PUBLIC
CT-2016-015

THE COMPETITION TRIBUNAL

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

CLOSING ARGUMENT OF THE RESPONDENT, VANCOUVER AIRPORT AUTHORITY

November 9, 2018

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

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PART I – OVERVIEW

1. The Commissioner's case fails at each of subsection 79(1)'s hurdles.

2. For paragraph 79(1)(a), the Commissioner's expert declines to give an opinion as to the correct market definition, while the evidence from fact witnesses makes it clear that the Commissioner's proposed market definition of "Galley Handling" is artificial and unsupportable.

3. For paragraph 79(1)(b), the Commissioner cannot prove that VAA had a plausible competitive interest in the downstream market and cannot prove that VAA had any anti-competitive purpose. On the contrary, the evidence clearly establishes that, at no time, was VAA acting with an anti-competitive purpose. In other words, VAA has not abused its position.

4. Finally, for paragraph 79(1)(c), neither the Commissioner's quantitative nor his qualitative evidence comes close to discharging the burden of proving a substantial lessening or prevention of competition in the alleged Galley Handling market.

PART II – KEY FACTS THAT HAVE GONE UNCHALLENGED

5. An in-depth discussion of the facts and evidence upon which VAA relies is integrated into the "Submissions" section of this Closing Argument, found at Part III. However, at the outset, it is helpful to identify four key facts that have gone unchallenged by the Commissioner. Those four key facts are as follows.

(a) **VAA is responsible for managing and operating the Airport in the public interest.**[1] Although this fact is denied in the Commissioner's pleading,[2] and although it was repeatedly referred to by Commissioner's counsel during opening argument as VAA's "alleged public interest mandate,"[3] as it turns out, the Commissioner did not adduce any evidence to the contrary, nor did he challenge any of VAA's evidence on this point in cross-examination.

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[1] R-108, Public Witness Statement of Craig Richmond ("**Richmond Statement**"), paras. 18, 21 and 22, Compendium, Tab 1 and Exhibits 3 and 5, Compendium, Tabs 2 and 3

[2] Reply of the Commissioner of Competition, November 28, 2016, para. 1, Compendium, Tab 4

[3] Public Hearing Transcript, Vol. 1, October 2, pp. 23, 33, 34, Compendium, Tab 5

(b) **VAA has been remarkably successful in fulfilling its public interest mandate.** By any measure – whether growth in passengers,[4] growth in Pacific Rim passengers,[5] growth in flights,[6] growth in destinations served,[7] operating efficiency (measured either by revenues per passenger, revenues per flight, or by operating expenses per passenger, or operating expenses per flight),[8] green initiatives,[9] investment in public transportation,[10] commitments to First Nations peoples,[11] or industry and governmental awards[12] – VAA has been remarkably successful in fulfilling its mandate to operate the Airport in a safe and efficient manner for the general benefit of the public, to expand British Columbia's transportation facilities, to contribute to the economy of British Columbia and, more broadly, to assist in the movement of people and goods between Canada and the rest of the world. None of VAA's evidence to this effect was contradicted or challenged in any manner over the course of the trial.

(c) **The decision to deny access to Newrest and Strategic in 2014 was motivated by a concern about whether the catering market at YVR was large enough to support the entry of a third caterer and about whether the entry of a third might cause one of the incumbent caterers to exit the market.** When Mr. Richmond and Mr. Gugliotta met on April 1, 2014, they discussed the state of the catering market at the Airport including:

(i) the history of catering at the Airport, including the departure of Sky Chefs in 2003, following the loss of its Canadian Airlines business;

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[4] R-159, Public Witness Statement of Tony Gugliotta ("**Gugliotta Statement**"), para .29, Exhibit 4, Compendium, Tab 6

[5] R-108, Richmond Statement, para. 17, Compendium, Tab 1

[6] R-108, Richmond Statement, para. 17, Compendium, Tab 1.

[7] R-108, Richmond Statement, para. 17, Compendium, Tab 1.

[8] CR-100, Confidential Level B Supplemental Expert Report of Dr. David Reitman ("**Reitman Report**"), para. 25-30, Figures 1-3, Compendium, Tab 7

[9] R-108, Richmond Statement, para. 48, Compendium, Tab 8

[10] R-108, Richmond Statement, para. 28, Compendium, Tab 9

[11] R-108, Richmond Statement, para. 29, Compendium, Tab 9

[12] R-108, Richmond Statement, paras. 55-56, Compendium, Tab 10

(ii) industry-wide shocks over the preceding decade, including the significant decline in fresh food purchases by airlines;

(iii) [redacted]; and

(iv) [redacted] to cover their fixed costs and make a reasonable profit.[13]

Both Mr. Gugliotta and Mr. Richmond were concerned that there was not enough business to support three caterers and that, as a result, the entry of a third caterer could cause one (or even both) of the incumbents to exit the airport. As Mr. Gugliotta testified:

[redacted]

The specific concern was that the unplanned exit of a caterer could cause disruption in the supply of catering services, which would have been problematic for airlines and which would have posed a serious risk to YVR's reputation, making it more difficult for VAA to attract and retain airlines and routes, including routes to the Pacific Rim, all of which is a key component of VAA's public interest mandate.[15]

At the same time, VAA was consistent throughout in stating that it would monitor the

[13] CR-109, Confidential Level B Witness Statement of Craig Richmond ("**Level B Richmond Statement**"), paras. 99-110, Compendium, Tab 11; CR-160, Confidential Level B Witness Statement of Tony Gugliotta, para. 89-90, Compendium, Tab 12

[14] Confidential Level B Transcript, Vol. 12, 973:5-10, Compendium, Tab 13; see also R-108, Richmond Statement, para. 111, Compendium, Tab 14; and see Confidential Level B Hearing Transcript, Vol. 10 (October 30, 2018), 814:23-817:3, Compendium, Tab 15

[15] CR-109, Level B Richmond Statement, paras. 64 and 116, Compendium, Tabs 16 and 17

situation and, should the market grow sufficiently to warrant additional entry, VAA would make the opportunity available through an open competitive process,[16] which indeed is precisely what VAA has done with the 2017 Market Study, followed by the RFEOI and RFP, culminating in the licensing of dnata.

None of this evidence was contradicted by evidence led by the Commissioner. And none of it was challenged on cross-examination.

(d) **The decision not to grant a catering licence to Newrest and Strategic in 2014 was <u>not</u> motivated by a desire to maximize revenues from concession fees or by a desire to maximize revenues from rents.** Both Mr. Richmond and Mr. Gugliotta were adamant that the decision in 2014 was not motivated in any manner by a desire to increase the revenues that VAA receives from caterers, whether by way of concession fees or by way of land rents. Mr. Richmond testified as follows:

[redacted]

[redacted]

Again, none of this evidence was contradicted or challenged in any way.

6. Those are the four evidentiary cornerstones of this case – cornerstones that stand unchallenged by the Commissioner.

[16] See, e.g., Letter of C. Richmond, dated May 12, 2014, CR-109, Level B Richmond Statement, Exhibit 28, Compendium, Tab 18

[17] Confidential Level B Transcript, Vol. 10 (October 30, 2018), 817:5-17, Compendium, Tab 15. And see R-108, Richmond Statement, para. 118, Compendium, Tab 14. For Mr. Gugliotta's testimony to the same effect, see Confidential Level B Transcript, Vol. 12 (November 1, 2018), 973:17-24, Compendium, Tab 13. And see R-159, Gugliotta Witness Statement, para. 103, Compendium, Tab 19

PART III – SUBMISSIONS

A. Basic Legal Framework – The Commissioner Bears the Burden of Proof

7. The focus of the analysis required under subsection 79(1) is upon whether a practice of anti-competitive acts by a dominant firm has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market.[18]

8. The Commissioner bears the burden of proving each of the three elements of subsection 79(1) on a balance of probabilities.[19]

B. The Commissioner Cannot Prove that "Galley Handling" Is a Relevant Market

9. Under paragraph 79(1)(a) of the *Act*, the Commissioner must prove that VAA "substantially or completely controls" a class or species of business throughout Canada or any area thereof. The Tribunal considers a "class or species of business" to be synonymous with a relevant product market.[20]

10. In this case, the Commissioner alleges that there are two relevant markets. The first is the upstream market for "airside access" for the supply of "Galley Handling" at YVR. The second is the market for "Galley Handling" at YVR. However, the market in which the Commissioner has alleged an SLPC is the market for "Galley Handling".[21]

11. In his Notice of Application, the Commissioner defines "Galley Handling" broadly (and non-exhaustively – stating it "consists primarily" of certain services) as encompassing a wide-range of different complementary services.[22]

12. The Commissioner also alleges that there is a separate bundle of products called "Catering"

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[18] *Canada (Commissioner of Competition v. Toronto Real Estate Board*, 2016 Comp. Trib. 7 ("***TREB* Tribunal Decision**"), para. 115, Compendium, Tab 20

[19] *Canada (Commissioner of Competition) v. Toronto Real Estate Board*, 2017 FCA 236 ("***TREB* FCA Decision**"), para. 48, Compendium, Tab 21

[20] *Canada (Director of Investigation and Research, Competition Act) v. NutraSweet Co*. (1990), 32 C.P.R. (3d) 1 (Comp.Trib.) at para. 83 [*NutraSweet*], Compendium, Tab 22

[21] Notice of Application, paras. 28-35 and 52-57, Compendium, Tabs 23 and 24

[22] Ibid., para. 12, Compendium, Tab 25

that "consists primarily of the preparation of meals for distribution, consumption or use on-board a commercial aircraft by passengers and crew, and includes buy-on-board offerings and snacks."[23]

(i) Galley Handling is not a relevant product market

13. VAA submits that the Commissioner has failed to prove that "Galley Handling", as defined by the Commissioner, is a relevant product market for the purpose of section 79(1)(a).

14. First, and significantly, the Commissioner's expert did not provide any opinion that Galley Handling is a relevant product market. In his report, under the heading, "Are there different downstream markets for catering and galley handling?", Dr. Niels states that Galley Handling might be a separate market from Catering, or it might not. He then concludes that "the precise delineation of the downstream market can be left open."[24]

15. Dr. Niels' view notwithstanding, the *Act* obviously requires the Commissioner to prove that the market alleged is, indeed, a relevant market for competition law purposes. The Commissioner's failure to lead any expert evidence on the point should, in and of itself, be fatal.

16. Moreover, the remaining evidence does not assist the Commissioner either.

17. Although he himself does not engage in a market definition exercise, Dr. Niels does set out some of the factors that should be considered:

> [I]n cases involving complementary products, whether to define separate product markets or a market for bundles depends on a number of factors. How common is it for suppliers in the market to offer bundles as opposed to individual products? How common is it for customers to purchase bundles as opposed to individual products?[25]

18. Those factors undermine the Commissioner's proposed market definition still further. For example, the evidence shows that airlines generally demand, and catering firms generally supply, a bundle of services that includes both Catering and Galley Handling. The fact that certain airlines may

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[23] Ibid.

[24] CA-84, Confidential Level A Report of Dr. Gunnar Niels, para. 2.88 and 2.90, Compendium, Tab 26

[25] A-82, Report of Dr. Gunnar Niels, para. 2.89, Compendium, Tab 26

take advantage of the opportunity to self-supply specific items, ranging from frozen entrées to beverages, does not alter the fact that Galley Handling and Catering are invariably used together. As demonstrated by the evidence below, It is artificial and arbitrary to separate these services along the lines proposed by the Commissioner.

19. Thus, Mr. Stent-Torriani noted that Catering and Galley Handling are complementary products and that "Newrest typically provides both services to an airline".[26] In cross-examination, he clarified that "typically" means "more than 90 percent of the time."[27]

20. Similarly, Mr. Padgett on behalf of dnata testified that it was "not common within the industry" for an inflight catering firm to offer only Galley Handling or "last mile logistics".[28] When asked where he does see that occur, he indicated that it was typically only at small airports, "not large gateway airports" that were "probably below" 5 million passengers.[29]

21. On behalf of Gate Gourmet, Mr. Colangelo confirmed that most airlines would prefer just to deal with one caterer that provide a "global basket of services" that includes both Catering and Galley Handling.[30]

22. The evidence from airlines similarly showed that they consider Catering and Galley Handling together, particularly when considering their costs. Ms. Stewart of Air Transat testified on cross-examination as follows:

> Q. So you really -- from Air Transat's perspective, you really can't meaningfully separate the food from the galley handling.
>
> A. No.
>
> Q. They're all part of one and the same.

