PUBLIC

CT-2024-010

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF certain conduct of Google Canada Corporation and Google LLC relating to the supply of online advertising technology services in Canada;

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*.

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

and

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

BOOK OF AUTHORITIES OF GOOGLE CANADA CORPORATION AND GOOGLE LLC
VOLUME 7 OF 20

August 22, 2025

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Kent E. Thomson (LSO# 24264J)
Tel: 416.863.5566
Email: kentthomson@dwpv.com

Elisa K. Kearney (LSO# 49342T)
Tel: 416.367.7450
Email: ekearney@dwpv.com

Chantelle T.M. Cseh (LSO# 60620Q)
Tel: 416.367.7552
Email: ccseh@dwpv.com

Chanakya A. Sethi (LSO# 63492T)
Tel: 416.863.5516
Email: csethi@dwpv.com

Chenyang Li (LSO# 73249C)
Tel: 416.367.7623
Email: cli@dwpv.com

Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for the Respondents, Google Canada Corporation and Google LLC

TO: **ATTORNEY GENERAL OF CANADA**
Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

Alexander M. Gay
Email: alexander.gay@cb-bc.gc.ca
Donald Houston
Email: donald.houston@cb-bc.gc.ca
John Syme
Email: john.syme@cb-bc.gc.ca
Derek Leschinsky
Email: derek.leschinsky@cb-bg.ca
Katherine Rydel
Email: katherine.rydel@cb-bc.gc.ca
Sanjay Kumbhare
Email: sanjay.kumbhare@cb-bc.gc.ca

Tel: 613.296.4470
Fax: 819.953.9267

Lawyers for the Applicant, the Commissioner of Competition

AND TO: **THE REGISTRAR OF THE COMPETITION TRIBUNAL**
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, ON K1P 5B4

Email: Tribunal@ct-tc.gc.ca

INDEX

Competition Tribunal Tribunal de la concurrence

Please see in particular para. 4

PUBLIC VERSION

Reference: *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6
File No.: CT-2016-015
Registry Document No.: 429

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*, RSC 1985, c C-34 as amended;

BETWEEN:

The Commissioner of Competition
(applicant)

and

Vancouver Airport Authority
(respondent)

Dates of hearing: October 2-5, 9-10, 15-17 and 30-31, November 1-2 and 13-15, 2018
Before: D. Gascon (Chairperson), P. Crampton C.J. and Dr. D. McFetridge
Date of Reasons for Order and Order: October 17, 2019

REASONS FOR ORDER AND ORDER

Table of Contents

I. EXECUTIVE SUMMARY

[1] On September 29, 2016, the Commissioner of Competition ("**Commissioner**") filed a Notice of Application ("**Application**"), seeking relief against the Vancouver Airport Authority ("**VAA**") under section 79 of the *Competition Act*, RSC 1985, c C-34 ("**Act**"), commonly referred to as the abuse of dominance provision of the Act. The Application concerns VAA's decision to allow only two in-flight caterers to operate at the Vancouver International Airport ("**YVR**" or "**Airport**") and its refusal to grant licences to new providers of in-flight catering services. VAA is responsible for the management and operation of YVR.

[2] The Commissioner claims that, by limiting the number of providers of in-flight catering services at YVR, and by excluding new-entrant firms and denying the benefits of competition to the in-flight catering marketplace at the Airport, VAA has engaged in a practice of anti-competitive acts that have prevented or lessened competition substantially, and are likely to continue to do so. In the Commissioner's view, in-flight catering comprises the sourcing and preparation of the food served to passengers on commercial aircraft ("**Catering**") as well as the loading and unloading of such food on the airplanes ("**Galley Handling**").

[3] VAA responds that, at all times, it has been acting in accordance with its statutory mandate to manage and operate YVR in furtherance of the public interest, and that the regulated conduct doctrine ("**RCD**") shields the challenged practices from the operation of section 79 of the Act. VAA further asserts that it does not control the alleged markets for Galley Handling services or for access to the airside at YVR, and that since it has no involvement with in-flight catering services, it does not have any plausible competitive interest ("**PCI**") in the market for Galley Handling services. VAA adds that it has a legitimate business justification for not allowing additional in-flight caterers to operate at YVR. In brief, it states that this would imperil the viability of the two firms currently operating at the Airport. It maintains that it did not have an anti-competitive purpose, and that its decision to restrict the number of caterers at YVR has not prevented or lessened competition substantially in any relevant market, and is not likely to do so.

[4] For the reasons that follow, the Tribunal will dismiss the Application brought by the Commissioner. The Commissioner has failed to establish, on a balance of probabilities, that all three elements of section 79 have been satisfied. The Tribunal[1] first concludes that, in the circumstances of this case, the RCD does not shield VAA from the application of section 79 to its impugned conduct. The Tribunal further finds that VAA substantially or completely controls the supply of Galley Handling services at YVR, within the meaning of paragraph 79(1)(*a*) of the Act. However, even though the judicial members of the Tribunal consider that VAA has a PCI in the relevant market, the Tribunal unanimously concluded that VAA has not engaged in a practice of anti-competitive acts, as contemplated by paragraph 79(1)(*b*). The Tribunal is satisfied that VAA had and continues to have a legitimate business justification for its decision to limit the number of in-flight catering firms at YVR. This latter finding is sufficient to dismiss the

[1] Where the words "Tribunal" or "panel" are used and the decision relates to a matter of law alone, that decision has been made solely by the judicial members of the Tribunal.

Commissioner's Application. The Tribunal also concludes that the Commissioner has not established that VAA's conduct has prevented or lessened competition substantially, or is likely to do so, as contemplated by paragraph 79(1)(*c*). The Tribunal reaches that conclusion after finding that VAA's conduct has not materially reduced the degree of price or non-price competition in the supply of Galley Handling services at YVR, relative to the degree that would likely have existed in the absence of such conduct.

II. INTRODUCTION AND OVERVIEW

A. The parties

[5] The Commissioner is the public official appointed by the Governor in Council under section 7 of the Act to be responsible for the enforcement and administration of the Act.

[6] VAA is a not-for-profit corporation established in 1992 pursuant to Part II of the *Canada Corporations Act*, RSC 1970, c C-32, and continued in 2013 under the *Canada Not-for-profit Corporations Act*, SC 2009, c 23. It manages and operates YVR pursuant to a ground lease entered into on June 30, 1992 with the Government of Canada, represented by the Minister of Transport ("**1992 Ground Lease**").

B. Section 79 of the Act

[7] Pursuant to subsection 79(1) of the Act, the Tribunal may make an order prohibiting all or any of the persons described in paragraph 79(1)(*a*) from engaging in a practice described in paragraph 79(1)(*b*), where it finds, on a balance of probabilities, that the three elements articulated in that subsection have been met. Those are that:

> (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;
>
> (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts; and
>
> (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

[8] The foregoing three elements must each be independently assessed. In *Canada (Commissioner of Competition) v Canada Pipe Company Ltd*, 2006 FCA 233 ("***Canada Pipe FCA***"), leave to appeal to SCC refused, 31637 (10 May 2007), the Federal Court of Appeal ("**FCA**") stressed that, in abuse of dominance cases, the Tribunal must avoid "the interpretive danger of impermissible erosion or conflation of the discrete underlying statutory tests" (*Canada Pipe FCA* at para 28). However, the same evidence can be relevant to more than one element (*Canada Pipe FCA* at paras 27-28).

[9] Pursuant to subsection 79(2), if an order is not likely to restore competition in a market, the Tribunal may, in addition to or in lieu of making an order under subsection 79(1), make an order directing any or all of the persons against whom an order is sought to take such actions as are reasonable and necessary to overcome the effects of the practice in a market in which the Tribunal has found the three above-mentioned elements to have been met.

