

**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**

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**AMENDED RESPONSE OF VANCOUVER AIRPORT AUTHORITY**

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**PART I - OVERVIEW**

1. Pursuant to its statutorily-derived mandate, the Vancouver Airport Authority (referred to hereinafter as the “**Authority**”) is charged with operating the Vancouver International Airport (the “**Airport**” or “**YVR**”) – Canada’s second largest airport – in a safe and efficient manner, to generate economic development for Vancouver, and more broadly, for British Columbia and the rest of Canada, in furtherance of the public interest. The fulfilment of that mandate involves countless operational decisions, requiring the application of the Authority’s experience and expertise in exercising its business judgment relating

to such matters as how best to assist in the movement of people and goods between Canada and the rest of the world.

2. In order for the Authority to achieve its goals, it must be able to compete with other similarly-situated airports (such as San Francisco and Seattle) in attracting the business of major international airlines to the Airport. Despite its relatively small size (as compared to some of its competitors), the Authority has succeeded in attracting major international airlines to YVR as a gateway to the Pacific Rim. The Authority has done so, in large part, by taking an active approach to managing the Airport with an eye to maximizing efficiency and value for all airlines and other stakeholders. The Airport's ability to compete depends upon a number of factors, including the services that are available at YVR. Among the services demanded by many airlines on numerous routes is the supply of catering and related services. Such services and, in particular, the provision of high quality, fresh catered meals are an important requirement for first-class and business class passengers, who, in turn, are key to airline profitability and the viability of existing and future airline routes to and from YVR. Given YVR's geographic location and unique ground access issues, in order to ensure delivery of such high quality, fresh meals on a timely and flexible basis, it is necessary that catering firms be located at the Airport.
3. Accordingly, it is particularly important for the Airport to ensure that the full range of catering and related services, including high quality, fresh catered meals, are available to airlines operating out of YVR. At the same time, the provision of catering services involves substantial capital investment, such that a departing catering firm cannot be easily (or quickly) replaced. In addition, to the best of the Authority's knowledge, the demand for catering and related services at the Airport is not sufficient to support additional entry at this time. As a result, the Authority believes that the entry of additional catering firms would imperil the continued viability of the operations of the two existing catering firms at the Airport. The Authority is particularly concerned about the significant disruptions of service that would follow the exit of either of the catering firms from the Airport.

4. It was for these reasons, in order to ensure that the Airport continues to be served by two competitive, on-site catering firms, that the Authority decided that it would not be in the public interest to permit an additional firm to operate at the Airport at this time. This decision was based on the Authority's experience and expertise having regard to the consideration of all relevant factors in operating one of the Canada's largest airports and in ensuring that the Airport, which is uniquely situated as Canada's primary gateway to the Pacific Rim, can compete with larger airports on the US west coast. Thus, far from committing any anti-competitive acts, the Airport has at all times acted in a manner designed to foster competition and ensure the overall efficiency of the Airport's operations.
5. Notwithstanding the Authority's expertise and experience in navigating the complex set of considerations at play in the operation of an airport such as YVR, the Commissioner of Competition (the "**Commissioner**") has brought the within proceeding and seeks an order substituting the Commissioner's judgment for that of the Authority as to what would best serve the public interest. Indeed, the very content of the order being sought by the Commissioner, which would require the Authority "to issue authorization, on non-discriminatory terms, to any firm that meets customary health, safety, security and performance requirements, so as to entitle that firm to access the airside at [YVR]" incorrectly assumes away the myriad factors the Authority must take into consideration when exercising its public interest mandate to provide access to the Airport, particularly airside.
6. As is discussed more fully below, the proceeding suffers from a number of fundamental flaws and should be dismissed by the Tribunal.
7. First, the proceeding wholly fails to take into account the fact that, at all times, the Authority as the regulator of access at the Airport has been acting in accordance with its statutory mandate to operate the Airport in furtherance of the public interest. Accordingly, section 79 of the *Competition Act* (the "**Act**") as a matter of fact and law does not apply to the actions of the Authority that are at issue, having regard to the application of the regulated conduct exemption.

8. Second, the Authority does not substantially or completely control the alleged market for access to the Airport airside for the purpose of providing “Galley Handling” (defined below), contrary to the allegations made in the Commissioner’s Notice of Application and Statement of Material Grounds and Facts (“**SMGF**”) (together, the “**Application**”).
9. Third, with respect to the market for Galley Handling (which is inaccurately defined by the Application and which is accurately defined below), the Authority does not itself provide Galley Handling or have a commercial interest in any entity providing Galley Handling at YVR. The Authority does not have market power in, and does not control – let alone substantially or completely control – that market.
10. Fourth, the Authority doesn’t represent entities involved in the provision of Galley Handling at YVR, nor does it have any plausible competitive interest in the market for Galley Handling, in respect of which it is alleged to have committed anti-competitive acts. This case is clearly distinguishable from, and represents an unwarranted attempt by the Commissioner to extend the reach of section 79 well beyond what was articulated in, the *Toronto Real Estate Board* case (“**TREB**”).
11. Fifth, as noted above, far from having an anti-competitive purpose, the Authority was at all times motivated by a desire to preserve and foster competition, and had a valid business justification that was both pro-competitive and efficiency-enhancing.
12. Sixth, the conduct of the Authority will not, and is not likely to, lessen or prevent competition substantially. On the contrary, the Authority’s conduct has ensured continuing vigorous competition between the two existing in-flight caterers. Moreover, the ability of airlines to self-supply, including by “ferrying” food and snacks from other airports, effectively limits the ability of the existing catering firms from imposing a significant, non-transitory increase in prices.