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[26] A-106, Witness Statement of Jonathan Stent-Torriani, para. 19, Compendium, Tab 27

[27] Public Trial Transcript, Vol. 3, October 4, p. 233-234, Compendium, Tab 28

[28] Public Trial Transcript, Vol. 1, October 2, p. 143-144, Compendium, Tab 29

[29] Public Trial Transcript, Vol. 1, October 2, p. 146-147, Compendium, Tab 30

[30] Public Trial Transcript, Vol. 5, October 9, p. 350, Compendium, Tab 31

A. They're all part of one and the same.[31]

23. Similarly, Mr. Mood from WestJet testified that, when WestJet was conducting an internal review of its inflight catering services with a view to providing more premium level of catering, it considered Galley Handling and Catering to be "inextricably linked" together.[32]

24. Even in cases where the components of inflight catering services are subcontracted to third parties, the subcontractors typically provide some combination of both Galley Handling and Catering items, such as commissary products. For example, in the case of Optimum's contract with Air Transat, Optimum has subcontracted the Galley Handling services (or "provisioning" services) to Sky Café. However, on cross-examination, Mr. Lineham of Optimum clarified that the services subcontracted to Sky Café include food, and that Sky Café provides "both the catering and the provisioning piece."[33]

25. Even Mr. Brown, the CEO of Strategic Aviation, a firm that has chosen to pursue a business model that focuses on Galley Handling services, [redacted][34]

26. In response to questions from the Tribunal, Dr. Reitman testified that drawing the line between Galley Handling and Catering was arbitrary.[35] He stated that the relevant product market needed to include both Catering and Galley Handling: "You can't do galley handling without food, so you need that product in there… you're not ever dealing with the product separately because, you know, you can't load aircraft with empty carts."[36]

27. Thus, the evidence demonstrates that Catering and Galley Handling are complementary products that are offered by caterers together and purchased by airlines together. As Dr. Niels noted,

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[31] Confidential Level B Transcript, Vol. 5, October 9, p. 415, Compendium, Tab 32

[32] Confidential Level B Transcript, Vol. 6, October 10, p. 457-459, Compendium, Tab 33

[33] Confidential Level B Transcript, Vol. 2, October 3, p. 153-155, Compendium, Tab 34

[34] Confidential Level B Transcript, Vol. 4, October 5, p. 293-298, Compendium, Tab 35

[35] Confidential Level B Transcript, Vol. 9, October 17, p. 802-806, Compendium, Tab 37

[36] Confidential Level B Transcript, Vol. 9, October 17, p. 804-805, Compendium, Tab 37

that evidence informs the relevant market analysis for the purpose of section 79(1)(a). The evidence suggests that Galley Handling is not a separate and distinct market from Catering for the purpose of section 79(1)(a).

28. A second flaw in the Commissioner's market definition is that Galley Handling encompasses an imprecise bundle of complementary services without any delineation of the boundaries of the market. That makes it is difficult, if not impossible, to precisely identify which products and services fall into galley handling and which do not. The imprecise delineation of the alleged market is problematic at each stage of the analysis under 79(1)(a) and (c).

29. Dr. Niels states in his report that it is not necessary to delineate the "exact boundaries" of the downstream market because his "conclusions are the same in both." However, the delineation of the relevant product market is essential to the analysis under 79(1)(a) and (c). If the relevant market is Galley Handling alone, then the Commissioner must prove the requisite anti-competitive effects in that specific market under paragraph 79(1)(c). By failing to establish an evidentiary foundation for the boundaries of the Galley Handling market, VAA submits that the Commissioner has not met his burden to establish a relevant product market.

30. If any distinction is to be made within inflight catering, it should be made as proposed by Dr. Reitman, that is, between Premium Flight Catering, on the one hand, and Standard Flight Catering, on the other.[37] In general, Premium and Standard catering are distinguished by the core principle of market definition, which is the extent to which there are substitution possibilities for each. Dr. Reitman based his opinion that these are separate markets having regard to the lack of substitutability between the two,[38] including an analysis highlighting the fact that premium flight catering products provided to front cabin passengers were substantially more expensive than standard flight catering products provided to economy passengers.[39] In addition, as compared to a market comprising all inflight catering, this market definition satisfies the principle that, when determining the relevant

[37] R-98, Reitman Report, p. 15, Compendium, Tab 38

[38] In addition, Dr. Tretheway testified that frozen food would not be an acceptable substitute for "front of the cabin" passengers on long-haul flights out of Vancouver to Europe and especially to Asia. He said, "that type of substitution may have important customer service consequences … negative consequences" and "I don't think [that type of substitution] would be very likely": Public Transcript, Vol. 12, November 1, p. 858-859, Compendium, Tab 39

[39] R-98, Reitman Report, para. 42-44, Compendium, Tab 40

product market, one should start with the smallest possible candidate market. Moreover, this market definition is more consistent with the evidence that Catering and Galley Handling are typically provided together.

31. If these product markets are employed, Dr. Reitman opined that YVR is not a market for Standard Flight Catering due to opportunities for airlines to self-supply, and to double-cater at other airports.[40] To reach that opinion, Dr. Reitman considered whether a hypothetical monopolist of standard flight catering products at YVR would be able to profitably maintain prices above competitive levels, but concluded "the substitution opportunities are greater for standard catering products than for premium catering products, and may be sufficient to constrain an exercise of market power for standard flight catering products at YVR."[41]

(ii) VAA does not substantially control the market for Galley Handling

32. There is no dispute that, absent VAA's authorization, a firm other than an airline cannot access the airside at YVR to load and unload Catering items. For the purpose of argument, VAA assumes that authorization does meet the test of "control" for these specific services.

33. However, the Commissioner's definition of Galley Handling includes a wide range of services that do not require access to the airside. VAA's authorization is not necessary for the supply of those services. For example, none of warehousing, inventory management, assembly of meal trays and aircraft trolley carts, equipment cleaning, and handheld point-of-sale device management require access to the airport airside or any authorization by VAA. Accordingly, VAA cannot be said to control the market for those services.[42]

34. With respect to loading and unloading of Catering products, the evidence shows substitution opportunities are significant. They include both full and partial self-catering, such as that engaged in

[40] R-190, Read-In Brief of the Respondent, Volume 1, p.129, Q. 225, Compendium, Tab 41

[41] R-98, Reitman Report, para. 51, Compendium, Tab 42

[42] This was confirmed by the witness for dnata, the witness for Strategic, and the witness for Air Transat. See Confidential Level B Transcript, Vol. 4, October 5, 294:16-295:6, Compendium, Tab 43; Public Transcript, Vol. 1, October 2, 140:2-23, Compendium, Tab 44; Public Transcript, Vol. 5, October 9, 312:7-316:12, Compendium, Tab 45

by WestJet and Air Canada at YVR and elsewhere.[43] They also include double catering, which Dr. Niels' own evidence suggests is particularly feasible for flights of less than 200 minutes' duration.[44] [redacted], which is evidence that they act as a constraint on market power.[45]

35. Accordingly, VAA submits that the Commissioner has not met its burden to prove on a balance of probabilities that VAA substantially or completely controls the market for "Galley Handling" in light of the fact that VAA exercises no control over many of the services included in Galley Handling and in light of the substitution opportunities of self-catering and double-catering.[46]

C. VAA Did Not Commit Anti-Competitive Acts – It Did Not Have an Anti-Competitive Purpose

(i) Legal Framework

36. The second part of the test for abuse of dominance, of course, requires the Commissioner to prove that the respondent has engaged in a practice of anti-competitive acts. This constitutes the "abuse" dimension of the conduct that is captured by section 79.[47]

37. The basic framework for an analysis of whether a particular practice qualifies as "anti-competitive" was established by the Federal Court of Appeal in *Canada Pipe*. Of note, the Court of Appeal explained that whether or not a particular act is "anti-competitive" depends upon the purpose that underlies the act:

> [A]n anti-competitive act is identified by reference to its purpose.[48]

38. The Court of Appeal went on to state that an anti-competitive act is one which is intended to

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[43] A-82, Niels Report, paras. 2.74-2.76, Compendium, Tab 46, Confidential Level B Transcript, Vol. 7, October 15, p. 519-525, Compendium, Tab 47; R-98, Reitman Report, paras. 55 and 56, Compendium, Tab 42

[44] A-82, Niels Report, paras. 2.77-2.83, Compendium, Tab 46; R-98, Reitman Report, paras. 52 and 53, Compendium, Tab 42

[45] Confidential Level A Transcript, Vol. 7, October 15, p. 229-231, Compendium, Tab 48

[46] If the relevant markets are divided between Premium and Standard Catering, then the substitution opportunities are most significant in the Standard Catering market.

[47] *TREB* Tribunal Decision, para. 270, Compendium, Tab 49

[48] *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233 ("***Canada Pipe***"), para. 66, Compendium, Tab 50, emphasis in original. And see *TREB* Tribunal Decision, para. 274, Compendium, Tab 49, where the Tribunal recognized that the respondent's subjective intent in carrying out the impugned acts is "probative and informative".

have a negative effect on a competitor that is "predatory, exclusionary or disciplinary".[49]

39. In determining whether the respondent acted with the requisite anti-competitive purpose, "all relevant factors must be taken into account and weighed".[50]

40. In *TREB*, this Tribunal further refined that test to make it applicable to situations, such as the present, where the respondent does not compete in the relevant market. In such cases, the Commissioner must prove that the respondent has a "plausible competitive interest in the market":

> [B]efore a practice engaged in by a respondent who does not compete in the relevant market can be found to be *anti-competitive*, the Commissioner will be required to satisfy the Tribunal that the respondent has a plausible *competitive interest* in the market.[51]

41. In cases where the respondent is upstream from the relevant market, this may involve proving that the respondent has a competitive interest that is different from what one would normally expect to see in a supplier (who typically wants to see the maximum degree of competition in the downstream market):

> In the case of an entity that is upstream . . . from the relevant market, this may involve demonstrating that the entity has a plausible competitive interest that is different from the typical interest of a supplier in cultivating downstream competition for its goods or services…[52]

42. As noted in *TREB*, this very issue has received consideration in the American jurisprudence and has been the subject of similar comment. For example, Areeda and Hovenkamp in their authoritative treatise, *Antitrust Law*, discuss one of the earliest "bottleneck cases" – the *Terminal Railroad* case. They draw a distinction between cases involving a competing defendant and those involving a defendant who does not compete in the relevant market. Such a non-competing defendant would ordinarily have "no economic incentive" to harm any of the competitors in that downstream market:

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[49] *Canada Pipe,* para. 68, Compendium, Tab 50

[50] *Canada Pipe,* para. 78, Compendium, Tab 51

[51] *TREB* Tribunal Decision, para. 279, Compendium, Tab 52, emphasis in original.

[52] *TREB* Tribunal Decision, para. 281, Compendium, Tab 52

> Had the Terminal Company [i.e., the defendant] remained independent, . . . its facilities would have been no less essential to the several railroads, but they were not competitors of an independent Terminal Company, which had no economic incentive to harm any of the railroads serving St. Louis.[53]

43. A similar focus on whether the defendant had a motive to lessen competition is apparent in *Allied Tube v. Indian Head, Inc.* In imposing liability, the U.S. Supreme Court noted that the defendant was "at least partially motivated by the desire to lessen competition" and that it "stood to reap substantial economic benefits from making it difficult for [the plaintiff] to compete".[54]

44. Also of note is the decision in *The Interface Group, Inc. v. Massachusetts Port Authority*, wherein the plaintiff airline challenged Logan Airport's decision to require the airline to use a particular terminal at the airport, which meant that the airline could not use its ground handler of choice. The Court dismissed the *Sherman Act* claim, noting that the defendant did not have any "economic motive . . . to enter into anticompetitive arrangements".[55]

45. If the defendant does not have any "economic incentive to harm" competitors in the downstream market, then there is no need for competition law to step in, because, as Areeda and Hovenkamp note, "market pressures would tend to push [the defendant] toward efficient decisions without management by the court":[56]

> To be sure, the monopolist might be unwise, insufficiently responsive to new market developments, or otherwise mistaken, but such profit-reducing mistakes tend to be self-correcting.[57]

46. This same reasoning was expressed by the U.S. Supreme Court in *Donovan v. Pennsylvania*. In that case, the defendant railway station had entered into an arrangement with a transfer company, pursuant to which the transfer company obtained the exclusive right to solicit passengers at the

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[53] Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law*, 1986 Supp. ("**Areeda and Hovenkamp**"), p. 494, Compendium, Tab 53. For the Tribunal in *TREB*'s reference to Hovenkamp's writings, see *TREB* Tribunal Decision, para. 280, Compendium, Tab 52

[54] *Allied Tube v. Indian Head, Inc.*, 486 U.S. 492 at 508-509 (1988), Compendium, Tab 54

[55] *The Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9 (1987) at 12, Compendium, Tab 55

[56] Areeda and Hovenkamp, p. 494, Compendium, Tab 53

[57] Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law*, 4th ed. (2015), Volume IIIB, ¶774, p. 290, Compendium, Tab 56

station. In dismissing a *Sherman Act* claim, the Court noted that the resolution of any problems or inefficiencies resulting from the exclusive arrangement did not properly lie with the courts:

> [I]f inadequate, or if the transfer company was allowed to charge exorbitant prices, it was for passengers to complain of neglect of duty by the railroad company, and for the constituted authorities to take steps to compel the company to perform its public functions with due regard to the rights of passengers.[58]

47. Of course, the statutory underpinning for all of the foregoing analysis is the need to determine whether the respondent's acts are "anti-competitive". To that end, the Tribunal must determine the overall character of the acts in question:

> [T]he purpose or character of the impugned conduct must therefore be determined.[59]

48. If the respondent does not compete in the relevant market, the character of the impugned acts will depend upon the respondent's economic incentives.[60] A finding that the respondent has an economic incentive to harm competition in the relevant market is thus a necessary precondition to finding that the respondent acted with an anti-competitive purpose.