[10] The Commissioner bears the burden of satisfying the three elements of subsection 79(1), and the Tribunal must make a positive determination in respect of each of those elements before it may issue an order (*Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 ("***TREB FCA***") at para 48, leave to appeal to SCC refused, 37932 (23 August 2018); *Canada Pipe FCA* at paras 27-28). The burden of proof with respect to each element is the civil standard, that is, the balance of probabilities (*TREB FCA* at para 48; *Canada Pipe FCA* at para 46).

[11] The full text of section 79 of the Act, and of section 78, which sets forth a non-exhaustive list of anti-competitive acts, is reproduced in Schedule "A" to this decision.

C. The parties' pleadings

[12] In his Application, the Commissioner alleges that each of the three elements that must be satisfied under subsection 79(1) of the Act has been met.

[13] With respect to paragraph 79(1)(*a*), the Commissioner contends that there are two relevant product markets in this Application: (1) the market for the supply of Galley Handling services at YVR ("**Galley Handling Market**"), as these services are defined by the Commissioner; and (2) the market for airport airside access for the supply of Galley Handling services ("**Airside Access Market**"). The Commissioner further submits that the relevant geographic market is YVR. The Commissioner claims that VAA substantially or completely controls the Airside Access Market at YVR, as well as the Galley Handling Market at the Airport.

[14] With respect to paragraph 79(1)(*b*) of the Act, the Commissioner asserts that VAA has engaged in and is engaging in a practice of anti-competitive acts through two forms of exclusionary conduct (together, "**Practices**"). First, through its ongoing refusal to grant access to the airside at YVR to new-entrant firms for the supply of Galley Handling services at the Airport ("**Exclusionary Conduct**"). Second, through its continued tying of access to the airport airside for the supply of Galley Handling with the leasing of airport land from VAA for the operation of catering kitchen facilities. As it turned out, the Commissioner's focus in this proceeding was primarily on the first alleged practice of anti-competitive acts, namely, the Exclusionary Conduct. The Tribunal notes that in early 2018, VAA granted a licence to a new provider of in-flight catering services, dnata Catering Services Ltd. ("**dnata**"), who was scheduled to start operating in 2019 with a flight kitchen located outside of YVR's airport land.

[15] The Commissioner alleges that until dnata received a licence in 2018, no new entry in the in-flight catering marketplace had occurred at YVR in more than 20 years. He further maintains that in 2014, VAA refused requests from two new-entrant firms which are both well established at other Canadian airports. The Commissioner submits that VAA refused to authorize new

entrants over the objections of several airlines, which expressed to VAA their desire to see greater competition in in-flight catering services at YVR. The Commissioner also maintains that VAA has a competitive interest in excluding competition in the market for the supply of Galley Handling services at YVR, given the rent payments and concession fees it receives from the in-flight caterers. As to VAA's explanations for its Exclusionary Conduct, the Commissioner submits that none constitutes a legitimate business justification.

[16] Finally, the Commissioner argues that VAA's conduct has had, is having and is likely to have the effect of substantially preventing or lessening competition in the relevant market. The Commissioner submits that, "but for" VAA's Exclusionary Conduct, the market for the supply of Galley Handling services at YVR would be substantially more competitive, including by way of materially lower prices, materially enhanced innovation and/or materially more efficient business models, and materially higher service quality.

[17] Having regard to the foregoing, the Commissioner asks the Tribunal to remedy VAA's alleged substantial prevention or lessening of competition in three general ways. First, by prohibiting VAA from directly or indirectly engaging in the Practices. Second, by requiring VAA to authorize airside access, on non-discriminatory terms, to any in-flight catering firm that meets customary health, safety, security and performance requirements, for the purposes of supplying Galley Handling services. Third, by ordering VAA to take any action, or to refrain from taking any action, as may be required to give effect to the foregoing prohibitions and requirements. The Commissioner also seeks an order from the Tribunal directing VAA to pay his costs and to establish (and thereafter maintain) a corporate compliance program.

[18] In its response, VAA requests that the Tribunal dismiss the Commissioner's Application, with costs. In brief, VAA submits that: (1) the Application fails to take into account that VAA has been acting in accordance with its statutory mandate to operate YVR in furtherance of the public interest and, as such, section 79 of the Act does not apply in light of the RCD; (2) VAA does not substantially or completely control the alleged Airside Access Market for the purpose of providing Galley Handling services; (3) VAA does not itself provide Galley Handling services nor does it have a commercial interest in any entity that provides these services at YVR and, thus, it does not substantially or completely control the Galley Handling Market; (4) VAA does not have any PCI in that market; (5) VAA was at all times motivated by a desire to preserve and foster competition and had a valid business justification to limit the number of in-flight caterers that was both pro-competitive and efficiency-enhancing; and (6) VAA's Practices did not, and are not likely to, prevent or lessen competition substantially.

[19] In his Reply, the Commissioner challenges the legitimate business justification advanced by VAA and its claim that it was acting in the "public interest." The Commissioner maintains that the RCD does not apply, in part because no legislative provision specifically requires or authorizes VAA to engage in the Practices. The Commissioner further submits that VAA's explanations for its Exclusionary Conduct do not constitute credible efficiency or pro-competitive rationales that are independent of the anti-competitive and exclusionary effects of its conduct. The Commissioner also underscores that open competition, not VAA, should determine the number and the identity of in-flight catering firms operating at YVR. The Commissioner finally disputes VAA's position that a less competitive market for in-flight catering services, with only a limited number of suppliers, is more competitive because the incumbents would

arguably be in a more solid financial situation and be able to offer a full range of in-flight catering services to airlines.

D. Procedural history

[20] The Tribunal's decision in this proceeding follows a long procedural history punctuated by numerous interlocutory motions and orders dealing with the pre-hearing disclosure of documents by the Commissioner and discovery issues.

[21] In accordance with the scheduling order initially issued by the Tribunal in December 2016, the Commissioner served VAA with his affidavit of documents in February 2017. The Commissioner's affidavit of documents listed all records relevant to matters in issue in this Application which were in the Commissioner's possession, power or control. It was divided into three schedules: (i) Schedule A for records that do not contain confidential information; (ii) Schedule B for records that according to the Commissioner, contain confidential information and for which no privilege is claimed or for which the Commissioner has waived privilege for the purpose of the Application; and (iii) Schedule C for records that the Commissioner asserts contain confidential information and for which at least one privilege (i.e., solicitor-client, litigation or public interest) is being claimed. The original affidavit of documents was amended and supplemented on a number of occasions by the Commissioner (collectively, "**AOD**").

[22] In March 2017, VAA challenged the Commissioner's claims of public interest privilege over documents contained in Schedule C of the AOD and requested disclosure of those documents. VAA argued that the Commissioner's privilege claims had an adverse effect on VAA's right to make a full answer and defence, and on its right to a fair hearing. This resulted in a Tribunal decision dated April 24, 2017 (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 6 ("***CT Privilege Decision***")). In that decision, the Tribunal upheld the Commissioner's claim of a class-based public interest privilege over the disputed documents. VAA appealed that decision to the FCA and, in a decision dated January 24, 2018, the FCA overturned the Tribunal's previous findings, and remitted the motion for disclosure to the Tribunal for redetermination (*Vancouver Airport Authority v Commissioner of Competition*, 2018 FCA 24 ("***FCA Privilege Decision***")). The FCA ruled that the Commissioner's claims of public interest privilege should be evaluated on a case-by-case basis.