13. The Authority therefore respectfully requests that the Tribunal dismiss the Application, with costs.

## **PART II – ADMISSIONS AND DENIALS**

14. Except as expressly admitted below, the Authority denies all allegations contained in the SMGF.
15. The Authority admits paragraphs 7, 8 and the first two sentences of paragraph 17, the first sentence of paragraph 38, and the first two sentences of paragraph 46 of the SMFG.

## **PART III – MATERIAL FACTS UPON WHICH THE AUTHORITY RELIES**

### **(a) The Authority and its Public Interest Mandate**

16. The Airport is located on Sea Island, approximately 12 kilometres from downtown Vancouver. It is the second busiest airport in Canada by aircraft movements and passengers. It is also an important driver of economic growth for Vancouver and, more broadly, for British Columbia and the rest of Canada, as it serves to connect Vancouver to other cities around the world and, in particular, serves as a gateway between Asia and the Americas.
17. The federal government decided in the early 1990s to cede operational control of major airports in Canada to not-for-profit, community-based organizations. To that end, the Authority was created pursuant to Part II of the *Canada Corporations Act*, R.S.C. 1970, c. C-32 (and, in 2013, continued under the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23.) The Authority's Articles of Continuance set out a "Statement of Purposes of the Corporation", which include:
  - a) to acquire all of, or an interest in, the property comprising the Vancouver International Airport to undertake the management and operation of the Vancouver International Airport in a safe and efficient manner for the general benefit of the public;

- b) to undertake the development of the lands of the Vancouver International Airport for uses compatible with air transportation; and
  - c) to generate, suggest and participate in economic development projects and undertakings which are intended to expand British Columbia's transportation facilities, or contribute to British Columbia's economy, or assist in the movement of people and goods between Canada and the rest of the world.
18. Most of the members of the Authority's Board of Directors are nominated by various levels of government and local professional organizations, including the Government of Canada, the City of Vancouver, the City of Richmond, Metro Vancouver, the Vancouver Board of Trade, the Law Society of British Columbia, the Institute of Chartered Accountants of British Columbia, and the Association of Professional Engineers and Geoscientists of British Columbia. In addition, there are currently five members who serve as "at large" directors (one of whom is the Authority's Chief Executive Officer; the others are local business people).
19. By Order-in-Council No. P.C. 1992-18/501,<sup>1</sup> the Minister of Transport was authorized to enter into an agreement to transfer operational control of the Airport to the Authority. To that end, the Minister of Transport entered into a ground lease dated June 30, 1992 with Authority. Among other things, the lease provides that the Authority shall "manage, operate, and maintain the Airport ...in an up-to-date and reputable manner befitting a First Class Facility and a Major International Airport, in a condition and at a level of service to meet the capacity demands for airport services from users within seventy-five kilometres."
20. Since that time, the operation of the Airport has been carried out by the Authority, which is a not-for-profit corporation and which re-invests all revenues net of expenses back into the Airport. Any excess of revenue over expenses that may

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<sup>1</sup> The Order-in-Council was made pursuant to the authority under the *Airport Transfers (Miscellaneous Matters) Act* (S.C. 1992, c. 5) which permits the Minister of Transport to designate a body to which the Minister is to "sell, lease or otherwise transfer an airport."

accrue in any given year are re-invested in capital projects for the Airport, pursuant to the Authority's public interest mandate.

21. The not-for-profit nature of the Authority reinforces its mandate to manage the Airport in the public interest, all as reflected in its "mission", "vision" and "values" which are as follows: mission: connecting British Columbia proudly to the world; vision: a world-class sustainable gateway between Asia and the Americas; and values: safety, teamwork, accountability and innovation.
22. The Authority grants licences and permits to businesses that wish to operate at the Airport and that comply with applicable regulations (relating to health & safety, security and otherwise), including airlines and related airline service businesses (such as ground handling, de-icing, fueling, maintenance and in-flight catering services). In deciding whether to grant any given licence or permit, the Authority carefully considers whether the addition of the particular business to the Airport would be consistent with, and further, the Authority's mandate to operate the Airport in the best interests of the public. Accordingly, the Authority cannot agree to any and all requests for access.