49. Before concluding this discussion of the applicable law, a caution should be raised with respect to the *Luton Airport* case, upon which the Commissioner relies. First, the legal framework as articulated in that case appears to exclude any consideration of whether the defendant had a plausible competitive interest in adversely affecting competition in the relevant market.[61] Second, even if the applicable law were analogous, the facts of the *Luton* case are strikingly different.[62]

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[58] *Donovan v. Pennsylvania Co.* (1905), 199 U.S. 279 at 295, Compendium, Tab 57; see also *Export Liquor Sales, Inc. v. Ammex Warehouse Company, Inc.*, 426 F.2d 251 (6th Cir. 1970), which held that a "corporation with control over a unique location essential to the conduct of a certain kind of business can lease a part of that location to one entity and thereby give it an effective monopoly without violating the *Sherman Act*," Compendium, Tab 58

[59] *Canada Pipe,* para. 67, Compendium, Tab 50

[60] See, e.g., *Weiss v. York Hospital,* 745 F.2d 786 (1984) at 815: "The 'substance' of an arrangement often depends on the economic incentive of the parties." Compendium, Tab 59

[61] *Arriva the Shires Ltd. v. London Luton Airport Operations Ltd.*, [2014] EWHC 64 at para. 96, where the Court cites with approval from the *Aeroports de Paris* case, which held that the fact that the defendant "has no interest in distorting competition [in the relevant market] . . . is irrelevant." See also para. 99. Compendium, Tab 60

[62] For example, in *Luton*, the defendant had granted an exclusive licence, where there had previously been open access. Moreover, by granting an exclusive licence, the defendant was able to extract ten times the revenues from the licensing

(ii) The Commissioner Cannot Demonstrate that VAA Has a Plausible Competitive Interest in Adversely Affecting Competition in the Relevant Market

50. In the present case, the Commissioner relies on two facts as providing this requisite interest in adversely affecting competition in the relevant market:

(a) the concession fees that that VAA receives from inflight caterers; and

(b) the rents that VAA receives from Gate Gourmet and CLS.[63]

51. It should be highlighted that the Commissioner's expert does not opine that either of these facts provides VAA with an economic incentive to adversely affect competition in the catering market. He only states that, from a theoretical perspective, he cannot rule out such a possibility.[64] Given that the Commissioner bears the burden of proving that the concession fees or the rents did, in fact, provide VAA with an economic incentive to adversely affect competition in the catering market, this failure to adduce any economic evidence in support of its assertion is, in and of itself, fatal to the Commissioner's case.

52. Furthermore and in any event, as is discussed more fully below, VAA's expert economist, Dr. David Reitman, has provided an unchallenged opinion that VAA did not have an economic incentive to adversely affect competition in the catering market.

(a) *Concession Fees Do Not Provide VAA With a Plausible Competitive Interest in the Downstream Market*

53. The Commissioner alleges that the concession fees payable by the caterers provide VAA with an incentive to harm competition in the downstream market, because they permit VAA to share in the higher prices that are alleged to have resulted from VAA's decision in 2014 to deny entry to a third caterer.[65]

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arrangement than it had previously with the open access. The defendant was also able to obtain a minimum guaranteed payment. As can readily be seen, the factual underpinning for the finding that the Luton Airport was not a "neutral or indifferent upstream provider of facilities" is entirely lacking in the present case. Confidential Level B Trial Transcript, October 15, p. 534-539, Compendium, Tab 61

[63] Notice of Application, paras. 45-47 and Concise Statement of Economic Theory, para. 9, Compendium, Tabs 62 and 63

[64] A-82, Expert report of Dr. Gunnar Niels, para. 2.107, Compendium, Tab 64

[65] Notice of Application, para. 47, Compendium, Tab 62

54. However, the Commissioner's allegation fails for two reasons. As a matter of economics, the concession fees are not capable of providing VAA with an economic incentive to harm a competitor in the downstream market. In the alternative, even if they were conceptually capable of providing such an economic incentive, they did not in fact motivate VAA and, accordingly, did not operate as an incentive to adversely affect competition.

55. Turning first to whether the concession fees could, as a matter of economic theory, conceptually function as an incentive to harm downstream competition, as is made clear by the analysis performed by Dr. Reitman – which analysis was not challenged on cross-examination – the concession fees are not capable of functioning as an economic incentive to harm competition:

> [T]here is no economic rationale for limiting entry to increase port fee revenues and, accordingly, in my opinion, the revenues earned from caterers did not provide VAA with an incentive to restrict competition in the flight catering market.[66]

56. The reasons for Dr. Reitman's conclusion are as follows. First, Dr. Reitman explains that limiting competition would only result in higher total catering revenues, if demand in the catering market were inelastic – i.e., were not responsive to price changes.[67] However, Dr. Reitman goes on to explain that assuming catering demand to be inelastic is inconsistent with the theoretical foundation for the Commissioner's entire argument – i.e., that VAA had an incentive to increase its revenues earned from caterers. Dr. Reitman explains that, if VAA were motivated to increase its revenues earned from caterers, it would have raised its concession fee to the point that demand became elastic:

> [I]f VAA is a rational economic agent and if (as I have presumed) its objective is to maximize port fee revenues, then VAA would increase its port fee rate until market demand is sufficiently elastic to make any further port fee rate increases unprofitable. At that point, economic theory indicates that the profit-maximizing quantity would be on an *elastic* portion of the demand curve.[68]

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[66] R-98, Reitman Report, para. 105, Compendium, Tab 65

[67] R-98, Reitman Report, para. 83, Compendium, Tab 66

[68] Ex. R-98, Reitman Report, para. 85, Compendium, Tab 66. It should be noted that the Commissioner purports to provide two answers to this point. First, Dr. Niels incorrectly characterizes Dr. Reitman's analysis as resting on an assumption that VAA is acting in a profit-maximizing manner. See Ex. A-85, Reply Report of Dr. Gunnar Niels, para. 3.8 and 3.10,

57. However, if demand is elastic (which is the conclusion that necessarily follows from the assumption that VAA is motivated to increase catering revenues), then the imposition of higher prices by the current operators in the catering market would lead to a drop in demand, with the result that total catering revenues would not increase:

> [I]f demand is elastic, then revenues would not increase by restricting entry. With elastic demand, the exercise of additional market power (i.e., the imposition of higher prices) by flight catering incumbents would decrease VAA's port fee revenues because demand would drop in response to the higher prices.[69]

58. In other words, the Commissioner's economic theory is internally inconsistent. On the one hand, it requires us to assume that VAA is motivated to increase catering revenues. As a matter of economic theory, that assumption leads necessarily to the conclusion that VAA would have set its port fee at a sufficiently high rate for catering demand to be elastic. On the other hand, the Commissioner's theory simultaneously requires us to assume that catering demand is inelastic. These two assumptions – each of which is key to the Commissioner's theory – cannot coexist as a matter of economics. Accordingly, as a matter of economic theory, the concession fees cannot provide VAA with an economic incentive to harm competition.

59. Second, although the Commissioner's theory requires us to assume that VAA is acting in order to increase the revenues it earns from concession fees, Dr. Reitman considers the possibility that VAA has for some unknown and inexplicable reason decided to forego some of those revenues, keeping port fee rates at a sufficiently low level that catering demand is inelastic, such that total market

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Compendium, Tab 67. This is simply incorrect. Dr. Reitman merely assumes (as the Commissioner's theory requires) that VAA is acting in order to increase revenues earned from the Airport's caterers. See Confidential Level B Trial Transcript, October 17, p. 777-778, Compendium, Tab 68. The Commissioner's second purported answer to this point is that VAA could be motivated to increase its concession fee revenues and yet nevertheless be reluctant to raise the concession fee rates so as "to avoid disrupting its relationships with the incumbent caterers". See Ex. A-85, Reply Report of Dr. Gunnar Niels, para. 3.11, Compendium, Tab 67. With respect, this is pure speculation. First, there is no evidentiary basis to suggest that VAA's "relationships" with its existing caterers would be "disrupted" if the port fee rate were to be increased. Indeed, as the Commissioner notes in his pleading, in 2010-2011, VAA was "able to impose and sustain a more than 40% increase in the fee it charges" to catering firms with no apparent adverse effects on the commercial relationships in question. See Notice of Application, para. 32, Compendium, Tab 69. Second, there is no evidentiary basis for suggesting that VAA values its relationships with caterers so highly that the risk – if any – to those relationships resulting from an increase in the port fee rate however small would outweigh its (assumed) interest in increasing catering revenues. Accordingly, it is submitted that the Commissioner's responses to this point should be given no credit.

[69] Ex. R-98, Reitman Report, para. 86, Compendium, Tab 66

revenues would decrease with lower prices.[70] (As noted above, this demand inelasticity is the necessary premise to the Commissioner's economic theory related to plausible economic interest.)

60. Dr. Reitman considers whether, under those conditions, VAA's assumed desire to increase catering revenues would provide it with an economic incentive to restrict entry of new caterers. Again, he finds that it would not.

61. He acknowledges that, if catering demand is assumed to be inelastic and if prices charged to airlines are assumed to fall upon entry of an additional caterer (as the Commissioner alleges), then the entry of an additional caterer would lead a decrease in the total amount of catering revenues and a corresponding decrease in the total concession fee revenues earned by VAA. However, assuming that VAA is motivated to increase its concession fee revenues (which, again, is the necessary premise to the Commissioner's argument), economic theory tells us that, facing such a decrease in concession fee revenues, VAA would simply increase its concession fee rate. Moreover, VAA would only need to increase its concession fee by a very small amount in order to make up for any potential loss of revenues.

62. Accordingly, as a matter of economic theory, even assuming catering demand to be inelastic (which, as noted above, is inconsistent with the Commissioner's premise that VAA is motivated to increase concession fee revenues), the concession fees still do not provide VAA with an incentive to adversely affect competition in the downstream market:

> VAA would never choose to restrict entry as an alternative to raising port fees. Accordingly, the revenues that it collects from caterers do not provide VAA with an incentive to limit competition in the flight catering market.[71]

63. None of the foregoing analysis was challenged on cross-examination.

64. Thus, the Commissioner's argument is conceptually untenable. Dr. Reitman clearly demonstrates that, from an economic perspective, the concession fees could not have provided VAA with an incentive to adversely affect competition in the catering market.

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[70] Ex. R-98, Reitman Report, para. 92, Compendium, Tab 70

[71] Ex. R-98, Reitman Report, para. 95, Compendium, Tab 71

65. This conclusion is further reinforced when the particulars of VAA's financial and economic position are considered. As Dr. Reitman explained, if one assumes a price effect of [redacted] from entry of a third caterer,[72] and if one assumes that market demand is inelastic (as the Commissioner's argument requires), then the entry of a third caterer in 2014 would have resulted in a reduction in total catering spending by airlines of [redacted].[73]

66. Dr. Reitman goes on to show that, when this decrease in total catering spending is considered in so far as it affects VAA's concession fee revenues, the effect on VAA's revenues is vanishingly small. Accepting all of the assumptions necessary for the Commissioner's argument (even those that are internally inconsistent), the entry of a third caterer would have resulted in VAA's concession fees decreasing by a mere [redacted] – which is a rounding error on VAA's total annual revenues of $465 million in 2014,[75] amounting to only [redacted] of total revenues.

67. To suggest that the potential for such a vanishingly small decrease in revenues could provide VAA with an economic incentive to adversely affect competition in the downstream market is not credible.

68. The implausibility of the Commissioner's allegation becomes even clearer when that vanishingly small amount of revenues is compared to the alternatives available to VAA. As Dr. Reitman explains, assuming that VAA is motivated to increase its revenues from caterers, then it could recoup that theoretical loss of [redacted] in concession fee revenues simply by increasing the port fee rate by a mere [redacted] points to [redacted]. Such a course of conduct would result in VAA suffering no loss of revenues, while it would (according to the assumption about price effects from entry discussed above) result in overall cost savings to airlines of over [redacted][76]

69. In other words, the Commissioner's allegation that concession fee revenues provide VAA with

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[72] Of course, VAA denies that any such price effect exists as a matter of fact. The price effect is only assumed for the purposes of this analysis. It should be noted that 2.5% is the price assumption used by Dr. Niels in his "dynamic analysis". Ex. CA-84, Confidential Level B Expert Report of Dr. Gunnar Niels, para. 3.89, Compendium, Tab 72

[73] Ex. CR-100, Confidential Level B Reitman Report, Table 3, Compendium, Tab 73

[74] Ex. CR-100, Confidential Level B Reitman Report, para. 99, Compendium, Tab 73

[75] Ex. R-110, Supplementary Witness Statement of Craig Richmond, Exhibit 1, p. 52, Compendium, Tab 74

[76] Ex. CR-100, Confidential Level B Reitman Report, Table 3 and para. 102, Compendium, Tab 73

a plausible competitive interest requires us to accept that VAA would be motivated to forego a course of conduct (i.e., allowing an additional caterer to enter the market) which would result in its airline customers saving over [redacted] on catering expenses, and which would grant them of the choice of an additional catering vendor, all in order to receive a vanishingly small increase in concession fee revenues, which increase could have been collected by VAA if it had merely raised the port fee rate to [redacted]. Such an argument is not consonant with, and cannot be explained by, economic theory. As Dr. Reitman puts it:

> Such a course of conduct is not one that I would expect from a rational economic actor.[77]

70. Again, none of this testimony from Dr. Reitman was challenged on cross-examination.

71. Given that the concession fees would not provide a rational economic actor in VAA's position with an incentive to exclude a third caterer from the market at YVR, they do not (and, indeed, cannot) provide VAA with a plausible economic incentive to adversely affect competition in the catering market.

72. Furthermore and in any event, even if the concession fees could as a matter of economic theory have provided VAA with an incentive to harm competition in the catering market, the clear and uncontradicted evidence is that they did not do so in the present case.

73. This question – i.e., whether VAA's decision not to license an additional caterer was, in fact, motivated by a desire to increase its concession fee revenues – must necessarily be considered if this Tribunal should find that the concession fees might theoretically have provided such an incentive. As discussed above, whether phrased as "competitive interest" or "economic incentive", this aspect of the 79(1)(b) analysis is – like all aspects of the analysis – designed to determine whether the respondent acted with an anti-competitive purpose.

74. If the Tribunal finds that a particular set of facts <u>might</u> have provided the respondent with a motivation to behave in an anti-competitive manner, it must nonetheless go on to consider whether

[77] Ex. CR-100, Confidential Level B Reitman Report, para. 103, Compendium, Tab 73

those facts did, indeed, motivate the respondent's conduct. If they did not, then the necessary conclusion is that the set of facts did not function as an incentive and, accordingly, did not provide the respondent with a reason to adversely affect competition.