[23] In the meantime, the Commissioner produced to VAA summaries of the facts obtained by him from third-party sources during his investigation leading up to the Application and contained in the records over which the Commissioner had claimed public interest privilege ("**Summaries**"). The first version of the Summaries was produced in April 2017. As it was not satisfied with the level of detail provided in the Summaries, VAA brought a motion to challenge the adequacy and accuracy of the Summaries. In July 2017, the Tribunal released its decision on VAA's summaries motion (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 8). In the decision, the Tribunal dismissed VAA's motion and concluded that VAA had not made the case for further and better disclosure of source identification in the Summaries, even in a limited form or under limited access.

[24] In September 2017, VAA brought a motion seeking to compel the Commissioner to answer several questions that were refused during the examination for discovery of the Commissioner's representative. In October 2017, the Tribunal released its decision on VAA's refusals motion (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16). That decision granted the motion in part and ordered that some questions be answered by the Commissioner's representative along the lines developed in that decision.

[25] After the Commissioner had waived his public interest privilege on all relevant information provided by the witnesses appearing on his behalf, both helpful and unhelpful to the Commissioner, including information not relied on by the Commissioner, VAA brought a motion in December 2017 to conduct a further examination of the Commissioner's representative. In its decision (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 20), the Tribunal granted VAA's motion in part. It ruled that, given the late disclosure of the waived documents by the Commissioner, coupled with the magnitude of the number of documents at stake, considerations of fairness commanded that VAA be given more time to review and digest the information in order to be able to adequately prepare its case in response.

[26] After the FCA issued its *FCA Privilege Decision* in late January 2018 and rejected the class-based public interest privilege of the Commissioner, the Tribunal suspended the scheduling order and adjourned the hearing which was scheduled to start in early February 2018. The hearing was postponed to October and November 2018.

[27] In September 2018, VAA filed a motion objecting to the admissibility of certain portions of two witness statements filed by the Commissioner, on the basis that they constituted improper opinion evidence by lay witnesses and/or inadmissible hearsay. This motion related to the witness statements of Ms. Barbara Stewart, former Senior Director of Procurement at Air Transat A.T. Inc. ("**Air Transat**"), and of Ms. Rhonda Bishop, Director for In-flight Services and Onboard Product of Jazz Aviation LP ("**Jazz**"). The Tribunal dismissed VAA's motion, and stated that it would be better placed at the hearing to determine whether or not the disputed evidence constitutes improper lay opinion evidence and/or inadmissible hearsay (*The Commissioner of Competition v Vancouver Airport Authority*, 2018 Comp Trib 15 ("***Admissibility Decision***")). VAA's motion was therefore denied, but without prejudice to bring another motion at the hearing, further to the cross-examinations of Ms. Stewart and Ms. Bishop, with respect to the admissibility of their evidence.

[28] The hearing took place in Ottawa and Vancouver, between October 2 and November 15, 2018.

III. FACTUAL BACKGROUND

A. YVR

[29] YVR is located on Sea Island, approximately 12 kilometres from downtown Vancouver. Sea Island is only accessible from the City of Vancouver by one bridge, and from the City of Richmond by three bridges. These bridges often act as bottlenecks, significantly slowing access to the Airport, particularly during rush hour traffic. In addition, vehicles that access the Airport

airside must first pass through a security check-point and individuals in the vehicle are also subject to security checks.

[30] YVR is the second busiest airport in Canada by aircraft movements and passengers. In 2017, it served over 24 million passengers, 55 airlines and had connections to 127 destinations. YVR had the highest rate of passenger destination growth among major Canadian airports in the last four years. In recent years, there has been strong growth in passengers from China, and more Chinese airlines now operate at YVR than at any other airport in the Americas or Europe.

[31] When YVR was established, the City of Vancouver owned the land. The City operated the Airport from 1931 to 1962. In 1962, Vancouver sold the land and the airport facility to the Government of Canada. From 1962 to 1992, the Government of Canada operated the Airport. In 1992, VAA was created and the Government of Canada transferred to it the responsibility for operating the Airport. This transfer was made as part of a policy choice by the federal government to cede operational control of major airports to community-based organizations.

B. VAA

[32] On March 19, 1992, by Order-in-Council No. P.C. 1992-18/501 ("**1992 OIC**"), the Governor in Council authorized the Minister of Transport to enter into an agreement to transfer the management, operation and maintenance of the Airport to VAA. On May 21, 1992, the Governor in Council issued Order-in-Council No. P.C. 1992-1130 under the *Airport Transfer (Miscellaneous Matters) Act*, SC 1992, c 5 ("**Airport Transfer Act**"), designating VAA as the corporation to which the Minister of Transport was authorized to transfer the Airport. Then, on June 18, 1992, the Governor in Council issued Order-in-Council No. P.C. 1992-1376 authorizing the Minister of Transport to enter into a lease with VAA in the terms and conditions of a document annexed as a schedule to the Order-in-Council. That document was a draft ground lease between the Minister of Transport and VAA for a lease of YVR for a term of 60 years. The provisions of the draft ground lease are identical to the 1992 Ground Lease ultimately executed on June 30, 1992. Since that date, VAA has been operating YVR pursuant to the 1992 Ground Lease.

[33] VAA's Statement of Purposes is set forth in VAA's Articles of Continuance dated January 21, 2013 ("**Articles of Continuance**"). The "purposes" that are relevant to this proceeding are as follows:

> (a) to acquire all of, or an interest in, the property comprising the [Airport] to undertake the management and operation of the [Airport] in a safe and efficient manner for the general benefit of the public;
>
> (b) to undertake the development of the lands of the [Airport] for uses compatible with air transportation;
>
> […]

> (d) to generate, suggest and participate in economic development projects and undertakings which are intended to expand British Columbia's transportation facilities, or contribute to British Columbia's economy, or assist in the movement of people and goods between Canada and the rest of the world;
>
> […]

[34] VAA operates in a commercial environment where it needs to and does obtain revenues in excess of its costs of operating YVR. VAA's audited consolidated financial statements indicate that VAA generated an excess of revenues over expenses of approximately $131.5 million in the fiscal year ended December 31, 2015, $85.1 million in fiscal year 2016 and $88.6 million in fiscal year 2017. As a not-for-profit corporation, and pursuant to its mandate, VAA re-invests any excess of revenue over expenses that may accrue in any given year in capital projects for the Airport.

[35] According to VAA, it is responsible for managing and operating YVR in the public interest. The Commissioner accepts that VAA has a contract with the Minister of Transport to operate YVR for the general benefit of the public. However, the Commissioner maintains that this does not mean that VAA acts in the public interest for all purposes.

[36] According to VAA, it has been remarkably successful in fulfilling its public interest mandate. By any measure – whether growth in passengers, growth in Pacific Rim passengers, growth in flights, growth in destinations served, operating efficiency (measured either by revenues per passenger, by revenues per flight, by operating expenses per passenger, or by operating expenses per flight), green initiatives, investments in public transportation, commitments to First Nations peoples, or industry and governmental awards –, VAA has fulfilled its mandate to operate YVR 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.

[37] VAA has no shareholders and most of the members of its Board of Directors are nominated by various levels of government and local professional organizations, including the Government of Canada, the City of Vancouver, the City of Richmond, Metro Vancouver, the Greater Vancouver Board of Trade, the Law Society of British Columbia, the Institute of Chartered Accountants of British Columbia, and the Association of Professional Engineers and Geoscientists of British Columbia. In addition, there are currently five members who serve as "at large" directors (one of whom is VAA's Chief Executive Officer ("**CEO**") while the others are local business people).

C. Airport revenues and fees

[38] Airport authorities such as VAA generate revenues from various sources. These include aeronautical revenues, non-aeronautical revenues and airport improvement fees.

[39] Aeronautical revenues are fees that airport authorities charge to airlines to land at the airport and use airport services. They include landing fees and terminal fees. The Tribunal understands that the aeronautical fees charged by VAA to airlines are lower than what other major airports charge in North America.