**(b) Catering and Galley Handling at YVR**

23. The Authority does not provide catering services or Galley Handling (defined below), or any other related service at YVR or elsewhere, nor does it have a commercial interest in, or represent, entities involved in providing any such service.
24. Virtually all commercial airlines operating out of YVR offer some type of food and drink service on virtually every flight. The level of food and drink service varies by airline, by route and by seat class, with the offerings ranging from drinks and peanuts or pretzels, at one extreme, to freshly prepared meals, including hot entrées, at the other extreme. For the vast majority of flights operated out of YVR, freshly cooked meals are offered in only two situations: on overseas flights; and to business/first class passengers (who are particularly important to airlines' profitability).

25. The Airport's ability to ensure the availability of 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. Asia-based airlines, in particular, place a premium on the availability of a competitive choice of freshly prepared meals.
26. There are currently two companies offering freshly prepared meals for airlines at the Airport, Gate Gourmet Canada Inc. ("**Gate Gourmet**") and CLS Catering Services Ltd. ("**CLS**"). Each company operates a full kitchen, in respect of which each has made significant investments on-site at the Airport.
27. In addition to the fresh meals, Gate Gourmet and CLS each provide a full range of other perishable food (such as fresh snacks and other buy-on-board offerings). They also provide a full range of non-perishable food items (chips and peanuts and the like) and drinks.
28. And, each of Gate Gourmet and CLS offers an additional service: the loading and unloading of all food and drink products onto aircraft, as well as ancillary services, such as the assembly of meal trays and aircraft trolley carts and the transportation of food and drink products between the warehouse or kitchen facility and aircraft.
29. In this Response, the preparation and loading onto aircraft of fresh meals and other perishable food offerings is referred to as "**Catering**", while the provision and loading onto aircraft of non-perishable food items and drinks, as well as other items such as duty free products are referred to collectively as "**Galley Handling**". The Authority specifically denies the market definitions set out at paragraph 12 of the SMFG.
30. Gate Gourmet and CLS compete with each other to meet the Catering and Galley Handling needs of airlines operating at YVR.
31. As acknowledged by the Commissioner, airlines also have the option of meeting all or a portion of their Catering and Galley Handling needs through self-supply or



“double catering”. (“Double catering”, also sometimes called “ferrying”, refers to the practise of transporting extra meals and supplies from one airport for service during a flight departing a second airport.)

32. The Authority specifically denies the Commissioner’s allegation, in the third sentence of paragraph 13 of the SMFG, that such self-supply or double catering is not a “feasible or preferable” substitute for in-flight catering for most airlines in Canada.
33. With respect to self-supply, all airlines are free to self-supply at YVR without being granted specific access for this purpose by the Authority. This includes the option for airlines to source meals and provisions from wherever they choose and to load all meals and provisions onto their aircraft at YVR themselves. WestJet, Canada’s second largest airline, with the second most flights serving YVR, self-supplies from its own facility at the Airport.
34. In addition, Alaska Airlines and Horizon both use double catering to fulfill their in-flight catering needs at YVR. And Air Canada, Canada’s largest airline with the most flights serving YVR, double caters, bringing into YVR frozen main course economy class meals prepared by a flight kitchen located at the Montréal airport. To the Authority’s knowledge, self-supply and double catering are widespread not only at YVR, but also at other airports throughout Canada.
35. Gate Gourmet and CLS (and their respective predecessors) have operated at YVR since approximately 1970 and 1983 respectively, under long term leases first entered into by the Minister of Transport and later assumed by the Authority.
36. The Authority charges competitive rents to Gate Gourmet and CLS, based in large part on the market value of the land occupied by their respective operations, as determined through an arbitration mechanism under each lease. The land rents charged to Gate Gourmet and CLS reflect the opportunity cost of the land being used at the Airport, which is in high demand given the prime location. The Authority would have no difficulty in finding other tenants at similar market rates for the space used by these two firms at the Airport.

37. In addition, like all suppliers at YVR with access to the airside, Gate Gourmet and CLS also entered into licence agreements with the Authority, setting out the terms and conditions under which they operate and obtain access to the airside. Under the licence agreements, Gate Gourmet and CLS pay to the Authority a percentage of their respective revenues from the sale of Catering and Galley Handling Services, as well as a percentage of the revenues earned from off-Airport catering services.
38. Gate Gourmet (including its predecessors) first occupied land at YVR in or about 1970. It operates pursuant to both a licence agreement and lease. The licence agreement, dated June 1, 1996, provides for a fee on revenues at a rate no higher than 3.5% until January 1, 2002. From January 1, 2002 to December 31, 2010, the Authority was able to increase the percentage rate under the licence agreement, provided it raised it for all operators. A supplemental agreement was entered into effective June 1, 1996 whereby off-airport sales were made subject to a lower percentage rate (i.e. 1.143% on the first \$4 million of revenues, 1.643% on revenues between \$4 million and \$6 million and 2.143% on revenues above \$6 million). The Authority increased the percentage rate for sales at the Airport on January 1, 2010, to 4.5%, and on January 1, 2011, to 5%.
39. CLS (including its predecessors) first occupied land at YVR in or about 1983. It operates pursuant to both a license agreement and lease. Its licence agreement, dated September 15, 1998, and its supplemental agreement effective September 15, 1998, provide for the same fee percentages and structure as described above in respect of Gate Gourmet's licence agreement. For CLS, as for Gate Gourmet, the Authority increased the percentage rate for sales at the Airport on January 1, 2010, to 4.5%, and on January 1, 2011, to 5%.
40. Gate Gourmet currently operates under a lease dated April 1, 2002. At that time, Gate Gourmet's predecessor leased, in addition to the land previously occupied by it, an additional 8.78 acres of adjacent land (the "Expansion Lands") for the purpose of building new and expanded facilities. Effective November 1, 2007, the Authority agreed to take back 4.54 acres of the Expansion Lands. Effective