75. In deciding whether the particular set of facts did, indeed, motivate the respondent's conduct, the Tribunal will of course need to consider all of the relevant facts, including facts relating to the strength or magnitude of the alleged incentive and any countervailing incentives.

76. In the present case, both Mr. Richmond and Mr. Gugliotta were categorical in their respective testimony that their decision was not motivated by a desire to protect the amount of concession fees paid by the two existing caterers. As discussed above, both men testified that the concession fees did not motivate them in any way – indeed, the fees did not even factor into their discussion.[78] Their testimony was not contradicted or challenged in any way on cross-examination.

77. Moreover, the credibility of their testimony is highlighted by the fact that, as discussed above, the potential benefit to VAA that the Commissioner alleges was at stake was only [redacted] or barely [redacted] of VAA's annual revenues. It makes perfect sense that Messrs. Richmond and Gugliotta would not have been motivated by such a tiny amount of revenues.

78. The credibility of their testimony is further highlighted by the fact that the VAA was charging a port fee rate that is at the low end of the range of those charged by other Canadian airports.[79]

79. Its credibility is highlighted still further by the explanation given by Messrs. Richmond and Gugliotta as to what, in fact, motivated them – namely, a concern, discussed more fully below, about the precarious state of the catering market and a concern that the entry of an additional caterer might lead to the unplanned exit of one of the existing operators, with the disruption that such a turn of events would entail, and the potential for an adverse impact on VAA's efforts to attract new routes and new carriers, in particular, Asian carriers.

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[78] Ex. R-108, Witness Statement of Craig Richmond, para. 118, Compendium, Tab 14. See also Confidential Level B Trial Transcript, Vol. 10 (October 30, 2018), 817:5-17, Compendium, Tab 15. Ex. R-159, Witness Statement of Tony Gugliotta, para. 103, Compendium, Tab 19; and see Confidential Level B Trial Transcript, Vol. XII (November 1, 2018), 973:17-24, Compendium, Tab 13

[79] Confidential Level B Witness Statement of Craig Richmond, Ex. CR-108, para. 80, Compendium, Tab 75

80. Accordingly, even if the concession fees were theoretically capable of providing VAA with an economic incentive to harm competition in the catering market, the uncontested facts are that they did not, in fact, operate as such an incentive – they did not in fact motivate VAA's decision not to grant an additional catering licence in 2014.

81. Therefore, it is submitted that the Commissioner has wholly failed to discharge his burden and prove on a balance of probabilities that the concession fees provided VAA with a plausible competitive interest in the downstream catering market. The Commissioner's case, accordingly, fails.

(b) *Land Rents Do Not Provide VAA With a Plausible Competitive Interest in the Downstream Market*

82. Just as the concession fees could not and did not provide VAA with an incentive to restrict competition in the downstream market, neither did the land rents paid by Gate Gourmet and CLS. Simply put, there is no basis for the Commissioner's allegation.

83. The unchallenged evidence before the Tribunal is that the rents payable both by Gate Gourmet and by CLS are determined [redacted]

84. The Commissioner has articulated only one theory as to how these market-based rents might motivate VAA to adversely affect competition in the catering market. Specifically, the Commissioner alleges that VAA would be motivated to adversely affect competition by the fear that, if the existing caterers were exposed to further competitors, they might "have less need" for the facilities they rent from VAA.[81]

85. The Commissioner's theory fails for a number of reasons. First, both CLS and Gate Gourmet have signed binding long-term lease agreements with VAA.[82] The fact that they might have "less need" for the demised premises would not relieve them of their respective obligations under the

[80] Ex. CR-160,Confidential Level B Witness Statement of Tony Gugliotta, paras. 48-57, Compendium, Tab 76

[81] Confidential Level B Read-Ins of VAA, Ex. CR-189, August 24, 2017, p. 278-279, Compendium, Tab 77

[82] Confidential Level B Witness Statement of Tony Gugliotta, paras. 49-58, Compendium, Tab 76

leases.

86. Second, even if CLS or Gate Gourmet decided to repudiate their lease, and even if VAA found itself (for reasons unexplained) unable to collect amounts owing in respect of rent, the uncontradicted and unchallenged evidence of Mr. Richmond is that VAA would have no difficulty in finding a replacement tenant paying comparable rents for the property in question.[83]

87. Third, if there were any doubt as to whether the land rents received from the caterers – and more specifically, the fear of a loss or reduction in those land rents – might have motivated VAA to deny entry to an additional caterer in 2014, that doubt is conclusively answered by the fact that VAA has granted a licence to a third inflight caterer, dnata, who does not rent any premises from VAA.

88. Accordingly, there is simply no basis for the Commissioner's allegation that the land rents provided an incentive for VAA to adversely affect competition in the catering market. And, in any event, as noted above, the revenues earned from caterers (whether rents or concession fees) did not, as a matter of fact, motivate VAA's decision in any way.

(iii) In the Alternative, VAA Did Not Have an Anti-Competitive Purpose – Rather, It Had a Legitimate Business Justification for Denying Access to Newrest and Strategic

89. Even if this Tribunal should find that the fees earned from caterers did provide VAA with a motive to restrict entry – the Commissioner nonetheless cannot satisfy the requirements of paragraph 79(1)(b), because any motivation that might have been provided by the fees from caterers (which is denied) was far outweighed by VAA's dominant motivation, which was to ensure the presence of two, viable full-service inflight caterers at the Airport.

90. Because this analysis engages the law related to "legitimate business justification", that law will be discussed prior to a consideration of the specific facts.

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[83] Confidential Level B Witness Statement of Craig Richmond, para. 89, Compendium, Tab 78. Although the Commissioner's expert states that there is [redacted] Confidential Level A Trial Transcript, October 15, 2018, p. 235-242, Compendium, Tab 79

(a) *The Law Related to Legitimate Business Justification*

91. Consideration of a valid business justification for the impugned act is relevant to the issue of whether the respondent acted with the requisite anti-competitive purpose. Where established, a valid business justification can serve to combat the inference that the respondent had an anti-competitive purpose, by demonstrating that any such purpose did not, in fact, play a predominant role in motivating the respondent:

> [A] valid business justification can . . . overcome the deemed intention arising from the actual or foreseeable negative effects of the conduct on competitors, by demonstrating that such anti-competitive effects are not in fact the overriding purpose of the conduct in question.[84]

92. Thus, a valid business justification provides an "alternative explanation as to why the impugned act was performed",[85] which, when properly weighed against all of the other evidence,[86] may result in a conclusion that the act's overall character was not anti-competitive. The question, accordingly, is whether legitimate business justification outweighs any other evidence tending to show an anti-competitive purpose.[87]

93. To qualify as a legitimate business justification, the explanation must be unrelated to the respondent's anti-competitive purpose,[88] must "involve more than the respondent's self-interest," and must "be a credible efficiency or pro-competitive rationale for the conduct in question . . . which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts".[89]

(b) *The Evidence Related to VAA's Purpose in the Present Case*

94. Both Mr. Richmond and Mr. Gugliotta provided extensive evidence as to the factors that they

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[84] *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233 at para. 87, Compendium, Tab 80

[85] *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233 at para. 87, Compendium, Tab 80

[86] *Canada (Director of Investigation and Research) v. D&B Companies of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 at para.150 (Comp. Trib.), Compendium, Tab 81

[87] *Canada (Commissioner of Competition) v. Toronto Real Estate Board*, 2016 Comp. Trib. 7 at para. 287, Compendium, Tab 52

[88] *Canada (Commissioner of Competition) v. Canada Pipe,* 2006 FCA 233 at para. 90, Compendium, Tab 80

[89] *Canada (Commissioner of Competition) v. Toronto Real Estate Board*, 2016 Comp. Trib. 7 at para. 294, Compendium, Tab 82

relied upon in April 2014, in deciding not to grant access to an additional caterer.

95. Most importantly, the two were concerned that there was not, at that time, sufficient demand to support three caterers and that, accordingly, the entry of a third caterer might cause the exit of one of the existing operators. Mr. Richmond states that, based upon the information available, he considered that risk to be "significant".[90]

96. The information available to, and considered by, Messrs. Richmond and Gugliotta included the following:

(a) The aviation industry had suffered a series of shocks over the preceding decade, including 9/11, SARS and the Great Recession of 2008. As Mr. Richmond stated, these events "significantly impacted airline traffic and passenger volumes".[91]

(b) The inflight catering industry had undergone major changes over that same time period, which resulted in a [redacted][92]

(c) Until 2003, there had been three caterers operating at YVR: Cara, CLS and LSG Sky Chefs. Sky Chefs' major customer was Canadian Airlines. After the acquisition of Canadian Airlines by Air Canada, its catering business was redirected to Cara. As a result of the downturn in its business that followed, Sky Chefs exited YVR.[93]

(d) No other caterer took over Sky Chefs' flight kitchen and none sought to replace it at the Airport. Sky Chefs' departure and the lack of any replacement indicated that, as at 2003, the inflight catering market at YVR was not able to support three caterers.[94]

(e) For several years following Sky Chefs' departure, VAA continued to have concerns about the catering market. As a result, VAA maintained concession fees for the two remaining

[90] Ex. R-108, Witness Statement of Craig Richmond, para. 99, Compendium, Tab 11

[91] Ex. R-108, Witness Statement of Craig Richmond, para. 103, Compendium, Tab 11

[92] Ex. CR-109, Confidential Level B Witness Statement of Craig Richmond, para. 102, Compendium, Tab 11

[93] Ex. CR-109, Confidential Level B Witness Statement of Craig Richmond, para. 104, Compendium, Tab 11

[94] Ex. CR-109, Confidential Level B Witness Statement of Craig Richmond, para. 105, Compendium, Tab 11

caterers at rates below what many other airports were charging.[95]

(f) [redacted]

(g) [redacted]

97. In light of all of that information, Messrs. Richmond and Gugliotta considered how the introduction of a new caterer would impact the catering market at YVR and, more broadly, the Airport as a whole. Based on the available information, they concluded that the catering market at the Airport remained precarious and that the entry of a third caterer would entail a significant risk that one of the existing caterers would leave the Airport. As Mr. Richmond testified:

[redacted][98]

98. Both men further explained that the unplanned departure of a caterer posed a risk that, for a period of time, customers of the departing caterer might struggle to procure replacement fresh food catering services. As Mr. Richmond explained:

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[95] Ex. CR-109, Confidential Level B Witness Statement of Craig Richmond, para. 106, Compendium, Tab 11

[96] Ex. CR-109, Confidential Level B Witness Statement of Craig Richmond, para. 108, Compendium, Tab 11. It should be noted that, although, on cross-examination, the Commissioner's counsel attempted to call into question whether Messrs. Richmond and Gugliotta had before them the caterers' revenue numbers when they made their decision, that suggestion was flatly rejected by both men. Mr. Richmond was clear that the men considered a version of the spreadsheet that is attached to his witness statement at Exhibit 20. Confidential Level B Trial Transcript, Vol. 10, October 30, 840:23-841:8, Compendium, Tab 83; and see Public Trial Transcript, Vol. 10 (October 30, 2018), 620:4-14, Compendium, Tab 84. Mr. Gugliotta was similarly clear that he took with him to the meeting a spreadsheet showing the caterers' historical revenues. Confidential Level B Trial Transcript, Vol. 12 (November 1, 2018), 1004:18-1005:13, Compendium, Tab 85.

[97] Ex. CR-109, Confidential Level B Witness Statement of Craig Richmond, para. 109, Compendium, Tab 11.

[98] Confidential Level B Trial Transcript, Vol. 10 (October 30, 2018), 815:19-23, Compendium, Tab 15; For Mr. Gugliotta's testimony to the same effect, see Confidential Level B Trial Transcript, Vol. 12, November 1, 973:5-10, Compendium, Tab 13

> For most international flights and flights with first class passengers, full-service catering is a *requirement,* not an option. Airlines cannot fly those routes without full-service inflight catering, including fresh meals. . . . Finding a new inflight caterer is not an easy task for an airline, especially in cases where its existing caterer leaves the market abruptly or unexpectedly.[99]

99. Having airlines unable to obtain the requisite catering services would risk serious operational and reputational harm to the Airport, particularly to its efforts to attract new routes and new carriers, including Asian carriers. Mr. Gugliotta explained:

> [T]he abrupt or unexpected departure of such an important service provider can negatively affect an airport's reputation for stable, reliable and efficient operations, something that can adversely impact its efforts to encourage airlines to establish new routes.[100]

100. Accordingly, having considered all of the foregoing, they concluded that it was not in the best interests of the Airport to grant an additional catering licence at that time.

(c) *VAA's Concerns About the Precarious Financial State of the Two Existing Caterers Are Proved Valid by the Expert Evidence*

101. At trial, questions were asked regarding the information upon which VAA based its decision and regarding the fact that VAA did not take into account certain other types of information (e.g., publicly available information about the proposed new entrants or about catering generally, or information that might have been obtained from the existing caterers, or information that might have been obtained from airlines).[101] However, none of that additional available information could have assisted VAA in gauging whether the existing caterers' financial position was sufficiently precarious such that the entry of an additional caterer might cause one of the existing operators to exit the Airport.