[40] Non-aeronautical revenues include revenues from concession fees charged by airport authorities to various service providers operating at the airport, car parking revenues and terminal and land rents. The fees charged to in-flight catering firms form part of these non-aeronautical revenues.

[41] Access to the airport airside is necessary to provide services such as baggage handling and Galley Handling services. The airport airside comprises that portion of an airport's property that lies inside the security perimeter. It includes runways and taxiways, as well as the "apron," where, among other things, an aircraft is parked, Catering products and ancillary supplies, as well as baggage and cargo, are loaded and unloaded, and passengers board. Airport authorities are the only entities from which a service provider may obtain authorization to access the airport airside. Typically, agreements or arrangements are concluded whereby firms pay a fee to the airport authority in exchange for this authorization. The fee is commonly composed of a percentage of the gross revenues generated by the firm at the Airport. As far as in-flight caterers at YVR are concerned, the fees paid to VAA are composed of (i) a percentage of the revenues earned from services provided on the property of YVR, **[CONFIDENTIAL]** "**Concession Fees**"). The Concession Fees are usually passed on to the airlines in the form of a "port fee," as part of the total invoice charged for in-flight catering services.

[42] Airport improvement fees are fees charged by airport authorities to passengers. The Tribunal understands that these airport improvement fees are typically added to the price of airplane tickets. VAA charges an airport improvement fee of $5 per enplaned passenger per flight for in-province travel and of $20 for all other flights. Most other airports in Canada also charge an airport improvement fee.

[43] In 2017, VAA reported total gross revenues of approximately $531 million, comprising $136 million in aeronautical revenues, $235 million in non-aeronautical revenues and $159 million in airport improvement fees. The revenues generated by the Concession Fees and the rents paid by in-flight caterers at YVR (which are included in the non-aeronautical revenues) represent approximately **[CONFIDENTIAL]** of VAA's total gross revenues.

D. Airlines

[44] More than 55 airlines operate at YVR. These include domestic, U.S. and international airlines.

[45] The four major domestic airlines in Canada (i.e., Air Canada, Jazz, WestJet and Air Transat) all operate at YVR.

[46] Air Canada is Canada's largest domestic, U.S. trans-border and international airline. Air Canada provides passenger transportation services through its main airline (Air Canada), its lower-cost leisure airline (Air Canada Rouge), and capacity purchase agreements with regional

airlines such as Jazz. Air Canada flies from 64 airports in Canada, including its main hubs located at YVR, Toronto Pearson International Airport ("**YYZ**") and Montreal Trudeau International Airport ("**YUL**"). In 2016, Air Canada (together with Rouge and its regional carriers) operated, on average, 150 daily departures at YVR. In 2016, Air Canada (including Rouge and Jazz) carried 10.8 of the 22.3 million passengers who travelled through YVR.

[47] Jazz provides passenger air transportation services to Air Canada under the "Air Canada Express" brand. As of August 2017, Jazz used a fleet of 117 aircraft with more than 660 departures per weekday to 70 destinations across Canada and the United States. YVR represents Jazz's busiest station by flight volumes.

[48] WestJet is an Alberta partnership. Its parent company, WestJet Airlines Ltd., is incorporated under the laws of Alberta. WestJet offers commercial air travel, vacation packages, and charter and cargo services to leisure and business guests. WestJet is currently Canada's second-largest airline. In 2017, it carried more than 24 million passengers (up by over 2 million from 2016) and generated revenue of over $4.5 billion. WestJet uses YVR, Calgary International Airport ("**YYC**") and YYZ as its main hubs in Canada. In 2016, 4.6 of the 22.3 million passengers who travelled through YVR were on WestJet.

[49] Air Transat is a holiday travel airline, carrying approximately four million passengers per year to more than 60 destinations in 30 countries. Air Transat is a subsidiary of Transat A.T. Inc., a holiday travel specialist, headquartered in Montreal and is publicly traded on the Toronto Stock Exchange. Air Transat flies from up to 22 airports in Canada, including YVR. In the 2018 winter season, Air Transat had 18 departures per week from YVR, primarily to southern sun destinations. In 2016, Air Transat carried 323,000 passengers at YVR.

[50] Though they only represent a small fraction of the overall number of airlines (i.e., 55) operating at YVR, the four major domestic airlines account for the vast majority of air traffic at the Airport.

E. In-flight catering

[51] This Application concerns Catering and Galley Handling services at YVR. However, the Commissioner and VAA have differing views on what these services actually cover and how they should be defined.

[52] According to the Commissioner, the industry recognizes a distinction between Catering and Galley Handling services. Catering refers to the sourcing and preparation of meals and snacks. It 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 ("**BOB**") offerings and snacks. Galley Handling refers to the logistics of getting that food onto the airplane. It consists primarily of the loading and unloading of Catering products, commissary products (typically non-food items and non-perishable food items) and ancillary products (duty-free products, linen and newspapers) on a commercial aircraft. It also includes warehousing; inventory management; assembly of meal trays and aircraft trolley carts (including bar and boutique assembly); transportation of Catering, commissary and ancillary products between aircraft and warehouse or Catering kitchen facilities; equipment cleaning; handheld point-of-sale

device management; and trash removal. Galley Handling is sometimes referred to as "last mile logistics" or "last mile provisioning" by airlines or providers of in-flight catering services. It appears that these terms refer essentially to the same bundle of products that the Commissioner defines as Galley Handling services. While the exact contours of the demarcation between Catering and Galley Handling services vary from firm to firm, the Tribunal understands that the core of Galley Handling services requires airside access.

[53] The Commissioner defines "In-flight Catering" as comprising two bundles of products and services, namely, what he defines as Catering and Galley Handling.

[54] VAA takes a different approach to the definition of the services subject to this Application. It segments the in-flight catering business based on the type of food being offered to the passengers: specifically, it distinguishes between "fresh catering" and "standard catering." VAA defines fresh catering as including the preparation and loading onto aircraft of fresh meals and other perishable food offerings. Thus, VAA includes much of what the Commissioner defines as "Galley Handling" in what it calls "fresh catering." It takes a similar approach to what it calls "standard catering." VAA considers that it includes the provision and loading onto aircraft of non-perishable food items and beverages, as well as other items such as duty-free products.

[55] For the purpose of this decision, and in order to avoid any confusion in the terminology used, the Tribunal will adopt the definitions of Catering and Galley Handling proposed by the Commissioner. The Tribunal also underlines that VAA does not itself provide any in-flight catering services, whether Catering or Galley Handling.

[56] Virtually all commercial airlines operating out of YVR offer some type of food (perishable and/or non-perishable) and/or beverages (alcoholic and/or non-alcoholic) service on every flight. Food items provided by airlines may be served to passengers in a cold or uncooked state, such as cheese or nuts, or in a cooked state, such as a casserole or hot entrée. Perishable food items may also be fresh or frozen. The level of food and/or beverages service varies by airlines, by route and by seat class, with the offerings ranging from beverages and peanuts or pretzels, at one extreme, to high end freshly prepared meals, including hot entrées, at the other extreme. Airlines provide food and beverages to their passengers on a complimentary basis and/or on a for-purchase basis (known as BOB).

[57] Over the years, food served by airlines on domestic and cross-border flights has gradually moved away from fresh food towards frozen food. Freshly prepared meals, once served to all passengers, were virtually eliminated from the economy cabins in the early 2000s and are now largely reserved for those passengers travelling in business or first class (also known as the front cabins). Economy class passengers are increasingly served lower-cost frozen meals, sometimes sourced from food services firms on a national basis. For the vast majority of flights operated out of YVR, freshly cooked meals are now offered in only two situations: on overseas flights and to business/first class passengers (who are particularly important to airlines' profitability) on certain other types of flights.