October 1, 2012, the Authority agreed to take back a further 2.03 acres from Gate Gourmet. On July 1, 2013, Gate Gourmet agreed to take 0.22 acres of this land back from the Authority, by way of an easement to install a security fence.

41. Gate Gourmet's current rent of \$937,190.25 per annum became effective April 1, 2012, and is applicable to the five year rent review period from April 1, 2012 to March 31, 2017.
42. CLS currently occupies a smaller piece of land than Gate Gourmet where it operates under a lease dated July 1, 2008. The current rent of \$271,066.78 became effective July 1, 2013 and is applicable to the lease's five year rent review period from July 1, 2013 to June 30, 2018.
43. These lease agreements and licence agreements generate revenues that are, relatively speaking, *de minimis* as a fraction of the Authority's total revenues, amounting to approximately 1% of the Authority's total revenues.
44. It is efficient for each of Gate Gourmet and CLS to provide both Catering Services and Galley Handling, using its same facilities, equipment and personnel.
45. It is also efficient for Gate Gourmet and CLS and, more particularly, for their respective kitchens to be located on-site at YVR. Sea Island, on which the Airport is located, is only accessible from the City of Vancouver by one bridge, and from the City of Richmond by three bridges. These bridges often act as bottlenecks, significantly slowing access to the Airport, particularly during rush hour traffic. In addition, vehicles that access the Airport airside must first pass through a security check-point and individuals in the vehicle are also subject to security checks. Given the unique ground access issues at YVR arising from it being located on an island and the importance of fresh food being provided to aircraft on a timely basis, and given that flight manifests are subject to last-minute changes, it is not desirable for Catering services to be located off-airport at YVR. On-airport Catering facilities provide the best assurance of an ability to meet such last-minute demands, thereby limiting the possibility either of

dissatisfied passengers (and, accordingly, dissatisfied airlines) or delayed flights. In that regard, it should be noted that the costs of flight delays are borne not only by the airline in question and its passengers, but also by other airlines and their respective passengers, as the delay of one flight at one gate can create a “domino effect” resulting in further delays at the Airport.

46. In addition, given the substantial investment required to set up a commercial kitchen, companies that provide Catering services from on-airport facilities are more committed to staying at the Airport even if business conditions deteriorate in the short term, which provides the Authority with greater assurance of the continuity of supply of such services and the avoidance of service disruptions.

**(c) Declining Demand for In-flight Catering Services at YVR**

47. In 1992, when the Authority took over responsibility for operating the Airport, there were three companies offering Catering and Galley Handling services at the Airport: Gate Gourmet, CLS and a third company, LSG Sky Chefs. However, LSG Sky Chefs exited the Airport following the acquisition of Canadian Airlines by Air Canada in 2003, due (to the best of the Authority’s knowledge) to a lack of demand.
48. The first decade of this century saw the commercial aviation industry experience a number of significant challenges, including 9-11 in 2001, the outbreak of SARs in 2003-2004 and the recession of 2007-2009. During this period, the market for Catering services changed dramatically in North America, with carriers eliminating meal service to the economy cabin and replacing it with “buy on board” offerings. Service of fresh meals became restricted to overseas flights and to the premium cabins.
49. As a result of this shrinking demand for Catering services, the revenues of the Catering operations at YVR declined. That drop in revenues persisted even when the number of passengers using the Airport experienced significant growth towards the end of the decade.

50. Over that ten-year period, although the Authority had the right under the terms of its licences with Gate Gourmet and CLS to raise the concession fees, it chose not to do so. Rather, over the period from the mid-to-late 1990s up until 2010, the concession fee rates were kept below comparable rates at other airports. When the Authority finally did increase the rates in 2010-2011, it raised them only to the bottom of the prevailing range charged at other Canadian airports, i.e., to 4.5% and then 5% of revenues earned from Catering and Galley Handling. Moreover, for revenues generated from off-Airport catering, it agreed to continue to hold the concession fees to below market rates. As described above, the Authority from time to time also allowed Gate Gourmet to surrender significant portions of the land it leased at YVR from the Authority, and to reduce its rent accordingly. The Authority took these measures in order to ensure the continued viability of the two companies' operations at the Airport and thereby to ensure continued competition for Catering services at YVR.
51. The Authority therefore specifically denies the Commissioner's inaccurate allegation, at paragraph 32 of the SMFG, that in 2010-2011, the Authority was able to impose and sustain a more than 40% increase in the fee it charges.