102. Moreover, with respect to the fact that VAA did not make inquiries of airlines, both Mr. Richmond and Mr. Gugliotta explained that they had frequent interactions with senior airline executives, during which the airlines were not reticent to raise any concerns they might have. And

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[99] Ex. R-108, Public Witness Statement of Craig Richmond, paras. 114-116, Compendium, Tab 14

[100] Ex. R-159, Public Witness Statement of Tony Gugliotta, para. 96, Compendium, Tab 86

[101] See, e.g., Confidential Level B Trial Transcript, Vol. 10 (October 30, 2018), p. 832-834, Compendium, Tab 87

yet, during none of those interactions did any airline executive with whom Mr. Richmond or Mr. Gugliotta dealt raise any concern with them relating to inflight catering at the Airport.[102]

103. Furthermore and in any event, even if one there was some additional information that might have been obtained by Messrs. Richmond and Gugliotta (which is denied), such information could not have led them to a more accurate decision, since, as demonstrated by the expert evidence, their conclusion as to the [redacted] of the two existing caterers and as to the risk that the entry of a third caterer might cause the exit of one of the existing operators was demonstrably correct.

104. In that regard, the analyses prepared by Dr. Niels – as corrected by Dr. Reitman – support VAA's conclusion that there would have been a real risk of one of the existing caterers exiting had a third caterer been permitted entry in 2014 and further support VAA's more recent decision to follow a plan of "incremental entry" – i.e., licensing dnata and then re-evaluating the market in the coming years to determine whether further entry is warranted.

105. Of Dr. Niels' analyses relating to the 2014 time period, due to serious flaws in most of the analyses,[103] only one is of any assistance – namely, the analysis that he terms "Static analysis of effects of a new entrant with kitchen, with price effect", the results of which are set out in Figure 4.2 of his Reply Report. (However, it should be noted that this analysis continues to suffer from one major flaw, in that it uses an average of the operators' EBITDA margins, rather than the EBITDA margin of the least profitable operator.)

106. The results set out in Figure 4.2 of Dr. Niels' Reply Report show that the average profitability of

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[102] Confidential Level B Transcript, Vol. 10 (October 30, 2018), p. 817-819, Compendium, Tab 88; And see Confidential Level B Transcript, Vol. 12 (November 1, 2018), p. 1035-1037, Compendium, Tab 89

[103] Those flaws include: a focus on the average EBITDA margins, instead of on the EBITDA margin of the least profitable operator; an assumption of no price effects from entry that is applied to Dr. Niel's original analyses relating to the years 2012-2017; unjustifiable assumptions about fixed costs of an entrant without an on-airport kitchen, which would effectively assume that such entrants would have no kitchen at all; and unjustifiable assumptions that entrants without a kitchen would have lower fixed costs but the same variable costs as an entrant with a kitchen. See, e.g., Expert Report of Dr. David Reitman, Ex. R-98, para. 114, Compendium, Tab 90; And see Confidential Level A Expert Report of Dr. Gunnar Niels, Ex. CA-84, para. 3.69 and Figures 3.18 and 3.19, Compendium, Tab 91; And see Confidential Level A Trial Transcript, Vol. 7 (October 15, 2018), p. 269: [redacted] And see Confidential Level A Trial Transcript, Vol. 7 (October 15, 2018), p. 271-272, Compendium, Tab 92

three providers in the market would have averaged somewhere between [redacted]% and [redacted]% in 2013 and [redacted]% and [redacted]% in 2014,[104] well below Dr. Niels' benchmark for viability of [redacted]

107. Moreover, Dr. Niels' analysis provides further evidence that there was a legitimate basis to be concerned that allowing entry in 2014 would have led to exit by one of the existing operators, as the EBITDA margin for [redacted] in 2013 – even without additional entry – was [redacted]%, which is already [redacted] Dr. Niels' viability benchmark.[105]

108. Moreover, if one takes Dr. Niels' estimates as to the average impact on EBITDA margins following entry by a caterer with an on-airport kitchen (even assuming no price effect) and applies that figure to [redacted]%,[106] which again is well below Dr. Niels' viability benchmark. In addition, once price effects are considered, the results become still more dire: [redacted][107]

109. Accordingly, the analysis performed by the Commissioner's own expert demonstrates the validity of VAA's concern as to the precarious financial position of the inflight caterers in 2014 and the risk that one of them might have been driven to exit the market had a third caterer been licensed. This fully answers any suggestion that VAA's concerns should be given less weight, due to limitations in the information relied upon by VAA.

110. Finally, it should be noted that Dr. Niels' analysis also demonstrates the correctness of VAA's more recent decision to pursue "incremental entry", by licensing dnata and then waiting for a couple of years to see whether further entry would be viable.

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[104] Confidential Level A Reply Report of Dr. Gunnar Niels, Ex. CA-86, Figure 4.2, Compendium, Tab 93

[105] Confidential Level A Report of Dr. David Reitman, Ex. CR-99, para. 128, Compendium, Tab 94. As noted by Dr. Reitman, if we are considering the justifiability of a decision made in early 2014, it would be reasonable to consider that decision based on information that was in existence at that time, even if it was not known by the decision-makers.

[106] Confidential Level A Expert Report of Dr. David Reitman, Ex. CR-99, para. 129, Compendium, Tab 94

[107] Confidential Level A Expert Report of Dr. David Reitman, Ex. CR-99, para. 129, Compendium, Tab 94. With respect to the possible impact of Gate Gourmet, it should be noted that Dr. Niels refers to a study performed by Gate Gourmet in 2013 which discusses [redacted]. Dr. Reitman concludes that the correct inference from the Gate Gourmet study is that losing [redacted]%. Confidential Level A Expert Report of Dr. David Reitman, Ex. CR-99, para. 139, Compendium, Tab 95

111. Specifically, when certain flaws in his analysis are corrected,[108] Dr. Niels' own analytical structure shows that entrant by a fourth caterer would result in an average EBITDA margin of between [redacted]% and [redacted]%, well below his benchmark viability range.[109] And even that result is likely overly optimistic, as the analysis continues to suffer from additional flaws.[110]

112. Moreover, if one were to correct Dr. Niels' focus on the average profitability and instead consider the profitability of the least profitable incumbent, the entry of a fourth provider would reduce [redacted] margin to [redacted]% in 2018 and [redacted]% in 2019,[111] which again, is far below the viability benchmark

113. Accordingly, the expert evidence clearly demonstrates that, despite any limitations in the information upon which VAA's decisions were based, those decisions were demonstrably correct.

(d) *The Evidence Clearly Establishes that VAA Did Not and Does Not Have an Anti-Competitive Purpose*

114. It is submitted that the explanation discussed above as to why VAA decided not to issue an additional catering licence in April of 2014, which decision is validated by the expert evidence relating to the sustainability of further entry, clearly shows that VAA did not act with an anti-competitive purpose and that it had a valid business justification for its decision:

(a) The explanation given by Messrs. Richmond and Gugliotta provides an alternative

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[108] For example, Dr. Niels used fixed costs that were estimated for only one quarter of 2018, but failed to annualize those costs (with the exception of dnata's rental costs). Confidential Level A Expert Report of Dr. David Reitman, Ex. CR-99, para. 145, Compendium, Tab 95. And see Confidential Level A Trial Transcript, Vol. 8 (October 16, 2018), p. 350, Compendium, Tab 156

[109] Confidential Level A Expert Report of Dr. David Reitman, Ex. CR-99, para. 147, Compendium, Tab 95. Indeed, even on its face, Dr. Niels' opinion calls into question whether the market could sustain a fourth entrant, as he conclusion that the market could sustain four operators only holds if the fourth caterer is similar in size to [redacted] and, even then, the average EBITDA range barely touches the bottom of Dr. Niels' viability benchmark of [redacted]% in 2019. Confidential Level A Report of Dr. Gunnar Niels, Ex. CA-84, Figures 3.23 and 3.24, Compendium, Tab 96. Dr. Niels acknowledges that, if the fourth caterer were similar in size to either Gate Gourmet or CLS, the average level of profitability would remain below the viability benchmark, falling between [redacted]% and [redacted]% in 2019, for an entrant with an on-airport kitchen and between [redacted]% and [redacted]% for an entrant without kitchen. Confidential Level B Expert Report of Dr. Gunnar Niels, Ex. CR-83, para. 3.113, Compendium, Tab 96

[110] For example, Dr. Niels assumes that entry will lower variable costs for both the entrant and incumbent firms. As explained by Dr. Reitman, this assumption is not reasonable, as certain of the incumbents' costs are likely to be driven up by entry, not down. Confidential Level B Reitman Report, Ex. CR-100, paras. 150-151, Compendium, Tab 95

[111] Confidential Level A Expert Report of Dr. David Reitman, Ex. CR-99, para. 148, Compendium, Tab 95

explanation for VAA's actions – i.e., an alternative to the theory that VAA was acting in order to increase its revenues earned from caterers.

(b) As explained by Messrs. Richmond and Gugliotta, VAA was not acting in order to protect its limited self-interests. Rather, it was acting with a view to serving the interests of all airlines operating at the Airport, by ensuring a stable supply of competitive full-service inflight catering.

(c) VAA was motivated by "valid pro-competitive and efficiency enhancing" concerns. Specifically, it was acting out of concerns that the entry of a third caterer might lead to the exit of an existing operator, putting at risk the continued presence of two full-service caterers at the airport, which presence is vital to the safe and efficient operation of the Airport.

(d) VAA's concerns about the [redacted] of the two existing caterers, and about the need to ensure the continued presence of two full-service inflight caterers are wholly independent of, and unrelated to, the alleged anti-competitive purpose of VAA's impugned acts. More specifically, VAA's concerns are entirely unrelated to any alleged desire to increase revenues from caterers.

(e) The Commissioner's expert acknowledged that concerns about whether only two providers could operate profitably at YVR [redacted][112]

115. Moreover, when the evidence is considered in its totality, it is clear that VAA's desire to ensure the stable presence of two full service inflight caterers at the airport far outweighs any possible motivation provided by any alleged desire to increase revenues from caterers. The overwhelming weight of the evidence – both documentary and testimonial – makes this clear.

[112] Confidential Level A Transcript, Vol. 7, October 15, p. 243-244, Compendium, Tab 97. Indeed, one of the questions Dr. Niels was specifically asked to answer by Commissioner's counsel was, "[W]hether there exist any justifications from an economic perspective that could apply to a decision by VAA to refuse to permit additional competition at YVR in respect of one or more components of in-flight catering and, more specifically: whether only two providers of in-flight catering services can operate profitably at YVR. Ex. A-82, Niels Report, paragraph 1.13, Compendium, Tab 98

116. Finally, to the extent that the information considered by VAA in reaching its decision might be considered somehow incomplete (which is denied), such an oversight does not, in and of itself, in any way undermine the legitimacy of VAA's purpose, nor does it render VAA's actions anti-competitive. Rather, any failure to consider or to seek out additional potentially helpful information is only relevant in so far as it cannot reasonably be explained and thereby calls into question the *bona fides* of VAA's explanation. Certainly, there can be no suggestion of such a lack of *bona fides* in the present case.

117. For these reasons, it is submitted that, to the extent that it is found that its revenues earned from caterers provided VAA with a plausible interest in adversely affecting competition in the catering market, that interest is far outweighed by VAA's actual and legitimate purpose, which was to ensure the operation of two viable, full service inflight caterers, whose presence is necessary to ensure the safe and efficient operation of the Airport.

D. The Commissioner Cannot Prove an SLPC

(i) The Legal Test for an SLPC

118. The Commissioner has failed to meet his burden to prove, on a balance of probabilities, that VAA's conduct in declining to licence Newrest and Strategic has had, or is likely to have the effect, of a substantial lessening or prevention of competition ("SLPC") in the relevant market.

119. The Commissioner has only alleged an SLPC in the Galley Handling market at YVR.[113] He has not alleged an SLPC in any other market for inflight catering. He also has not alleged an SLPC in the national Galley Handling market or any other geographic market in Canada.[114]

120. "Substantial" has the meaning of a "material" increase to the market power of the respondent.

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[113] The Commissioner specifically alleges that but for VAA's conduct, significant new entry into the market would likely occur, resulting in enhanced rivalry and with it, materially lower prices, materially greater service and product quality and the introduction of innovative and/or more efficient Galley Handling business models. There is no evidence that VAA is, or has, tied access to the Airport airside to the leasing of Airport land from VAA, and so we do not address this allegation further. Notice of Application, at para. 52, Compendium, Tab 24

[114] In his evidence, the Commissioner attempted to demonstrate variously that VAA's actions had anti-competitive effects beyond YVR, anti-competitive effects in the inflight catering market generally, and how the denial of licences to Newrest and Strategic may or may not have impacted the businesses of these specific entities. All of this evidence should be disregarded, as it is irrelevant to the only pleaded question, which is whether there were, are or likely to be, anti-competitive effects in the Galley Handling market at YVR. See *TREB*, FCA, para. 66, Compendium, Tab 99

On the unique facts of this case, where the respondent does not compete in the market where the SLPC is being claimed, it is submitted that the Commissioner must prove that the actions of VAA materially created, enhanced, or maintained the market power of both Gate Gourmet and CLS, in the supply of Galley Handling at YVR, i.e., "whether the market at issue would be substantially more competitive."115 There is no meaningful difference to the test the Tribunal should apply to determine whether the Commissioner has met his burden to prove that VAA's conduct has, or is likely to, prevent competition, as opposed to lessen competition.[116]

121. In evaluating whether VAA's conduct materially enhanced the market power of either Gate Gourmet or CLS, the Tribunal must also consider the interaction between the effect of the denial of licenses to Newrest and Strategic and the countervailing market power exercised or exercisable by the airline customers of Gate Gourmet and CLS. dnata's Robin Padgett testified as to the ability of airlines to discipline any market power of catering firms.[117] Dr. Niels agreed that it is the [redacted][118]

122. The factual circumstances relevant to the consideration of whether there has been an SLPC should be updated to the date of the hearing.[119] In this instance, given the imminent entry of dnata, the Commissioner must therefore prove that VAA's conduct, including the licensing of dnata, is likely

[115] *TREB* FCA Decision, para. 88, Compendium, Tab 100. Note there is no suggestion that VAA's actions could have increased its own market power in any market. There is also no suggestion of coordinated conduct between Gate Gourmet and CLS.