[58] Despite this new trend of switching towards frozen meals, VAA considers that its ability to ensure a competitive choice of freshly prepared meals is important to attract and retain airlines and routes at YVR, especially for Asia-based international airlines.

[59] The Tribunal understands that, while in-flight catering is an important service for both airlines and passengers, it only represents a very small fraction of the overall operating costs of airlines.

F. In-flight catering providers

[60] There are currently six main firms that directly or indirectly supply Catering and/or Galley Handling services in Canada. They are Gate Gourmet Canada Inc. ("**Gate Gourmet Canada**"), CLS Catering Services Ltd. ("**CLS**"), dnata Catering Canada Inc. ("**dnata Canada**"), Newrest Holding Canada Inc. ("**Newrest Canada**"), Strategic Aviation Services Ltd. ("**Strategic Aviation**") and Optimum Stratégies / Optimum Solutions ("**Optimum**").

[61] Gate Gourmet Canada is a subsidiary of Gate Gourmet International Inc. ("**Gate Gourmet**"). Gate Gourmet currently operates at more than 200 locations in more than 50 countries. Gate Gourmet Canada was created in 2010, when it purchased Cara Airline Solutions ("**Cara**"), which had been providing in-flight catering to airlines at Canadian airports since 1939. Gate Gourmet Canada operates at nine Canadian airports, including YVR. In 2017, Gate Gourmet Canada had **[CONFIDENTIAL]** airline customers in Canada and provided catering to more than **[CONFIDENTIAL]** flights annually, with reported revenues of more than $**[CONFIDENTIAL]**.

[62] CLS is a joint venture between Cathay Pacific Airways Ltd. and LSG Sky Chefs ("**LSG**"), the world's largest airline caterer and provider of integrated service solutions. CLS has provided in-flight catering in Canada for 20 years. It currently operates at YVR, YYC and YYZ.

[63] dnata is a global provider of air services to over 300 airlines in 35 countries with more than 41,000 employees. dnata provides four types of air services via separate business arms, which include ground handling, cargo and logistics, catering, and travel services. dnata's catering services include: in-flight catering services, in-flight retail services, airport food and beverage services and pre-packaged solutions services. dnata's food division serves customers at 60 airports across 12 countries. In Canada, YVR is the first airport at which dnata, through its subsidiary dnata Canada, will offer in-flight catering services, starting in 2019.

[64] Newrest Group Holding S.A. ("**Newrest**") is the ultimate parent company of Newrest Canada. Newrest is a global provider of multi-sector catering, with operations in 49 countries and more than 30,000 employees. Newrest operates in four catering and related hospitality sectors, servicing approximately 1.1 million meals each day: (i) in-flight catering; (ii) rail carrier catering; (iii) catering for restaurants and institutions; and (iv) catering at the retail level. Newrest's in-flight unit represented approximately 41% of Newrest's turnover in 2016-2017. This business unit provides in-flight catering, logistics and supply-chain services for on-board products and airport lounge management to approximately 234 airlines in 31 countries. Newrest Canada began operations in Canada in 2009 and offers a full line of in-flight catering services in Canada, comprising both Catering and Galley Handling, at YYC, YYZ and YUL.

[65] Strategic Aviation Holdings Ltd. is the parent company of Strategic Aviation and Sky Café Ltd. ("**Sky Café**"). Strategic Aviation provides in-flight catering services at ten airports in Canada, including YYC, YYZ and YUL. Strategic Aviation offers airlines a "one-stop shop" for Galley Handling and outsourced Catering. It provides Galley Handling services with its own personnel. However, for Catering services, Strategic Aviation partners with specialized third parties responsible for the food preparation and packaging. Its principal Catering partner is Optimum.

[66] The Optimum group comprises Optimum Solutions and its subsidiary Optimum Stratégies. Optimum does not directly provide any in-flight catering service but functions as an amalgamator. Optimum Stratégies specializes in "provisioning" (i.e., Galley Handling) through sub-contracts with **[CONFIDENTIAL]**. Optimum Solutions also offers Catering services to airlines through a network of independent third-party providers. In essence, it serves as an intermediary between food providers and airlines.

[67] In-flight catering firms can operate on-airport or off-airport. Leasing premises "off-airport" to house in-flight catering facilities is generally at a significantly lower cost than the rate paid for leasing land from the airport.

[68] In-flight catering firms can be "full-service" or "partial-service." The Tribunal understands that being a "full-service" firm typically includes being able to offer freshly prepared meals, other perishable food items such as frozen meals and snacks, and non-perishable food items. "Partial-service" firms do not offer fresh meals to the airlines. Notwithstanding the foregoing, the industry also refers to "full-service" in-flight catering firms as those who are able to provide both Catering and Galley Handling services. Conversely, "partial-service" firms provide only one of either Catering or Galley Handling services and outsource the other. The Tribunal notes that "full-service" in-flight caterers are sometimes also referred to as the "traditional" flight kitchen operators.

[69] Historically, in-flight caterers were full-service firms offering both Catering and Galley Handling services, including a full spectrum of fresh meals, frozen meals and non-perishable food items. This is the case for Gate Gourmet at most airports in Canada, for CLS in YVR and YYZ, and for Newrest in YYC, YYZ and YUL (since 2009). dnata also appears to be viewed as a full-service in-flight caterer.[2] However, Strategic Aviation and Optimum are not considered to be full-service providers.

[70] According to the Commissioner, new and different business models have emerged recently in the in-flight catering services business. As airplane food has moved away from fresh meals, in-flight catering has also evolved away from the traditional, full-service flight kitchens located at airports, towards off-airport options, the separation of Catering and Galley Handling (when provided by different providers), and the outsourcing of the preparation of frozen meals and non-perishable BOB food items to specialized firms. The Commissioner submits that with

[2] In this decision, the Tribunal will use the terms Gate Gourmet, Newrest and dnata to refer to the activities of each of those entities in Canada, even though they are sometimes acting through their respective Canadian subsidiaries, namely, Gate Gourmet Canada, Newrest Canada and dnata Canada, respectively.

changing demand in the market, in-flight catering firms can deliver efficiencies through specializing in the provisions of either Catering or Galley Handling services. For example, certain firms source freshly prepared meals from local restaurants proximate to airports, and then deliver these goods to Galley Handling firms or full-service in-flight catering firms. Strategic Aviation, for one, seeks to provide Galley Handling services and is partnering with Optimum for off-airport food supply.

[71] According to the Commissioner, this has resulted in significant savings as well as new product choices and models for airlines. The Tribunal further understands that with the migration towards frozen meals and pre-packaged food items, even the full-service in-flight catering firms like Gate Gourmet and CLS focus primarily on delivering, warehousing and storing pre-packaged meals and non-perishable food items to airlines. Stated differently, although they are still expected to be able to provide fresh meals for international flights and for the front cabins on certain other flights, their focus is less on preparing and providing freshly prepared meals and more on logistics, inventorying and delivering food on airplanes.

[72] Airlines can therefore use various methods to source or purchase food and/or beverages for distribution, consumption or use on-board a commercial aircraft by passengers and/or airline crew. The Tribunal understands that these methods include but are not necessarily limited to: (1) purchasing one or more food and/or beverage items from in-flight catering firms; and (2) purchasing one or more food and/or beverage items from specialized third-party firms having commercial kitchen operations or directly from manufacturers, distributors or wholesalers.

[73] VAA maintains that, in addition to purchasing their in-flight catering needs from third-party providers, airlines can also use "double catering" or "self-supply" to source food and/ or beverages for their flights.