**(d) Requests by Potential New Entrants**

52. In or about December 2013, the Authority was contacted by a representative of Newrest Canada ("**Newrest**"), seeking a licence to access the airside at the Airport for the purpose of providing both Galley Handling and Catering services. With respect to the Catering services that it wished to provide at the Airport, Newrest was proposing to do so from a kitchen located off-Airport.
53. In or about April 2014, the Authority was contacted by a representative of Strategic Aviation Services Ltd. ("**Strategic**"), seeking a licence to access the airside at the Airport for the purpose of providing Galley Handling services.
54. Upon being contacted by Newrest and Strategic, the Authority applied its experience and expertise to carefully review the markets for Catering and Galley Handling at YVR, with a view to determining whether there was sufficient

demand to permit new entry without jeopardizing the existing operational excellence and competition for the full range of services, including the provision of meals freshly-prepared on-site at the Airport.

55. Ultimately, the Authority concluded and advised Newrest and Strategic that the licences requested would not be granted at that time. As Newrest and Strategic were advised, the reasons included: the presence of two competitive flight kitchen operations at YVR; the fact that a third – LSG SkyChef – had left the Airport in 2003 for reasons that the Authority understood were due to the size of the market at YVR; and the setbacks that the airline industry had undergone since that time, including the declining market for Catering services. The Authority advised Newrest and Strategic that it believed that the local market demand was simply not able to support the addition of a new entrant.
56. At all times, representatives of the Authority explained that, while the Authority was of the view that additional entry was not warranted at that time, the Authority would review the situation from time-to-time. It was further explained that if, upon such review, a different conclusion was reached, the Authority would likely issue a Request for Proposal (“**RFP**”) for the selection of an additional provider or providers of Galley Handling and Catering services at YVR.
57. In 2015, the Authority received one further request for a licence for airside access from each of Newrest and Strategic. The Authority has not received any other requests for licences to provide either Galley Handling or Catering services at the Airport.
58. The Authority has continued to assess the advisability of issuing a RFP for additional Catering and/or Galley Handling-service providers at YVR.
59. In 2015, the Authority removed the restriction on the number of ground handling operators at YVR, in favour of a policy to license all those providers who could meet the Authority’s requirements. The Authority’s decision to open ground handling in this manner was based on its experience and its expertise, involving consideration of a wide range of considerations specific to the market for ground

handling, including, among other factors, the merger of two non-airline providers of ground handling services, the ability of ground handlers to enter or exit the market because they can easily move their equipment and operations among airports, and the Authority's desire to incentivize environmentally-friendly performance in the provision of these services.

60. In or about February, 2016, Strategic was among the companies granted a licence to provide ground handling at YVR.

**(e) The Authority Grants a Licence to a Third Caterer**

61. In 2017, the Authority carefully reviewed the markets for Catering and Galley Handling at YVR, with a view to determining whether there was sufficient demand to permit new entry without jeopardizing the existing operational excellence and competition for the full range of services, including the provision of meals freshly-prepared on-site at the Airport. As a result of that review, the Authority concluded that there was sufficient demand to permit new entry.
62. Accordingly, following a Request for Proposals process, the Authority entered into a licence agreement with dnata Catering Services Ltd ("dnata"), which grants to dnata "non-exclusive privileges to operate in-flight catering services at the Airport". The licence agreement, which is dated January 22, 2018, has a commencement date of February 1, 2018 and has a term of 15 years.
63. Neither the licence agreement nor any other agreement requires dnata to lease land at the Airport. Moreover, to the best of the Authority's knowledge, dnata does not intend to lease land at the Airport.

**PART IV – STATEMENT OF THE GROUNDS ON WHICH THE APPLICATION IS OPPOSED**

**(a) Section 79 of the Act Does Not Apply to the Authority's Decision Not to Permit Additional Firms to Offer Galley Handling Services at the Airport**

64. Section 79 of the Act does not apply to a regulator acting pursuant to a validly enacted legislative or regulatory mandate. Accordingly, section 79 does not

apply as a matter of fact and law to the Authority when exercising its public interest mandate pursuant to legislative enactment, including the applicable Order in Council.

**(b) In the Alternative, the Requirements of Section 79 Are Not Made Out**

65. In the alternative, if section 79 of the Act does apply to the Authority's decision not to permit additional firms to offer Galley Handling services at the Airport, then the requirements under paragraphs 79(1)(a), (b) and (c) of the Act have not been met.