[116] "[T]here is no reason why degree and duration should not also be considered under the "prevention" branch. *Tervita* vs. *Canada (Commissioner of Competition)*, 2015 SCC 3, para. 45, Compendium, Tab 101. See also paras. 54-55, quoting Crampton, C.J. at the Tribunal "the assessment of merger review under either the 'prevention' or 'lessening' branch is 'essentially the same'", but "under the 'prevention' branch, the focus is on whether the merged entity would retain its existing market power."

[117] Confidential Transcript, Vol 1 (October 2, 2018), 25:8-26:2, Compendium, Tab 102

[118] Confidential Level B Transcript, Vol. 7 (October 15, 2018), 521:4-12 and 522:14-524:1, Compendium, Tab 47; Niels [redacted] Confidential Level B Transcript, Vol. 7 (October 15, 2018), 519:25-520:3, Compendium, Tab 47 – [redacted]

[119] See, for example, *Canada Pipe*, where the Tribunal considered evidence of the current state of competition among various products and the current regulatory environment at paras 75-80, Compendium, Tab 51; *TREB*, where the Tribunal discussed TREB's 2014 and 2015 behaviour under "Recent Developments" at paras 372-374, Compendium, Tab 103; and *Tele-Direct*, at para. 484, Compendium, Tab 104, referring to "successive drafts and refinements of the 1995 [Profitability] study, almost until the moment that the study was entered in these proceedings."

to have the effect of substantially lessening competition in the future.

123. This Tribunal has recognized that the Commissioner can resort to either quantitative or qualitative evidence, or both, provided however that the Commission must always adduce "sufficiently clear and convincing evidence."[120] Qualitative effects are more relevant to an assessment of dynamic competition in innovation markets, such as that in *TREB*, in the sense that innovation or technology plays a key role in the competitive process. The Galley Handling market is not such a market.

(ii) The Commissioner's Quantitative Evidence Purporting to Demonstrate an SLPC

124. The Commissioner relies on four discrete pieces of evidence from its economist, Dr. Niels, to support its allegation that prices were materially higher at YVR as a result of VAA's decision not to license Newrest and Strategic. While three of these pieces of evidence relate to Gate Gourmet, no evidence specifically addresses the market power of CLS. This is a fatal flaw in the Commissioner's case, as he has not alleged any form of collusion between Gate Gourmet and CLS. One cannot simply imply CLS' market power from that, if any, of Gate Gourmet.

125. The only econometric evidence relied upon by the Commissioner is a regression performed by Dr. Niels, for customers that that did not switch inflight caterers (the "Niels Regression"). This regression only included customers of Gate Gourmet, as Dr. Niels was unable to identify separate Galley Handling prices from the records kept by CLS.[121] Niels also did not look at catering prices, even though he had the data to do so.[122] The Niels Regression suffers from a number of significant flaws and raises concerns about whether he is making particular modeling choices in order to obtain results more favourable to the Commissioner's case.

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[120] *TREB*, para. 470, Compendium, Tab 105. The Tribunal has also recognized that it may be more difficult to meet this burden when the Commissioner relies largely on qualitative evidence, "in part because quantitative evidence can be more probative to demonstrate the presence or absence of anti-competitive effects." Ibid, para. 470.

[121] This fact, in and of itself, is arguably a strong indication that Galley Handling is not a separate market. Indeed, even for Gate Gourmet, it is not clear that the Galley Handling services the prices of which were included in the Regression match, or accurately reflect the services included in the Commissioner's market definition.

[122] Confidential Level B Transcript, Vol. 8, 582:22-583:17, Compendium, Tab 106. Dr. McFetridge noted that switching involved Strategic's partner, Optimum, on the food side: Confidential Level B Transcript, Vol. 8, 583:18-25, Compendium, Tab 106

126. First, the Niels Regression results reflect effects for only a small subset of airlines that operate at YVR (so-called "small airlines"). These small airlines reflect only 30% of the share of *flights* at YVR. This 30% figure does not reflect a share of passengers, nor does it necessarily reflect a share of Galley Handling expenditures at YVR. As Dr. Niels himself reported, [redacted][123] Moreover, although his report did not make this fact clear, under questioning by members of the Tribunal [redacted].[124]

127. Second, the Niels Regression doesn't compare prices at YVR to prices at airports where there was entry. As Dr. Reitman wrote, Dr. Niels "does not perform a properly designed study that tests the impact of entry in markets where entry occurred against a control group where entry did not occur. Instead, he conflates entry effects in multiple markets and periods without a valid control sample."[125]

128. Significantly, the Niels Regression does not differentiate between entry episodes that reflect the competitive situation at YVR and those that do not.[126] Instead, it gives the same weight to the impact on Gate Gourmet's prices at airports where Gate Gourmet held a monopoly prior to Strategic's entry, as to the impact at other airports which already had pre-existing competition. This is a fatal flaw with the evidence, as any effects from Strategic's entry at an airport where Gate Gourmet had a monopoly cannot be extrapolated to YVR, where Gate Gourmet already competes with CLS. Moreover, as dnata is poised to enter, it is still more difficult to see how the results can be extrapolated to the market at YVR with three competitors going forward. [redacted]

[123] CA-83, Confidential Level A Expert Report of Dr. Gunnar Niels dated July 4, 2018, para. 4.77, Compendium, Tab 107

[124] Confidential Level B Transcript, Vol. 8, 584:10-585:5, Compendium, Tab 106. Air Transat and Jazz Aviation were also not included in Dr. Dr. Niels' sample, although because these airlines did, in fact, switch, the analysis does not logically apply to them.

[125] CR-100, Confidential Level B Report of Dr. Reitman dated August 1, 2018, para. 196, Compendium, Tab 108. Dr. Niels agrees that one can't infer anything about what happens to catering prices based on his study of galley handling prices, nor can one exclude the possibility that they go up in a way that counteracts the decrease in galley handling prices: Confidential Level B Transcript (October 15, 2018), Vol. 7, 543:8-18, Compendium, Tab 109

[126] CR-100, Confidential Level B Report of Dr. Reitman dated August 1, 2018, para. 199, Compendium, Tab 108

[redacted][127]

129. The Niels Regression was also artificially limited to show the impact of only Strategic's entry at other airports. In contrast, a comparison of Gate Gourmet's prices before and after the entry of Newrest showed an (albeit statistically insignificant) *increase* in prices associated with that entry. The Niels Regression was also based on a shorter time period than that for which Dr. Niels had the relevant data.[128] [redacted]

130. Even disregarding all of its flaws, the Niels Regression only purports to show a revenue-weighted impact to Gate Gourmet's Galley Handling prices from Strategic's entry of [redacted][130] This is hardly material, particularly in light of the minor significance of catering costs to airlines and passengers.[131] Moreover, given Dr. Niels' evidence [redacted][132]

131. Dr. Reitman adapted the regression model used by Dr. Niels to isolate the impact of each entry episode, using a "differences-in-differences" technique. In this manner, Dr. Reitman isolated [redacted] entry into [redacted] and [redacted] entry and [redacted] entry into airports where there was [redacted] – which is the situation analogous to that at YVR. The results for the two entry episodes that occurred at airports where there were already at

[127] Confidential Level A Transcript, Vol. 8, 337:1-8, Compendium, Tab 110

[128] CR-100, Confidential Level B Report of Dr. Reitman dated August 1, 2018, para. 197 Compendium, Tab 108

[129] Confidential Level A Transcript, Vol. 8 (October 16, 2018), 312:15-322:4, Compendium, Tab 111

[130] Drs. Niels and Reitman agreed this "revenue weighting" was the most relevant weighting of the results.

[131] See generally, R-133 (Tribunal #00170), Supplementary Report of Dr. Mike Tretheway dated August 1, 2018 ("**Tretheway Report**"), paras. 2.1.4 – 2.1.12, Compendium, Tab 112

[132] Confidential Level B Transcript, Vol. 8 (October 16, 2018), 553:3-554:11, Compendium, Tab 113

least two incumbent caterers provided no evidence that prices fell following entry. As Dr. Reitman wrote, [redacted][133]

132. The second piece of evidence relied upon by the Commissioner relates to savings purportedly realized by Jazz from switching its business from Gate Gourmet to Strategic at eight different stations (the "Jazz Analysis"). As with the Niels Regression, the Jazz Analysis tells us nothing of CLS' market power. The Jazz Analysis suffers from other flaws. It is not confined to Galley Handling prices, and so does not control for the very real possibility that any savings in Galley Handling costs were partially or entirely offset through higher costs for catering. [redacted][134] Therefore, these results are not reliable as evidence of lower Galley Handling costs from switching. Although Dr. Niels did perform a similar analysis for Galley Handling prices alone, he himself cautioned that the "galley handling only result should be interpreted with care" [135].

133. In any event, the Jazz Analysis employed the incorrect "but for" scenario and is accordingly not indicative of the actual savings relative to choosing Gate Gourmet. It measured the difference in costs incurred by Jazz at eight stations by comparing what Gate Gourmet *had* charged Jazz in 2014 to what Jazz paid to Strategic in 2015. [redacted] The relevant "but for" would have compared what Jazz *would* have paid to Gate Gourmet the next year, if it had not switched, to what Jazz instead paid to Strategic.[136]

134. The Jazz Analysis further demonstrates that Jazz's costs went up, rather than down, at many of

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[133] CR-100 (Tribunal #00352), Confidential Level B Report of Dr. Reitman dated August 1, 2018, para. 210, Compendium, Tab 114. It was only for Strategic's entry into [redacted] that Dr. Reitman found [redacted] CR-100, Confidential Level B Report of Dr. Reitman dated August 1, 2018, para. 209 and 212, Compendium, Tab 114

[134] Confidential Level B Transcript, Vol. 7 (October 15, 2018), 544:17-20, Compendium, Tab 115

[135] Niels Report, para. 4.55, Compendium, Tab 116; Confidential Level B Transcript, Vol. 7 (October 15, 2018), 498:7-23, Compendium, Tab 117. Under cross examination, he explained [redacted] Confidential Level B Transcript, Vol. 7 (October 15, 2018), 499:6-8, Compendium, Tab 117

[136] CR-100, Confidential Level B Report of Dr. Reitman, paras. 183, 184 and 188, Compendium, Tab 118

the stations where it switched from Gate Gourmet to Strategic, and it is not clear that YVR would have been a station at which it would have experienced any savings, in any event, as there is evidence that Jazz thought that [redacted][137] Moreover, [redacted][138] If Strategic was [redacted], these prices do not reflect a "but for" competitive environment following Strategic's entry.[139]

135. The third piece of evidence relied upon by the Commissioner is Dr. Niels' so-called "switching analysis", which consists simply of counting the number of switches at different airports. Dr. Niels counts [redacted] switches at YVR, [redacted][140] However, the switches counted by Dr. Niels were for Catering and Galley Handling together. So, it is not possible to discern any specific effect in the Galley Handling market, *per se*. If anything, the evidence shows that the competitive dynamics at YVR are no different from those at any other airport in terms of the number of switches among existing providers, apart from entry.[141] Dr. Niels agreed [redacted][142] Therefore, although this evidence includes CLS, it reveals nothing about the competitive dynamic between Gate Gourmet and CLS, other than that it is typical of industry dynamics across Canadian airports.

136. The switching analysis does not prove that that there would be greater rivalry at YVR but for VAA's conduct. The supposed [redacted] of switching at YVR demonstrates that at best, the rate of

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[137] CR-100, Confidential Level B Report of Dr. Reitman, paras. 185-186, Compendium, Tab 118

[138] CR-33, Compendium, Tab 119; Confidential Level B Transcript, Vol. 4 (October 5, 2018), 319:6 – 322:12, Compendium, Tab 120

[139] This kind of indirect evidence of price effects suffers from the serious deficiency that it compares pricing for the product offerings of one provider to the offerings of another; however, the mix of products and services offered by different providers will generally be different. Accordingly, the analysis cannot be used to assess whether VAA's conduct has had any price effects without comparing the value of services provided by two different suppliers: CR-100, Confidential Level B Report of Dr. Reitman dated August 1, 2018, para. 192, Compendium, Tab 121

[140] CA-83, Confidential Level A Report of Dr. Niels, para. 4.33, Compendium, Tab 123; Confidential Level B Transcript, Vol. 7 (October 15, 2018), 474:15-475:19, Compendium, Tab 122

[141] CA-83, Confidential Level A Report of Dr. Niels, Table 4.2 and para. 4.34, Compendium, Tab 123

[142] Confidential Level B Transcript, Vol. 8 (October 16, 2018), 564:12-16, Compendium, Tab 124

switching is an incomplete measure of the rivalry among inflight caterers at any Canadian airport.[143]

137. Dr. Reitman observes that the fact that there is switching associated with entry "is hardly surprising: a flight caterer cannot enter the market unless it attracts some customers, most of whom would have been served by another flight caterer previously."[144] Dr. Niels agreed that dnata's entry at YVR will lead to switching.[145] Indeed, Air Canada's witness conceded that the announcement of dnata's entry had already assisted in its renegotiation of its contract with Gate Gourmet.[146] Therefore, Dr. Niels' switching analysis cannot be relied upon to conclude that "but for" VAA declining to licence Newrest and Strategic, Gate Gourmet and CLS will likely be able to exercise materially greater market power at YVR, at least not going forward.

