to the "airside" to service airlines on the tarmac. VAA does not provide any in-flight catering services, nor does it have an interest in any entity that participates in that market.

In 2013 and 2014, two potential new entrants sought licences to compete with the two incumbent full-service in-flight catering firms operating at the airport. VAA declined to grant licences to either of the new entrants, due to its concern that the catering market at the airport could not support three participants, and that allowing further entry could cause one or more of the incumbents to exit. VAA was concerned that, if the new entrant offered only a limited range of catering services, the exit of one of the incumbents would result in a lessening of competition for the provision of high-quality, fresh food for business class passengers that is of particular importance to Asian airlines at the airport (which is Canada's principal gateway to the Pacific Rim). VAA's management was further concerned about the disruption in service to airlines that would result from the unplanned departure of an incumbent caterer, and the ensuing reputational harm to the airport.

However, VAA remained open to the possibility of further licences being granted in the future, should the market conditions change. And, indeed, by the time the case reached a hearing in the fall of 2018, VAA had licensed a third in-flight catering firm.

Authors

Michael Koch
mkoch@goodmans.ca
416.597.5156

Julie Rosenthal
jrosenthal@goodmans.ca
416.597.4259

Sarah Sothart
sstothart@goodmans.ca
416.849.6908

Notwithstanding the entry of a third caterer, the Commissioner continued to allege that VAA's refusal to license still further entrants was anti-competitive. The Commissioner alleged that by limiting the number of caterers at the airport, VAA had caused a substantial lessening of competition in a subset of the in-flight catering market, which the Commissioner referred to as "galley handling". ("Galley handling" was said to consist of loading food onto planes, as well as ancillary services, such as waste removal, warehousing and inventory management.) The Commissioner sought an order from the Tribunal that would require VAA to authorize airside access to any interested in-flight catering firm.

The Decision

To obtain an order, the Commissioner had to prove that:

1. VAA substantially controlled a relevant market;
2. VAA had engaged in a practice of anti-competitive acts; and
3. VAA's conduct had, or was likely to have, the effect of preventing or lessening competition substantially in a market.

The Tribunal – sitting as a three-member panel comprised of two Federal Court judges and one economist – determined that the Commissioner could not meet either the second or the third part of the test.

On the first part of the test, the Tribunal determined that VAA substantially controlled the relevant market for "galley handling", because of its power to grant or deny access to the airside at the airport.

The second part of the test was the most significant to the determination of this case. Because VAA does not compete in the in-flight catering market, the Tribunal engaged in a two-step analysis. First, as a kind of screening mechanism, the Tribunal considered whether VAA had a "plausible competitive interest" in adversely affecting competition in the downstream market for in-flight catering services. Notwithstanding VAA's extensive economic evidence challenging the assertion that it had any economic incentive to adversely affect competition for galley handling services, the judicial members of the Tribunal (but not the economist) concluded that the relatively low threshold for the plausible competitive interest screen had been met. This conclusion was due solely to the fact that the licence fee payable by the in-flight caterers to VAA was structured as a percentage of revenues earned from catering services.

The Tribunal then considered whether the "overall character" of VAA's conduct was anti-competitive and unanimously held that VAA had not acted with an anti-competitive purpose. This conclusion rested in large part on the legitimate business justification for VAA's decision, namely, a legitimate concern over the impact that further entry would have on airport operations. The Tribunal rejected the Commissioner's allegations that VAA's concerns were not validly held. Instead, the Tribunal accepted the evidence given by VAA executives and deferred to the experience and professionalism of VAA's management, in a manner reminiscent of the "business judgment rule", whereby courts defer to the business judgment of a corporation's directors, so long as the decision lies within the range of reasonable alternatives. The Tribunal also confirmed that VAA's concerns of potential disruption at the airport constituted a pro-competitive and efficiency-enhancing rationale.

On the third and final branch of the test, the Tribunal found that the Commissioner had not met his burden to prove that there had been any substantial lessening of competition in the marketplace, either from a price or quality perspective.

Finally, although it held that VAA had not committed any abuse of dominance contrary to section 79 of the *Competition Act*, the Tribunal nonetheless considered whether, if a violation had been committed, it would have been excused by operation of the "regulated conduct defence". The Tribunal held that the regulated conduct defence did not apply, as section 79 does not contain the type of language that indicates an intention by Parliament to exempt conduct authorized by another legislative enactment. In addition, the Tribunal held that the legislative instruments that governed VAA's conduct did not specifically authorize the particular conduct in question – i.e., they did not specifically authorize VAA to limit the number of caterers operating at the airport.

Significance for Competition Law

The VAA case as a whole is significant for Canadian competition law for several reasons, including a 2018 decision of the Federal Court of Appeal in this same case, overturning the Commissioner's blanket public interest privilege (see our February 5, 2018 Update, *Federal Court of Appeal Levels the Playing Field for Respondents Before the Competition Tribunal*).

In addition, this decision on the merits marks the first consideration of the application of the abuse of dominance law to an entity charged with a public interest mandate, who exercises an important "gatekeeping" function and thereby potentially affects access to a market. Similar considerations could arise in future cases arising from disputes over access to infrastructure or property. In addition, the Tribunal's decision more firmly establishes the application of the abuse of dominance position even to entities that do not compete in the relevant market and that do not seek to extend their dominance to that market – which marks an important departure from American antitrust law. And finally, the case should provide comfort to business executives that their good faith decisions, if pursued for valid pro-competitive and efficiency-enhancing reasons, will be carefully considered and accorded a measure of deference by the Tribunal.

VAA was represented before the Tribunal by Goodmans LLP, with a team led by partners Julie Rosenthal and Michael Koch, and including senior counsel Cal Goldman and Ryan Cookson, Sarah Stothart and Justine Johnston.

For further information, please contact Michael Koch or Julie Rosenthal.

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