**(i) *The Authority does not Substantially or Completely Control Either the Market for Airport Airside Access for the Supply of Galley Handling or the Market for Galley Handling***

66. The Authority denies that it substantially or completely controls either the market for access to the YVR airside for the supply of Galley Handling, or the market for the supply of Galley Handling.
67. The Authority denies that it substantially or completely controls the market for access to the Airport airside for the supply of Galley Handling. The Authority is not generally able to dictate the terms upon which it sells or supplies access to the Airport airside for the supply of Galley Handling, among other reasons, because airlines are free to meet their Galley Handling needs through self-supply or double catering and, accordingly, do not need to obtain access to the Airport airside for that purpose.
68. As well, the Authority, which competes with other airports to attract airlines, including through offering an efficient mix of services to those airlines, is constrained in its ability to dictate the terms upon which it sells or supplies access to the Airport airside for the supply of Galley Handling. The fact that the Authority chose not to raise the rates of the concession fees it charges to Gate Gourmet and CLS for more than a 10-year period demonstrates that it was, and continues to be, constrained in its ability to dictate terms upon which it sells or supplies access to the airside for the supply of Galley Handling.



69. The Authority further denies that it substantially or completely controls the market for Galley Handling. Because airlines can meet their Galley Handling needs through self-supply or double catering, the relevant geographic market for Galley Handling is broader than the Airport.
70. The Authority does not provide Galley Handling and does not own any interest in, or represent, any provider of Galley Handling.
71. The Authority does not have any market power in the market for Galley Handling. Contrary to the Commissioner's allegation, the Authority does not have "considerable latitude" to determine or influence price and non-price dimensions of competition in the market for Galley Handling. In the alternative, if the Authority did have such latitude (which is denied), that would not amount to market power in the relevant product market.
72. In the further alternative, if a provider of an input into a downstream market can be viewed as having market power in that downstream market, then the Authority does not have market power in that market, for the same reasons cited above at paragraphs 64 and 65 – it does not completely or substantially control the market for access airside at the Airport for providing Galley Handling.

***(ii) The Authority Has Not Engaged in a Practice of Anti-Competitive Acts***

73. The Authority has not engaged in a practice of anti-competitive acts, within the meaning of paragraph 79(1)(b) of the Act.
74. The Authority has at all times acted, and continues to act, for the purpose of fulfilling its public interest mandate in operating the Airport and for no anti-competitive or other improper purpose.

**The Authority's Purpose**

75. The Authority did not at any time have any anti-competitive purpose. On the contrary, it had (and continues to have) a valid, efficiency-enhancing, pro-competitive business justification for not permitting new entry at this time.

76. In the exercise of its business judgement, informed by its expertise and experience, the Authority was (and remains) concerned that there is insufficient demand to justify the entry of additional firms providing Galley Handling services at the Airport.
77. The Authority carefully considered the complex set of factors affecting its decision in the unique context of YVR's competition with other airports – including major U.S. airports such as San Francisco and Seattle – to attract flights and grow as a gateway to the Pacific Rim and other destinations of major international long-haul carriers.
78. In view of the importance of Catering services to these carriers, the Authority acted to ensure that the existing companies providing Catering and Galley Handling services are able to operate efficiently at the Airport by, among other things, each sharing its costs over both the Catering and the Galley Handling services it provides. Having experienced the exit of one firm providing Catering and Galley Handling services at the Airport, the Authority is concerned that, if one or more new firms were permitted to provide Galley Handling services at the Airport, one or both of the two existing firms – who provide both Catering and Galley Handling – would no longer be viable. Such an eventuality would eliminate the existing choice of, and competition between, at least two Catering providers at the Airport. Moreover, if one or both of these Catering firms were to exit the market, the Authority believes that it would be difficult to attract another on-Airport provider to provide Catering services at YVR, thereby affecting quality and service levels.
79. The decision made by the Authority was therefore directed at fulfillment of its public interest mandate, including ensuring to the greatest extent possible, the competitiveness of the Airport.
80. Thus, the Authority's purpose was at all times to ensure that it is able to retain and attract additional airline business to the Airport, by providing these airlines –

in particular, long-haul carriers – with a competitive choice of at least two Catering companies at YVR.

81. Further, there is no factual or legal foundation for, and the Authority specifically denies, the Commissioner's allegations of "tying" set out at paragraphs 42 through 44 of the SMFG regarding the Authority's requirement for firms providing Catering services to be located on-site at YVR.
82. At all material times, the Authority had a valid business justification for requiring Catering firms to be located on-site at the Airport. The Authority reasonably believes that the presence of Catering firms on-site at the Airport is important to ensure optimal levels of quality and service, which, in turn, are important to ensuring the efficient operation of the Airport as a whole, including achieving its public interest mandate, mission and vision.
83. Any exclusionary negative effect on Newrest and/or Strategic, which is not admitted but denied, was never the goal of the Authority. Moreover, any such effect (which is denied) is outweighed by the Authority's legitimate business justification for refusing entry to an additional Galley Handling operation, at this time.

No Plausible Competitive Interest in Adversely Impacting Competition

84. As described above, unlike the respondent in prior cases decided by the Tribunal under section 79 of the Act, the Authority is not involved in the business in question, and does not have any similar commercial interest in the relevant markets as has been reflected in prior section 79 cases.
85. In any event, for the reasons discussed below, the Authority specifically denies that it has any plausible competitive interest in adversely impacting competition in the market for Galley Handling such as would be necessary to a finding that the Authority had committed anti-competitive acts within the meaning of paragraph 79(1)(b) of the Act.