138. The fourth piece of evidence relied upon by the Commissioner at the hearing – evidence relating to the renegotiation of a contract between KLM and Gate Gourmet (the "KLM Renegotiation") – also does not provide evidence of a material increase in Gate Gourmet's market power, let alone that of CLS, and is limited to one airline – hardly the basis for a finding of an SLPC across the Galley Handling market at YVR.

139. The KLM Renegotiation was first raised by Dr. Niels in his Reply Report in the context of his criticism of Dr. Reitman's price effects analysis. He described a [redacted]. Acknowledging that [redacted] In sum, the only evidence provided by Dr. Niels of an increase to the Galley Handling prices charged [redacted]

[143] At the hearing, it was pointed out that there are many aspects of competitive dynamics that Dr. Niels does not consider, beyond just full switching from one caterer to another, even though he had the data and time to examine some of them. Confidential Level B Transcript, Vol. 8 (October 16, 2018), 577:10-582:11, Compendium, Tab 125; see also Confidential Level B Transcript, Vol. 8 (October 16, 2018), 581:7-9, Compendium, Tab 125, where Dr. Niels conceded that he dropped partial switches, meaning airlines who had two flight caterers.

[144] CR-100, Confidential Level B Report of Dr. Reitman, para. 180, Compendium, Tab 126.

[145] Confidential Level B Transcript, Vol. 8 (October 16, 2018), 565:3-18, Compendium, Tab 124

[146] Confidential Level B Transcript, Vol. 3 (October 4, 2018), 191:3-11, Compendium, Tab 127

[147]

140. Again, this piece of evidence does not address whether VAA's conduct enhanced CLS' market power, if any. And, with regard to Gate Gourmet, there is no "but for" comparison included in this evidence. As Dr. Niels conceded,

[148] While Dr. Niels alleged that Gate Gourmet

[149] that did not represent a change in market power, as there is no evidence that the prospect of new entry at YVR was present at any time prior to Newrest and Strategic requesting licences in 2014. Moreover, Dr. Niels' claim that

was shown to be unsupported by the available evidence, including the increasing revenues being earned by CLS at YVR observed by Justice Gascon[150] and was contradicted by

[151]

141. Moreover, as testified to by Dr. Reitman,

[152]

In any event, the price increase to KLM – one relatively small customer – does not satisfy the Commissioner's burden to demonstrate a substantial lessening or prevention of competition in the market as a whole.

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[147] CA-86, Confidential Level A Reply Report of Dr. Niels, paras. 5.46 to 5.58 and Figure 5.4, Compendium, Tab 128

[148] Confidential Level B Transcript, Vol. 7 (October 15, 2018), 500:15-501:9, Compendium, Tab 129

[149] CA-86, Confidential Level A Reply Report of Dr. Niels, para. 5.57, Compendium, Tab 128

[150] Confidential Level B Transcript, Vol. 12 (November 1, 2018), 1040:4-7, Compendium, Tab 130; Confidential Level B Witness Statement of Tony Gugliotta, Exhibit 6, p. 994, Compendium, Tab 131

[151] CA-63, Compendium, Tab 132

[152] Confidential Level B Transcript, Vol. 8 (October 16, 2018), 590:19-591:7, Compendium, Tab 133 – Reitman states that

Confidential Level A Transcript, Vol. 9 (October 17, 2018), 385:14-386:2, Compendium, Tab 134 – Reitman explains that

Confidential Level A Transcript, Vol. 8 (October 16, 2018), 327:6-16, Compendium, Tab 135 – Dr. Niels considered

(iii) No weight should be placed on the anecdotal evidence from Air Transat and Jazz

142. In addition to the report of Dr. Niels, the Commissioner relies on anecdotal evidence from two airlines, Air Transat and Jazz,[153] to support his position that there are materially higher prices in the galley handling market at YVR. However, on cross-examination, that evidence was shown to wholly unreliable and accordingly should be given no weight.[154]

143. Air Transat's witness, Ms. Stewart, testified as to: alleged increased expenses that Air Transat expected to incur at YVR as a result of contracting with Gate Gourmet, as opposed to Optimum; and alleged savings by Air Transat as a result of contracting with Optimum, as opposed to Gate Gourmet, at other airports across the country.[155]

144. With respect to the alleged increased expense at YVR, in her witness statement, Ms. Stewart stated that "Air Transat determined that Optimum's bid for YVR was superior to that of Gate Gourmet from both a price and service perspective."[156] However, on cross-examination, Ms. Stewart admitted that this statement was incorrect, and that Gate Gourmet's bid for catering services at YVR was actually lower than Optimum's bid.[157]

145. [redacted] in the case of Gate

[153] CA-36, Confidential Level B Statement of Barbara Stewart, paras. 5, 29, 35 and 42, Compendium, Tab 136; CA-5, Confidential Level B Statement of Rhonda Bishop, paras. 4, 42, 45 and 52, Compendium, Tab 137

[154] Prior to trial, VAA objected to the admissibility of that evidence on the basis that it was improper lay opinion evidence and inadmissible hearsay. The Tribunal deferred any ruling on the admissibility of the evidence until after Ms. Stewart and Ms. Bishop had testified, noting that "the testimonies of Mss. Stewart and Bishop will provide a better factual context to assist the Tribunal" in assessing the evidence. As explained below, the cross-examinations of Ms. Stewart and Ms. Bishop revealed that VAA's objections to their evidence were well-founded and the conclusory statements regarding alleged savings or increased costs are not accurate or reliable.

[155] CA-36, Confidential Level B Statement of Barbara Stewart, paras. 5, 29, 35 and 42, Compendium, Tab 136

[156] A-35 (Tribunal #00249), Public Statement of Barbara Stewart, para. 33, Compendium, Tab 138

[157] Confidential Level B Transcript, Vol. 5 (October 9, 2018), 393:11-24, Compendium, Tab 139. Specifically, the costing analysis showed that Gate Gourmet's bid for YVR was [redacted], which was lower than Optimum's bid of [redacted] for the same services: CR-38 (Tribunal #39278), "Summary" Tab, Cells I12 and I13, Compendium, Tab 140. Ms. Stewart did not mention this in her witness statement and it was not until she was presented with the costing analysis on cross-examination that she admitted that her witness statement was incorrect.Confidential Level B Transcript, Vol. 5 (October 9, 2018), 393:11-24, Compendium, Tab 139 and 395:19-396:16, Compendium, Tab 141

[158] Exhibit CR-38 (Tribunal #39278), "YVR1" Tab, Columns H, J and L, Compendium, Tab 140; Confidential Level B Transcript, Vol. 5 (October 9, 2018), 402:6-13, Compendium, Tab 142

Gourmet, [redacted]

146. Cross-examination revealed yet a further error in Ms. Stewart's witness statement, relating to her statement that, as a result of contracting with Gate Gourmet at YVR, Air Transat [redacted] On cross-examination, Ms. Stewart clarified that Air Transat [redacted][161]

147. Even as corrected, Ms. Stewart's statement is not evidence of an SLPC related to galley handling at YVR. First, Ms. Stewart's mere assertion (there is no documentation to verify this statement) of a [redacted] in costs paid to Gate Gourmet encompasses both food and galley handling together.[162] [redacted] Third and in any event, comparing the prices Gate Gourmet would have charged at YVR under a multi-airport contract with the prices it charged under a single-airport contract provides no evidence of any market power by Gate Gourmet. In both cases, Gate Gourmet was competing against CLS.[163] As Dr. Reitman explained, [redacted].[164]

148. Ms. Stewart's second category of evidence relates to alleged savings by Air Transat as a result of contracting with Optimum (as opposed to Gate Gourmet) at airports other than YVR. However, Ms. Stewart admitted on cross-examination that, when the prices for only galley handling services are considered, [redacted]

[159] Exhibit CR-38 (Tribunal #39278), "YVR1" Tab, Column H, Compendium, Tab 140; Confidential Level B Transcript, Vol. 5 (October 9, 2018), 404:9-406:3; 407:20-409:13; and 406:4-407:19. Compendium, Tab 142

[160] CA-36 (Tribunal #00250), Confidential Level B Statement of Barbara Stewart, para. 35, Compendium, Tab 136

[161] Confidential Level B Transcript, Vol. 5 (October 9, 2018), 416:3-16, Compendium, Tab 143

[162] Confidential Level B Transcript, Vol. 5 (October 9, 2018), 416:22-417:3, Compendium, Tab 143

[163] Confidential Level B Transcript, Vol. 8 (October 16, 2018), 610:4-20, Compendium, Tab 144

[164] Confidential Level A Transcript, Vol. 9, October 17, p. 386-388, Compendium, Tab 134

[165] Confidential Level B Transcript, Vol. 5 (October 9, 2018), 414:16-415:8, Compendium, Tab 143

[redacted]

149. Turning to the anecdotal evidence provided by Jazz, that evidence too was shown to be wholly unreliable and should be given no weight. Jazz's witness, Ms. Bishop, purports to provide evidence regarding increased expenses that Jazz allegedly incurred as a result of contracting with Gate Gourmet, as opposed to Sky Café, at YVR;[168] and evidence regarding savings allegedly realized by Jazz as a result of contracting with Newrest and Sky Café at eight other airports across the country.[169]

150. As revealed on cross-examination, all of the evidence given by Ms. Bishop in that regard was based entirely on Exhibits 10 and 13 to her witness statement.[170] However, Ms. Bishop had no role in performing the calculations that underlie the figures set out in Exhibits 10 and 13,[171] nor did she appear to have any understanding as to how they were performed. Thus, for example, Ms. Bishop also was unable to reconcile inconsistencies between the figures in Exhibit 10 and those in an email sent by her colleague, Trevor Umlah.[172]

151. Similarly, Ms. Bishop was unable to reconcile inconsistencies between the figures in Exhibit 10 and those derived following an attempt to recreate the figures in Exhibit 10, using the purported

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[166] See, e.g., "Variable Costs" in CR-38, "YVR1" Tab, Columns H, J and L, rows 199 to 393, Compendium, Tab 140

[167] Exhibit CR-38, "Summary" Tab, Compendium, Tab 140

[168] CA-5, Confidential Level B Statement of Rhonda Bishop, paras. 4, 45 and 52, Compendium, Tab 137

[169] CA-5 Confidential Level B Statement of Rhonda Bishop, paras. 4, 45 and 52, Compendium, Tab 137. Finally, Ms. Bishop states at paragraph 4 of her witness statement that, in 2015, [redacted] by switching away from Gate Gourmet at eight stations". However, Ms. Stewart clarified on cross-examination that those cost savings do *not* include YVR. As such, they do not provide evidence of an SLPC at YVR.

[170] Confidential Level B Transcript, Vol. 2 (October 3, 2018), 104:13-108:5; 136:1-137:7, Compendium, Tab 145 and 146

[171] For each of Exhibit 10 and 13, Ms. Bishop 's witness statement provides no information as to who prepared those Exhibits, how the costs and expenses set out in those documents were calculated, or as to the specific data that were used to calculated the alleged costs and expenses. On cross-examination, Ms. Bishop confirmed that she did not prepare Exhibit 10 or 13. Confidential Level B Transcript, Vol. 2 (October 3, 2018), 108:1-5, Compendium, Tab 145, and 137:8-11, Compendium, Tab 146

[172] Confidential Level B Transcript, Vol. 2 (October 3, 2018), 108:1-5, Compendium, Tab 145. When confronted with the inconsistencies on cross-examination, she stated simply: "I can't assist you". Confidential Level B Transcript, Vol. 2 (October 3, 2018), 113:18-114:5, Compendium, Tab 147

explanation provided by Jazz's counsel and adopted by Ms. Bishop.[173] Ms. Bishop was invited to reconcile several other such inconsistencies and on each occasion stated that she could not do so.[174] Ms. Bishop was similarly unable to offer any information as to how the figures in Exhibit 13 were calculated.[175]

152. In sum, the cross-examination of Ms. Bishop demonstrated that the evidence in Ms. Bishop's witness statement and in Exhibits 10 and 13 is both inadmissible and unreliable: inadmissible because Ms. Bishop is purporting to give lay opinion evidence based on facts of which she has no personal knowledge,[176] and unreliable because Ms. Bishop has no knowledge of how the figures in Exhibit 10 and 13 were determined. As such, those numbers cannot be verified or subjected to any meaningful cross-examination to test their accuracy.[177] Even if those numbers are admissible, they should be given no weight by the Tribunal.

(iv) Dr. Reitman's Evidence that Prices were not Higher at YVR

153. Finally, there is affirmative, reliable evidence that prices were *not* materially higher at YVR as a result of VAA's conduct. Unlike Dr. Niels, Dr. Reitman compared the prices for flight catering products at YVR and at other airports to determine whether prices at YVR are higher (the "Reitman Regression"). The conclusion Dr. Reitman reaches is that [redacted][178] Dr. Reitman compared prices across airports for all flight catering and galley handling products, as well as for just galley handling (service) aspects of inflight

[173] ID-2, Letter from Daniel McMillan (Jazz Aviation) dated September 25, 2018, Compendium, Tab 148. On cross-examination, the instructions set out in that letter were followed to determine Newrest's bid for YVR in the 2014 Jazz RFP. However, when those instructions were followed, the number for Newrest's bid at YVR did not match the number for Newrest's bid for YVR set out in Exhibit 10, as Ms. Bishop acknowledged on cross-examination: Confidential Level B Transcript, Vol. 2 (October 3, 2018), 127:12-128:5, Compendium, Tab 149

[174] Confidential Level B Transcript, Vol. 2 (October 3, 2018), 128:10-19; 129:5-130:14, Compendium, Tab 149

[175] Ms. Bishop admitted that she "didn't get into the weeds of the numbers in Exhibit 13."Confidential Level B Transcript, Vol. 2 (October 3, 2018), 137:12-18, Compendium, Tab 146

[176] *Canada (Commissioner of Competition) v. Imperial Brush Co.*, 2007 Comp. Trib. 22 at para. 10 and 11, Compendium, Tab 150

[177] The reliability of Ms. Bishop's evidence is further called into question by the expert report of Dr. Niels, which states that, as a result of limitations in the data, it is not possible accurately to determine the amounts (if any) that Air Transat has saved as a result of switching from Gate Gourmet to Optimum. As such, Ms. Bishop purports to rely on calculations that, according to the Commissioner's expert, are impossible to perform, given the data that is available.