[74] Double catering refers to the activity whereby an airline loads and transports extra food and/or beverages on an aircraft at one airport for use on one or more subsequent commercial flights by that aircraft departing from a second (or third, etc.) airport ("**Double Catering**"). By loading such extra food, beverages and non-food commissary products on in-bound flights to an airport for use on a subsequent flight by the same aircraft, the airline can avoid the need for Galley Handling services at that second (or third, etc.) airport. Double Catering is also sometimes referred to as "ferrying," "return catering" or "round-trip catering."

[75] Self-supply refers to the practice of an airline itself sourcing meals and provisions from its own facilities, or wherever else it may choose, and loading itself all meals and provisions that are served to passengers on the aircraft ("**Self-supply**"). All airlines are free to Self-supply at YVR and do not need to be granted specific access by VAA for this purpose.

[76] The Tribunal understands that the number of in-flight catering firms authorized to operate at airports varies but that there are typically two or three in-flight caterers operating at most Canadian airports. There are however three airports in Canada with four in-flight caterers: YYC, YYZ and YUL.

G. In-flight caterers at YVR

[77] At the time of the Commissioner's Application, Gate Gourmet and CLS were the only firms authorized by VAA to provide in-flight catering at YVR. Gate Gourmet and CLS (and their respective predecessors) have operated at YVR since approximately 1970 and 1983 respectively, under long-term leases first entered into by the Minister of Transport and later assumed by VAA. In early 2018, dnata became the third provider of in-flight catering services authorized to operate at YVR.

[78] Until 2003, there had been three in-flight caterers operating at YVR: Cara (which became Gate Gourmet Canada), CLS and LSG. LSG's major customer was Canadian Airlines International Ltd. ("**Canadian Airlines**"). After the acquisition of Canadian Airlines by Air Canada, LSG's catering business was redirected to Cara. As a result of the downturn in its business that followed that acquisition, LSG exited YVR. At the time, no other caterer took over LSG's flight kitchen and none sought to replace it at the Airport. According to VAA, LSG's departure and the lack of any replacement indicated that, in 2003, the in-flight catering business at YVR was not able to support three in-flight caterers.

[79] Gate Gourmet, CLS and dnata are full-service in-flight catering firms providing both Catering and Galley Handling services at YVR. As such, they all prepare and offer freshly prepared meals. Each company operates a full kitchen, in respect of which each has made significant investments on-site at the Airport (in the case of Gate Gourmet and CLS) or off-Airport (in the case of dnata). In addition to fresh meals, Gate Gourmet, CLS and dnata each provide a full range of other food (such as frozen meals, fresh snacks and other BOB offerings), and beverages.

[80] Like all suppliers at YVR needing access to the airside, in-flight catering firms must obtain authorization from VAA to access the YVR airside. Gate Gourmet and CLS each entered into licence agreements with VAA many years ago that set out the terms and conditions under which they operate and obtain access to the airside. Under those licence agreements, Gate Gourmet and CLS pay Concession Fees to VAA, calculated on the basis of a percentage of their respective revenues from the sale of Catering and Galley Handling services, **[CONFIDENTIAL]**. Upon beginning to operate in 2019, dnata also has to pay Concession Fees to VAA further to the in-flight catering licence agreement it entered into with VAA ("**dnata Licence**").

[81] Gate Gourmet and CLS have each entered into long-term leases with VAA for the land they rent from VAA on Airport property, for terms of **[CONFIDENTIAL]**. Pursuant to both leases, **[CONFIDENTIAL]**.

H. The 2013-2015 events

[82] The particular events that led to the Commissioner's Application can be summarized as follows.

[83] In December 2013, Newrest made a request to VAA to be granted a licence to supply in-flight catering services at YVR, with a flight kitchen located off-Airport. Newrest renewed its request in March 2014. In April 2014, Strategic Aviation submitted a similar request for a licence to offer Galley Handling services. These requests were made following the issuance of a Request for Proposal ("**RFP**") process that Jazz launched in respect of its in-flight catering needs.

[84] VAA denied Newrest's as well as Strategic Aviation's requests in April 2014. The licences were refused because VAA believed that the local market demand for in-flight catering services at YVR could not support a new entrant at the time. According to VAA, the decision to deny access to Newrest and Strategic Aviation in 2014 was motivated by concerns about the precarious state of the in-flight catering business at YVR. VAA was of the view that the market was not large enough to support the entry of a third in-flight caterer, and that the entry of a third caterer might cause one (or even both) of the incumbent caterers to exit the market. Among other things, VAA was concerned that this would give rise to a significant disruption at YVR, and adversely affect its reputation.

[85] In 2015, Newrest and Strategic Aviation made further licence requests, which were denied by VAA.

[86] **[CONFIDENTIAL]**.

I. The 2017 RFP

[87] In January 2017, Mr. Craig Richmond, the President and CEO of VAA, requested a study of the current state of the market for in-flight catering services at YVR. The purpose of that study was to determine whether a third in-flight caterer should be licenced at YVR ("**In-flight Kitchen Report**"). The study was launched after the Commissioner had filed his Application. The In-flight Kitchen Report concluded that in light of the increase in passenger traffic and the addition of several new airlines at YVR, the size of the in-flight catering market at the Airport had grown sufficiently compared to 2013-2014 to justify a recommendation that at least one additional licence be provided.

[88] As a result, in September 2017, VAA issued a RFP for a new in-flight catering licence at YVR. VAA also recommended that the RFP be open to off-site full-service and non-full-service operators, with responses to be judged based upon a set of guiding principles and evaluation criteria. In November 2017, VAA retained a fairness advisor who concluded that the RFP process had been fair and reasonable.

[89] VAA received responses to the RFP from **[CONFIDENTIAL]** firms: **[CONFIDENTIAL]**. The evaluation committee at VAA unanimously recommended to VAA's executive team that dnata be selected as the preferred proponent for an in-flight catering licence at the Airport.

[90] The dnata Licence has a term of **[CONFIDENTIAL]** years, which began on **[CONFIDENTIAL]** and will end on **[CONFIDENTIAL]**. dnata does not lease land from VAA. Instead, it will operate a flight kitchen located off-Airport. On February 19, 2018, VAA publicly

announced that it had granted a new in-flight catering licence to dnata. At the time of the hearing, dnata expected to begin its operations in the **[CONFIDENTIAL]**.

IV. EVIDENCE -- OVERVIEW

[91] The evidence considered by the Tribunal came from 14 lay witnesses, three expert witnesses and exhibits filed by the parties.

A. Lay witnesses

(1) The Commissioner

[92] The Commissioner led evidence from the following five lay witnesses associated with the four major domestic airlines operating in Canada:

- Andrew Yiu: Mr. Yiu has been the Vice President, Product, at Air Canada since 2017. Mr. Yiu is responsible for the design of Air Canada's products, services and amenities experienced by customers at airports and onboard all flights worldwide. In this capacity, he knows about Air Canada's in-flight catering operations. He is the direct supervisor of Mr. Mark MacVittie, who signed two witness statements filed by the Commissioner but subsequently resigned from his position prior to the hearing. Mr. Yiu reviewed and reaffirmed Mr. MacVittie's witness statements.

- Barbara Stewart: until her retirement on June 1, 2017, Ms. Stewart worked as the Senior Director, Procurement, for Air Transat. In this capacity, she was responsible for all procurement activities at Air Transat as they relate to in-flight catering, ground handling and fuel, together with managing the relationship between Air Transat and the major airports it serves.

- Rhonda Bishop: Ms. Bishop has been the Director, In-flight Services and Onboard Product of Jazz since 2010. In this capacity, she is responsible for the oversight of four business units: (1) Inflight Services, where she performs the duties of Flight Attendant Manager; (2) Regulatory & Standards, where she is responsible for the operation and implementation of the *Canadian Aviation Regulations*, SOR/96-433 ("**Canadian Aviation Regulations**") including airline operations; (3) Inflight Training, where she is responsible for the professional standards of cabin crews; and (4) Onboard Product, where she oversees the efficient operation of the Inflight Services Department.