86. The Authority specifically denies that a landlord and tenant relationship, such as that between the Authority on the one hand, and Gate Gourmet and CLS on the other hand, is of such a nature as to give rise to a plausible competitive interest in adversely impacting competition in the market in which the tenant competes.
87. In the alternative, as explained in further detail in the Authority's Concise Statement of Economic Theory set out in Schedule "A" to this Response, even if one assumes that the Authority was acting as a sole profit-maximizing monopolist with respect to control over airside access at the Airport, in order to maximize the revenues it earns from complementary service providers, such as from Galley Handling firms at the Airport, as alleged by the Commissioner, a monopoly supplier of access to the Airport airside for the purpose of supplying Galley Handling would have an interest in ensuring the most efficient market structure for the provision of Galley Handling at the Airport. Therefore, it follows that, even on the Commissioner's theory, the Authority would have no plausible interest in adversely affecting competition in Galley Handling.
88. In any event, as outlined above, the Authority had a number of efficiency-enhancing and pro-competitive reasons for refusing further entry at this time.

***(iii) No Substantial Lessening or Prevention of Competition***

89. The Authority denies that its refusal to permit any additional companies to offer Galley Handling services at the Airport at this time has lessened or prevented, or is likely to lessen or prevent, competition for Galley Handling substantially.
90. First, because there is insufficient demand at the Airport to sustain additional entry at this time, if the Authority had permitted additional entrants to provide Galley Handling services at the airport, the likely result would have been less competition at the Airport for the provision of Catering services.
91. Second, the Authority's impugned acts in this case have not enabled, and are unlikely to enable, Gate Gourmet and CLS to exercise materially greater market power than they would have exercised in the absence of the acts.

92. There is vigorous competition between Gate Gourmet and CLS at the Airport as evidenced by significant shifts in the share of Galley Handling business and Catering business between them. Airlines can and do change Galley Handling and Catering firms at any given airport in response to price and service competition. The presence of only two Galley Handling and Catering firms at YVR is consistent with the number of such competitors located at other comparable North American airports.
93. In addition, the airlines, which are increasingly joining together in large international alliances, have considerable negotiating power with Galley Handling firms and exercise countervailing market power to play one Galley Handling provider off against the other in order to drive down prices and increase service levels.
94. The airlines' negotiating power is increased (and the Galley Handling firms' market power is correspondingly decreased) by the fact that they have the option of self-supplying or double catering all or a portion of their Galley Handling needs.
95. In any event, the Authority's judgment that providers of Catering and Galley Handling should be located on-site at the Airport cannot have had any "but for" effect on competition since the Authority determined that, in any event, no additional entry was warranted at this time.
96. Finally, the Authority's impugned acts have not had, and are unlikely to have, an impact on the existing providers' market power that extends through a material part of the market for Galley Handling, as to the best of the Authority's understanding, only Jazz and, possibly, Air Transat have sought to contract with a new entrant supplier of Galley Handling at the Airport.
97. In the alternative, if the Authority's refusal to grant Newrest and Strategic a licence to offer Galley Handling services at YVR has at any time, or was, or is likely to, lessen or prevent competition for Galley Handling substantially (which is

denied), the licensing of dnata eliminates such lessening or prevention of competition.

#### **PART V – STATEMENT OF ECONOMIC THEORY**

98. The Authority's Concise Statement of Economic Theory is set out in Schedule "A" to this Response.

#### **PART VI – RELIEF SOUGHT**

99. The Authority requests an Order dismissing the Application with costs payable to the Authority. The Authority submits that the circumstances warrant the awarding of costs to the Authority on a full indemnity basis.

## **PART VII – PROCEDURAL MATTERS**

100. The Authority agrees that the Application be heard in English. The Authority proposes that the Application be heard in the City of Vancouver in addition to Ottawa. The Authority agrees with the Commissioner's proposal that documents be filed electronically.

All of which is respectfully submitted this 14th day of November, 2016.

Amended this 16<sup>th</sup> day of April, 2018.



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### **Schedule A - Concise Statement of Economic Theory**

1. The Authority is a non-profit corporation operating in the public interest. Part of its mandate is to maximize traffic at the Airport by providing attractive services at the lowest possible fees to airlines and airline passengers. To accomplish that objective, it is in the interest of the Authority to ensure that its complementary service providers, including firms supplying Catering and Galley Handling, operate as efficiently as possible.
2. The Authority derives no benefit from restricting competition among firms providing Catering and Galley Handling, if the resulting market structure is inefficient. On the contrary, even if one assumes that the Authority was acting as a sole profit-maximizing monopolist with respect to control over airside access at the Airport as alleged by the Commissioner, such a monopoly supplier of access to the Airport airside for the purpose of supplying Galley Handling would have an interest in ensuring the most efficient market structure for the provision of Galley Handling at the Airport, as that would enable such a monopolist to maximize the revenues it earns from complementary service providers, including Catering and Galley Handling service providers.

