

Vancouver airport decision clarifies law on evidence and costs, lawyers say

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- Tribunal reluctant to abandon courtroom-type evidence rules
- CCB liable for costs despite acting in public interest
- Visa and MasterCard decision an 'outlier' for costs — lawyer

A Canadian Competition Tribunal (CCT) decision in a case involving the Vancouver Airport Authority (VAA) clarifies that it will apply courtroom-type evidence rules whenever procedural fairness is involved, lawyers said.

In November, the CCT dismissed an application by Canada's Competition Bureau's (CCB) to force the VAA to do business with more than two catering firms, ruling that the airport authority had a legitimate business interest in restricting the number to two.

During the tribunal hearing, the CCB had argued for a "more relaxed approach to the evidentiary rules," said Julie Rosenthal, a competition lawyer at Goodmans who successfully represented the Vancouver Airport Authority.

The CCB had cited a section of the Competition Tribunal Act that says its proceedings should be as expeditious and informal as possible. The CCT's 5 November [decision](#) "rejected that argument," she told PaRR, calling the finding "important."

"The evidentiary rules regarding hearsay and opinion evidence really go to the fairness of the proceeding" and the CCT "lies very close to if not at the judicial end of the procedural fairness spectrum," so the CCT embraced "regular courtroom-type rules," she said.

However, the CCT's decision "leaves itself a bit of wiggle room," she noted. "They don't say: 'We will never depart,'" from courtroom-type evidence rules. "They say 'We'll be reluctant to depart.'" As to the circumstances in which the CCT might do so, "That'll become clear over time with further cases."

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Rosenthal's interpretation was echoed by Zirjan Derwa, a competition lawyer at Torys.

The decision is based on the terms of the Competition Tribunal Act, he noted. The Act required the CCT to find that its flexibility is "limited by the circumstances and considerations of fairness," Derwa told PaRR. "In this case, procedural fairness is very important, especially since the tribunal has the discretion to impose a number of remedies which can significantly affect a party's interests."

In an abuse of dominance proceeding, Derwa said, it would be difficult to see the CCT moving away from court-like evidentiary rules, because of the possibility of fines of "up to ten million dollars."

The CCT will be more likely to depart from courtroom-type rules to expedite the process when dealing with issues lacking a clear link to procedural fairness, Derwa noted, giving the example of scheduling.

The CCT "understands the need to be flexible," said Subrata Bhattacharjee, a competition lawyer at Borden Ladner Gervais. He added that the CCT is "not going to budge" on procedural rules that go to fairness, but with other rules, "There are things that [the CCT] can do" to simplify the process.

Costs

The CCT decision also provided some clarity on the issue of costs, Rosenthal said.

The losing party in contested cases usually pays some of the legal expenses of the winning party, Rosenthal said. The CCB argued that, despite the dismissal of its application, it should not have to pay costs because there was a "broad public interest in bringing the case because the case would clarify the scope of section 79" of the Competition Act. The CCT disagreed, ordering the CCB to pay the Vancouver Airport Authority USD 70,000 for legal costs and USD 1.25m for disbursements.

This "represents a bit of a stepping back" from the CCT's decision in *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, Rosenthal said. In that 2013 decision, the CCT noted the public interest served by the CCB's unsuccessful application and did not award costs.

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In *Vancouver Airport Authority*, Rosenthal explained, the CCT is clarifying that parties should not read the language in *Visa Canada* "overly broadly." There is no consistent public interest exemption to the ordinary rule that costs follow the event, she noted.

Derwa called the *Visa Canada* case atypical and "an outlier," noting that the CCB's public interest arguments in *Vancouver Airport Authority* were not as strong and the case itself was not as "novel."

Derwa said that the public interest is "one factor but not the only factor" in determining costs. If the CCB's position was correct, the CCB would "never have to pay costs," as all cases by the CCB "have a public interest dimension," Derwa noted. He pointed out that the legislation covering costs at the CCT – the Federal Court Rules – does not exempt the CCB from costs.

Citing the "potential for an appeal," a CCB spokesperson declined to comment.

The decision's other findings have been [summarized](#) by the CCT and [discussed](#) by one of the CCT judges.

The case is *The Commissioner of Competition v. Vancouver Airport Authority*.

by Mark Coakley in Toronto

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