[178] CR-100, Confidential Level B Report of Dr. Reitman, para. 153, Compendium, Tab 151

catering, for all airline customers from 2013-2017. With respect to all flight catering and galley handling products, he concludes, "[t]he regression results [redacted] coefficients on the variables for other airports".[179] With respect to just galley handling, he concludes [redacted][180] Dr. Reitman concluded that "Across time periods and specifications, the results therefore support the conclusion that there was no substantial lessening of competition by any actions taken by VAA with respect to flight catering at YVR."[181]

154. In addition, in this case, the Commissioner's claim of a *prospective* SLC will have to be evaluated against the fact that the YVR market is facing imminent entry from dnata, which is expected to be an effective competitor. Dr. Niels agreed[182] that if the evidence suggests that the majority of switches occur upon new entry, then there is no reason to expect that dnata's entry will not bring with it this same competitive dynamic. dnata's Mr. Padgett testified it would compete on the basis of being both [redacted][183] As discussed further below, the impact of dnata's entry will be particularly important to the Tribunal's consideration of whether to exercise its discretion to grant the remedies requested by the

[179] CA-100, Confidential Level B Report of Dr. Reitman, para. 163, Compendium, Tab 152

[180] CA-100, Confidential Level B Report of Dr. Reitman, para. 171, Compendium, Tab 153. Dr. Niels critiqued Dr. Reitman's evidence on the basis that it does not show the "but for" to demonstrate what the impact of VAA's conduct might have been on competition. This is incorrect, however, as Dr. Reitman also ran different variations of the model to test whether there were price differences between YVR and other airports for flight catering products and services in the period before those other airports experienced additional entry by flight caterers [redacted] as well as in the period after the last entry [redacted] CA-100, Confidential Level B Report of Dr. Reitman, para. 173, Compendium, Tab 154

[181] CA-100, Confidential Level B Report of Dr. Reitman, para. 176, Compendium, Tab 154. In his Reply Report, Dr. Niels states that the airport indicators in his analysis are unlikely to solely reflect the effect of VAA's actions. He suggests an alternative, which is to look at differences in Gate Gourmet margins, rather than prices, across Canadian airports, and presents this finding in Figure 5.1 of his report, which compares EBITDA margins to prices. CA-86, Confidential Level A Reply Report of Dr. Niels, para. 5.29-5.33, Figure 5.1, Compendium, Tab 155. [redacted] Confidential Level A Transcript, Vol. 8 (October 16, 2018), 352:3-353:5, Compendium, Tab 156. [redacted] Confidential Level A Transcript, Vol. 8 (October 16, 2018), 353:5-354:11, Compendium, Tab 156; CR-102, Slide 26 of Dr. Reitman's Presentation, Compendium, Tab 157. [redacted]

[182] Confidential Level B Transcript, Vol. 8 (October 16, 2018), 565:3-18, Compendium, Tab 124

[183] Confidential Transcript, Vol. 1 (October 2, 2018), 26:16-21, Compendium, Tab 102

Commissioner, which are strictly prospective in nature.

(v) No Qualitative Evidence of an SLPC

155. As discussed above, the Commissioner alleges that but for VAA's conduct there would have been materially greater service and product quality and the introduction of innovative and/or more efficient Galley Handling business models. This allegation is belied by the evidence. The market for Galley Handling is not a "dynamic market" in the sense of featuring significant technological change or innovation, the two hallmarks of a market in which qualitative effects are of particular relevance. In this sense, this case is readily distinguishable from *TREB*, where the respondent's withholding of data from competitors was proven to have a significant impact on innovation, the development of new products and *meaningful* choice.[184]

156. Galley Handling is an activity into which the major inputs are labour, physical facilities such as warehouses, and equipment such as trucks. This can be usefully contrasted to examples of innovation or technology-driven markets, e.g., "big data" markets such as Fintech, or telecommunications markets, where access to data, or to a technological platform may spur significant non-price benefits of competition, including inter-platform competition, such as the ability to innovate and to offer new and different services.

157. Thus, Strategic was not proposing to innovate; rather, it was proposing to follow a business model of providing only the Galley Handling component of catering services, while partnering with Optimum Solutions or others for the provision of food.[185] During cross-examination, Strategic's CEO, Mark Brown, conceded that any alleged benefits that his business model offers airline customers can

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[184] Dr. Tretheway agreed with Dr. McFetridge that the market for inflight catering services were "dynamic" in the sense that there had been a major decline in airline spend and market consolidation. Public Transcript, Vol. 12, November 1, p. 884-886, Compendium, Tab 158

[185] In his report, Dr. Reitman addresses and rejects the Commissioner's allegation that "enhanced innovation and/or more efficient business models" were stifled by VAA's decision to restrict entry in 2014, specifically Strategic's claim that its business model is different or innovative. Dr. Reitman's opinion is based on the evidence that [redacted] CR-100, Confidential Level B Report of Dr. Reitman, para. 221-222, Compendium, Tab 159

be boiled down to efficiency gains.[186]

158. Moreover, the services that Strategic is proposing to provide (i.e. only the galley handling portion of inflight catering) are currently being provided by the existing caterers at YVR and will be provided by dnata once it commenced operations. Notably, since 2017, Gate Gourmet has provided WestJet with galley handling only services at YVR.[187] Similarly, Gate Gourmet provides services to Air Canada that involve loading and unloading frozen foods prepared by Air Canada's third-party suppliers, [redacted] and Optimum.[188] In addition, CLS advised VAA that it would pursue a logistics only airline contract.[189] Mr. Padgett testified that dnata would provide "last mile logistics" for airlines that request it.[190] In fact, the only firm that explicitly stated that it would *not* be interested in providing Galley Handling services on a stand-alone basis to customers at YVR was Newrest. [191]

159. There is also no evidence of lower service or product quality in the galley handling market at YVR and no evidence that there were any material service or product quality improvements as a result of airlines switching catering providers at other airports.[192]

160. Simply put, even leaving aside dnata's imminent entry, there is no evidence that the availability of greater choice, innovation or new services were materially impacted by VAA's decision not to license Newrest or Strategic. Moreover, there is every indication that dnata intends to provide the full range of inflight catering services from its flexible, modern kitchen located in proximity to YVR in Richmond. Therefore, particularly when one considers dnata's entry as part of the existing factual circumstances, there is no evidence of how there is materially less choice, service quality or

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[186] Confidential Level B Transcript, Vol. 4 (October 5, 2018), 296:15-297:4, Compendium, Tab 160

[187] CA-78, Confidential Level B Witness Statement of Steven Mood, para. 42, Compendium, Tab 161; Confidential Level B Transcript, Vol. 5 (October 9, 2018), 377:15-24, Compendium, Tab 162; Public Transcript, Vol. 2 (October 3, 2018), 165:14-22, Compendium, Tab 163

[188] CA-11, Confidential Level B Witness Statement of Mark MacVittie, paras. 21 and 32, Compendium, Tab 164

[189] CR-172, Confidential Level B Witness Statement of Scott Norris, Exhibit 6, p. 161, ftnt. 4, Compendium, Tab 165

[190] Public Transcript, Vol. 1 (October 2, 2018), 142:23-143:14, Compendium, Tab 29

[191] Public Transcript, Vol. 3 (October 4, 2018), 236:23-237:7, Compendium, Tab 166

[192] Confidential Level B Transcript, Vol. 2 (October 3, 2018), 134:15- 135:24, Compendium, Tab 167

innovation at YVR as a result of not permitting yet further entry.[193] With dnata's entry, the Commissioner cannot argue the competitive effects of VAA restricting entry beyond Gate Gourmet and CLS.

E. Regulated Conduct Defence

161. The jurisprudence exempts from the operation of the *Act* activities that are authorized by federal legislation, pursuant to the regulated conduct defence (the "RCD").[194] The British Columbia Court of Appeal in *Sutherland v. Canada (Attorney General)* held that in order to consider "what work, conduct or activity is authorized by statute…one must have regard not only for the relevant statutes, but also for the Orders-in-Council and the Regulations."[195] In that case, the Court held that the construction of the runway was authorized by the Order-in-Council that authorized the Minister of Transport to enter into the Ground Lease with VAA.[196]

162. A similar conclusion was reached in *Edmonton Regional Airports Authority v. North West Geomatics Ltd.* where, in response to a claim that the airport breached the *Act*, Belzil J. stated, "I do not accept that the *Competition Act* could apply to legal entities incorporated by statute and required by statute to operate in the public interest."[197] The jurisprudence does not limit the application of the RCD only to criminal matters under the *Act*, but rather suggests that implementation and enforcement of a law that requires a demonstration of some conduct contrary to the public interest can be negated by a statutory authority.[198]

163. In the instant case, VAA relies on the Order-in-Council that authorized the Minister of Transport to implement the government's policy choice to transfer the management, operation and maintenance of YVR to VAA, a local airport authority, "in order to foster the economic development of

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[193] The Commissioner chose not to amend his pleading to allege the likelihood of any SLPC following dnata's entry, even when faced with VAA's amendment to its Response to plead the effect of that entry on the level of competition in the relevant market. Amended Response of Vancouver Airport Authority, para. 97, Compendium, Tab 168

[194] See, for example, *Industrial Milk Producers Assn. v. British Columbia (Milk Board)*, 1988 CarswellNat 148 at para. 36, Compendium, Tab 169

[195] *Sutherland v. Canada (Attorney General)*, 2002 BCCA 416 at paras. 67-68 and paras. 69-71, Compendium, Tab 170

[196] *Sutherland v. Canada (Attorney General)*, 2002 BCCA 416 at paras. 77-84, Compendium, Tab 170

[197] *Edmonton Regional Airports Authority v. North West Geomatics Ltd.*, 2002 ABQB 1041 at para. 127, Compendium, Tab 171

[198] *Canada (Attorney General) v. Law Society of British Columbia*, [1982] S.C.J. No. 70 at para. 89, Compendium, Tab 172

the community that this airport serves, and the commercial development of YVR through local participation". The Ground Lease imposes on VAA the obligation to "manage, operate and maintain the Airport in an up-to-date and reputable manner befitting a First Class Facility and a Major International Airport".[199]

164. VAA's decision-making regarding the market structure for the inflight catering market at YVR is further to its authority granted pursuant to the Ground Lease that was authorized by the Order-in-Council. The evidence is uncontested that VAA has at all times made its decisions in this matter in furtherance of, and consistent with, that public interest obligation in the Ground Lease.[200] If VAA acted pursuant to its authorized public interest mandate, section 79 does not apply to such decision-making. Section 79 cannot be interpreted in a manner that would result in a finding that, for example, VAA engaged in a practice of anti-competitive acts, consistent with VAA's statutory authority.

PART IV – REMEDY AND ORDER SOUGHT

165. VAA requests that the application be dismissed, with costs.

166. In the alternative, if the Tribunal finds that the Commissioner has proven, on the balance of probabilities, all of the requisite elements of Section 79, which is denied, VAA respectfully submits that the Tribunal should exercise its discretion to decline to make an order, particularly in light of VAA's good faith commitment to review the market. In addition, to the extent that the Tribunal declines to incorporate dnata's entry into its consideration of the current state of the market for Galley Handling at YVR, then dnata's imminent entry will eliminate any prospective lessening or prevention of competition found by the Tribunal, and there is no evidence that the remedy sought by the Commissioner is either necessary, or will be effective.

167. Further, 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]" [emphasis added] incorrectly assumes away the myriad factors the Authority must take into

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[199] Witness Statement of Craig Richmond at para. 21 and Exhibit 3, Compendium, Tab 1 and 2

[200] Moreover, when an entity such as VAA is acting pursuant to a legislative mandate, its actions are deemed to be in the public interest: *Law Society of Upper Canada v. Canada (Attorney General)*, para. 49, Compendium, Tab 173

consideration when exercising its public interest mandate to provide access to the Airport, particularly airside. Such factors dictate that VAA cannot permit an unlimited number of inflight catering firms to operate on the tarmac at YVR. These include Mr. Richmond's role and responsibility as the "Accountable Executive" under the applicable Transport Canada regulations,[201] as well as factors that might lead to congestion on the tarmac from the presence of an unlimited number of inflight catering firms, demonstrate the problems with the order sought, such as concerns regarding physical space constraints for equipment, rounding/vehicle storage, as well as additional non-passenger vehicle screening, unfamiliar drivers, the requirement for escorts and the risk of compromise.[202]

168. For all of the foregoing reasons, VAA respectfully requests an order dismissing the within application and awarding VAA its costs.

November 9, 2018

GOODMANS LLP
Lawyers for the Respondent, Vancouver Airport Authority

[201] VAA is required under Canadian Aviation Regulations ("CARs") s. 107.01(2)(a) to have a safety management system. Mr. Richmond is the appointed "accountable executive" pursuant to s. 106.02(1) of CARs. Mr. Richmond (as opposed to another executive) is the appointed accountable executive because, pursuant to s. 106.02(2), the accountable executive must "…have control of the financial and human resources that are necessary for the activities and operations authorized under the certificate."

[202] R-108, Public Witness Statement of Craig Richmond, para. 209, Compendium, Tab 174