- Simon Soni: Mr. Soni has been the Director of Catering Services for WestJet since November 2017. In this capacity, he is responsible for development selection and safe provision of WestJet's on-board Catering products. He reviewed and adopted parts of the witness statements signed by Mr. Colin Murphy, who was the Director of Inflight Cabin Experience for WestJet and was responsible for WestJet Aircraft Catering operations,

onboard product development and delivery, and inflight standards and procedures, prior to leaving the company.

- Steven Mood: Mr. Mood has been the Senior Manager Operations Strategic Procurement for WestJet since January 2017. In this capacity, he is responsible for leading a team of sourcing specialists supporting WestJet and WestJet Encore Domestic, Trans-border and International operations, which includes WestJet Aircraft Catering operations, Fleet Management and Maintenance services, as well as Ground Handling and Cargo services. Mr. Mood also reviewed and reaffirmed parts of Mr. Murphy's witness statements.

[93] The Commissioner also led evidence from the following six lay witnesses associated with firms that directly or indirectly supply Catering and/or Galley Handling services:

- Ken Colangelo: Mr. Colangelo has been the President and Managing Director of Gate Gourmet Canada since 2012. In this capacity, he is responsible for all of Gate Gourmet Canada's operations, including those with respect to commercial, financial, legal and regulatory matters.

- Maria Wall: Ms. Wall has been the Financial Controller for CLS since 2008. She is responsible for the financial management and reporting of CLS. The Commissioner filed a very cursory witness statement prepared by Ms. Wall which did not address any of the issues in dispute in this proceeding. She was not called to testify at the hearing.

- Jonathan Stent-Torriani: Mr. Stent-Torriani is the Co-Chief Executive Officer of Newrest. He, along with Mr. Olivier Sadran, co-founded Newrest in 2005-2006.

- Geoffrey Lineham: Mr. Lineham has been the President and co-owner of Optimum Stratégies since 2015. He is also the Vice President of Business Development at Optimum Solutions.

- Mark Brown: Mr. Brown has been the President and CEO of Strategic Aviation since 2012. He oversees all the activities of Strategic Aviation, including its ground handling and Catering businesses.

- Robin Padgett: Mr. Padgett is the Divisional Senior Vice President of dnata. In this capacity, he has run the catering division of dnata for the past four years and has full responsibility of the operational and strategic direction of the division.

[94] The Tribunal generally found Messrs. Yiu, Soni, Mood, Colangelo, Stent-Torriani, Lineham, Brown and Padgett, as well as Mss. Stewart and Bishop, to be credible, forthright, helpful and impartial.

(2) VAA

[95] VAA led evidence from the following four lay witnesses, who are or were all employed at VAA:

- Craig Richmond: Mr. Richmond has been the President and CEO of VAA since June 18, 2013 and has over 40 years of experience in aviation, including as CEO of seven airports in four different countries (Bahamas, England, Cyprus and Canada). Mr. Richmond initially joined VAA in 1995 and spent the following 11 years there in various roles (including Manager of Airside Operations and Vice President of Operations).

- Tony Gugliotta: Mr. Gugliotta has held various roles at the managerial level for VAA, including Senior Vice President, Marketing and Business Development, from 2007 to 2014. He retired from VAA in 2016. Mr. Gugliotta's responsibilities included: all land and property management at YVR, including commercial real estate and retail development; YVR's marketing to airlines and passengers; and ground transportation.

- Scott Norris: Mr. Norris has been the Vice President of Commercial Development of VAA since September 2016. He is responsible for oversight of areas such as: terminal leasing; parking and ground transportation operations and business development; and airport estate lease management and development. Mr. Norris formerly held various positions in airport operations and management at several airports in Australia.

- John Miles: Mr. Miles has been the Director, Corporate Finance at VAA since 2007. Prior to that, he was Manager, Corporate Finance. Mr. Miles is responsible for oversight of the annual budget preparation, financial statement preparation, corporate financing, investment analyses and enterprise risk management at VAA. Budget and financial statement preparation includes monitoring the revenues derived from the flight kitchens.

[96] The Tribunal generally found Messrs. Richmond, Gugliotta, Norris and Miles to be credible, forthcoming, helpful and impartial.

B. Expert witnesses

(1) The Commissioner

[97] Dr. Gunnar Niels testified on behalf of the Commissioner. Dr. Niels is a professional economist with nearly 25 years of experience working in the field of competition analysis and policy. He is a Partner at Oxera, an independent economics consultancy based in Europe specializing in competition, regulation and finance. He holds a Ph.D. in economics from Erasmus University Rotterdam in the Netherlands. Dr. Niels' mandate was to determine: (1) whether VAA is dominant in a market for airside access at YVR for one or more components of in-flight catering; (2) whether there exists any economic justification for the refusal by VAA to permit additional competition in one or more components of in-flight catering at YVR; (3)

whether VAA's refusal to permit additional competition in in-flight catering or its tying of airside access to the provision of an on-site kitchen facility has prevented or lessened competition substantially; (4) whether additional providers of in-flight catering services can operate profitably at YVR; and (5) whether VAA's continuing policy to restrict entry at YVR, in respect of one or more components of in-flight catering, is having or is likely to have the effect of preventing or lessening competition substantially in a relevant market.

[98] Dr. Niels was accepted as an expert qualified to give opinion evidence in industrial organization and competition economics. The Tribunal generally found Dr. Niels to be credible, forthright, objective and impartial, and willing to concede weaknesses/shortcomings in his evidence or in the Commissioner's case.

(2) VAA

[99] Two expert witnesses testified on behalf of VAA: Dr. David Reitman and Dr. Michael W. Tretheway.

[100] Dr. Reitman is a Vice President at Charles River Associates, an economics and business consulting firm. Prior to that, he was an economist with the Antitrust Division of the U.S. Department of Justice and served on the faculty in the economics department at Ohio State University and the Graduate School of Management at UCLA. He holds a Ph.D. in Decision Sciences from Stanford University in the United States. Dr. Reitman indicates in his report that he was retained "to conduct an economic analysis relating to an allegation made by the Commissioner of Competition that the activities of VAA have resulted in, or are likely to result in, an abuse of dominant position in the flight catering market" at YVR. In undertaking this analysis, his mandate was as follows: (1) to define the relevant antitrust markets for flight catering; (2) to determine whether VAA had an incentive to restrict competition in those markets; (3) to determine whether there has been or is likely to be a substantial lessening of competition in those markets; and (4) to review and respond to the report of Dr. Niels.

[101] With the parties' agreement, Dr. Reitman was qualified as an expert in industrial organization and antitrust economics. For the most part, the Tribunal found Dr. Reitman to be credible, forthright, objective and helpful. As indicated in the reasons below, where the evidence of Dr. Niels and Dr. Reitman was inconsistent, the Tribunal sometimes preferred Dr. Niels' evidence, and at other times preferred Dr. Reitman's evidence, depending on the particular issue being considered.

[102] Dr. Tretheway is currently Executive Vice President, Chief Economist and Chief Strategy Officer of the InterVISTAS Consulting Group, which forms part of Royal Haskoning DHV, a global provider of consultancy and engineering services in the areas of aviation, transportation, water, environment, building and manufacturing, mining and hydropower. Dr. Tretheway holds a Ph.D. in Economics from the University of Wisconsin-Madison in the United States. Dr. Tretheway's mandate was as follows: (1) to explain how the demand for in-flight catering services evolved in North America since 1992 and the supply conditions affecting the structure of the industry; (2) to explain the significance of in-flight catering services to airlines; (3) to explain the incentives (objectives) of airport authorities in general, and the incentives of VAA,

both in general and with respect to the provision of access to in-flight catering operators; and (4) to provide an opinion regarding VAA's rationale for refusing to issue licences to new in-flight caterers in 2014.