### **Market Power**

3. One of the key responsibilities of the Authority in executing its public interest mandate is to control access to the Airport airside. In addition to ensuring safety at the airport, this control allows the Authority to authorize an efficient number of providers across the full range of complementary service providers, including Catering and Galley Handling.
4. The Airport is the relevant geographic market for the provision of Catering to airlines using the Airport. The relevant geographic market for Galley Handling is broader than the Airport. Airlines can and do self-supply Galley Handling. Accordingly, Galley Handling services are not required at every airport. For example, Galley Handling may occur at any of the origin, destination or connecting airports. A number of airlines at the Airport meet their respective



needs for Galley Handling for flights to and from Vancouver through services offered by third party suppliers at other airports or by providing those services themselves.

5. Airside access is an input to Catering at the Airport. Airside access is also an input to any Galley Handling that occurs at the Airport. However, airside access in Vancouver is not required to provide airlines with Galley Handling services since airlines can use multiple airports for Galley Handling services. The Authority charges fees for airside access to providers of Galley Handling and Catering, just as the Authority charges fees for airside access to other complementary service providers operating at the Airport.
6. The Authority does not supply any Galley Handling or Catering services. The Authority does not compete with any Galley Handling or Catering firms, and does not provide services that are a substitute for Galley Handling and Catering services. The Authority has no market power in any market for Galley Handling or Catering services.
7. Any influence that the Authority has on the prices charged by Galley Handling or Catering services to airlines is through the fees that the Authority charges for airside access. This is no different from the influence that a shopping mall owner has on the retail prices charged by its tenants to consumers for merchandise purchased at the shopping mall, when tenant rent is set as a percentage of retail revenues. The total revenues earned by the Authority from fees charged for airside access to Galley Handling and Catering services firms are a very small fraction of the Authority's total revenues.

#### **The Authority's Conduct is Pro-Competitive**

8. Catering and Galley Handling are complementary products to the services offered by the Authority. Therefore, it is in the Authority's interest that the markets for these complementary products be as competitive and efficient as possible, in order to maximize the value of the package of services offered by the Authority to airlines and passengers.

9. Any inefficiency in the provision of Catering or Galley Handling at the Airport reduces the fees that the Authority can recover from those services while still maintaining attractive pricing to airlines.
10. It is well established in the economics literature that entry may not be “socially efficient” even if it is profitable for the entrant. With respect to services offered at the Airport, “social efficiency” means maximizing the value of services offered to airlines and passengers net of the total cost of providing those services. It is in the Authority’s interest to ensure that only socially efficient entry takes place in complementary markets, since socially efficient complementary markets will allow the Authority to maximize the value of its offering to airlines and passengers.
11. It is the Authority’s experience that having three Catering service providers at the Airport was not efficient, as one provider exited and the market for Catering services has been in decline. Further, it is the Authority’s experience that timely, high-quality Catering services can only be provided at YVR with on-site kitchen facilities.
12. If it were socially efficient to alter its conditions of airside access for a third supplier of Galley Handling and Catering at the Airport, it would be in Authority’s interest to do so because the Authority would benefit from the improved efficiency of its complementary service providers.
13. Requiring Catering suppliers to lease facilities at the Airport provides no additional exclusionary power to the Authority beyond that associated with limiting the number of Catering suppliers that have airside access. As a result, there is no possible exclusionary purpose for tying airside access to the condition of operating a catering kitchen on-site. Rather, the on-site requirement for Catering services at the Airport is necessary to guarantee timely service to airlines.
14. If Catering service could be provided at lower cost from an off-airport location while meeting the same service requirements such as timely and flexible

delivery, it would be in the Authority's interest to allow suppliers to operate off-airport, since then the Authority could generate the same total revenues from Catering services while prices paid by airlines for Catering services would be reduced.

### **No Substantial Lessening of Competition**

15. Incumbent Catering suppliers operating at the Airport rely on Galley Handling revenues to contribute to covering the shared fixed costs of providing Catering and Galley Handling services at the Airport. The Authority has determined that giving airside access to a firm offering only Galley Handling services would not be efficient because it would not allow current Catering and Galley Handling providers to cover costs, forcing one to exit, thereby eliminating competition for Catering services at the Airport. Similarly, given the Authority's past experience, it expects that entry by a third Catering service provider would cause the subsequent exit of one Catering supplier, thereby resulting in no increase in competition but with the Authority bearing some of the costs of such exit. Thus the decision not to authorize airside access for additional Catering and Galley Handling firms has not resulted in a substantial lessening of competition.
16. But-for the Authority's restrictions on airside access at the Airport, there would not be substantially more competition for Catering services at the Airport as there would remain either the same number of Catering firms or one fewer. But-for the Authority's requirements related to Galley Handling at the Airport, there would not be substantially more competition for Galley Handling services since airside access at the Airport is not required for airlines to have these services.