[103] VAA sought to qualify Dr. Tretheway as an expert in airline and airport economics. The Commissioner objected in part to the qualification of Dr. Tretheway as an expert and asked the Tribunal to declare inadmissible and strike from his report those portions that dealt with items 2, 3 and 4 of his mandate. The Commissioner made this objection on the basis that Dr. Tretheway was not properly qualified to testify on those issues and that his expert evidence was not necessary for the Tribunal. The Tribunal declined to strike the responses to questions 2 and 3, as the panel was satisfied that they met the "necessity" and "properly qualified expert" factors established by the Supreme Court of Canada ("**SCC**") in *R v Mohan*, [1994] 2 SCR 9, 114 DLR (4th) 419 ("***Mohan***") and *R v Bingley*, 2017 SCC 12 ("***Bingley***"), and could therefore be properly accepted as expert evidence. However, the Tribunal declared inadmissible those portions of Dr. Tretheway's report dealing with item 4 above, after concluding that Dr. Tretheway's opinion did not contribute to the determination of the issues that the panel had to decide.

[104] Ultimately, Dr. Tretheway was accepted by the Tribunal as an expert qualified to give opinion evidence in airline and airport economics. At the hearing, the Tribunal indicated that, since the objections voiced by the Commissioner raised a number of elements regarding the applicability of the *Mohan* factors and the Tribunal's approach to expert evidence, it would provide more detail in its final decision. What follows are the Tribunal's reasons for its ruling on Dr. Tretheway's expert evidence.

(a) Admissibility of expert evidence

[105] In court proceedings, the admissibility of expert opinion evidence is determined by the application of a two-stage test, as confirmed by the SCC in *Bingley* and *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 ("***White Burgess***"). The test may be summarized as follows.

[106] The first step (the threshold stage) requires the party putting forward the proposed expert evidence to establish that it satisfies the four requirements established in *Mohan*, namely, (i) logical relevance, (ii) necessity in assisting the trier of fact, (iii) the absence of an exclusionary rule, and (iv) a properly qualified expert. Each of these conditions must be established on a balance of probabilities in order for an expert's evidence to meet the threshold for admissibility. The second step (the gatekeeping stage) involves the discretionary weighing of the benefits, or probative value, of admitting evidence that meets the preconditions to admissibility, against the "costs" of its admission, including considerations such as consumption of time, prejudice and the risk of causing confusion (*White Burgess* at para 16). This is a discretionary exercise, and the cost-benefit analysis is case-specific. Should the costs be found to outweigh the benefits, the evidence may be deemed inadmissible despite the fact that it met all the *Mohan* factors.

[107] In its proceedings, the Tribunal has consistently applied the principles articulated by the SCC in *Mohan* and its progeny when considering the admissibility of expert evidence (see for

example: *Commissioner of Competition v Imperial Brush Co Ltd and Kel Kem Ltd (cob as Imperial manufacturing Group)*, 2007 Comp Trib 22 ("***Imperial Brush***") at para 13; *B-Filer Inc et al v The Bank of Nova Scotia*, 2006 Comp Trib 42 ("***B-Filer***") at para 257; *Commissioner of Competition v Canada Pipe Company*, 2003 Comp Trib 15 ("***Canada Pipe 2003***") at para 36).

[108] In the case of Dr. Tretheway's opinion, the only two factors at stake are the "necessity" and "properly qualified expert" requirements. With respect to the "necessity" requirement, the SCC has insisted that in order to be admissible, the proposed expert opinion evidence must be necessary to assist the trier of fact, bearing in mind that necessity should not be judged strictly. The proposed evidence must be "reasonably necessary" in the sense that "it is likely outside the [ordinary] experience and knowledge of the [trier of fact]" (*Mohan* at pp 23-24). This is notably the case where the expert evidence is needed to assist the court due to its technical nature, or where it is required to enable the court to appreciate a matter at issue and to help it form a judgment on a matter where ordinary persons are unlikely to do so without the help of those with special knowledge.

[109] However, evidence that provides legal conclusions or opinions on issues and questions of fact to be decided by the court is inadmissible because it is unnecessary and usurps the role and functions of the trier of fact: "[t]he role of experts is not to substitute themselves for the court but only to assist the court in assessing complex and technical facts" (*Quebec (Attorney General) v Canada*, 2008 FC 713 at para 161, aff'd 2009 FCA 361, 2011 SCC 11; *Mohan* at p 24).

[110] The requirements of a "properly qualified expert" are also well established. A party proposing an expert has to indicate with precision the scope and nature of the expert testimony and what facts it is intending to prove. Expertise is established when the expert witness possesses specialized knowledge and experience going beyond that of the trier of fact, relating to the specific subject area on which the expertise is being offered (*Bingley* at para 15). The witness must therefore be shown "to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify" (*Mohan* at p 25).

[111] The admissibility of expert evidence does not depend upon the means by which the skill or the expertise was acquired. As long as the court or the Tribunal is satisfied that the witness is sufficiently experienced in the subject area at issue, it will not be concerned with whether his or her skill was derived from specific studies or by practical training, although that may affect the weight to be given to the evidence. Nor is it necessary for the expert witness to have the best qualifications imaginable in order for his or her evidence to be admissible. As long as the expert witness has specialized knowledge not available to the trier of fact, deficiencies in those qualifications go to the weight of the evidence, not to its admissibility.

[112] While expertise can be described as a modest standard, it is important that the expert possesses the kind of special knowledge and experience appropriate to the subject area. This is why the precise field of expertise of the expert witness has to be defined. Expert witnesses should not give opinion evidence on matters for which they possess no special skill, knowledge or training, nor on matters that are commonplace, for which no special skill, knowledge or training is required.

[113] Finally, the fact that an expert's opinion is based in whole or in part on information that has not been proven before the trier of fact does not render the opinion inadmissible. Instead, the extent to which the factual foundation for the expert opinion is not supported by admissible evidence will affect the weight it will be given by the trier of fact.

(b) Dr. Tretheway's evidence

[114] For the reasons that follow, the Tribunal was satisfied that the responses to questions 2 and 3 of Dr. Tretheway's report meet the factors established in *Mohan* and *Bingley*, and that the costs-benefits analysis prescribed by the SCC weighs in favour of admitting this evidence. Even though Dr. Tretheway was not qualified as an expert in "in-flight catering" as such, the Tribunal finds that he was properly qualified to provide expert opinions on those questions and that his evidence was necessary to the work of the panel.

[115] The issues raised in question 2 of Dr. Tretheway's report relate to the significance of in-flight catering for airlines, including questions such as the impact that delays can have on airlines in the provision of in-flight catering services. The issues raised in question 3 relate to incentives of airport authorities and to VAA's particular incentives in the context of what other airport authorities have been doing.

[116] In this case, Dr. Tretheway was accepted and qualified by the Tribunal as an expert in airline and airport economics. VAA submitted that air transportation economics includes the economics of how airports and airlines interact with complementary services, namely, services located at airports that are provided not to the airport itself, but to airlines. VAA further argued that these complementary services include in-flight catering services, not in terms of their inner workings but in terms of how they relate to airlines' costs and to airport operations. The Tribunal agrees.

[117] Dr. Tretheway's report and his credentials demonstrate that he is an expert in the air transportation industry. That expertise includes airlines' use, and airports' provision, of access to complementary services such as in-flight catering, among others. Dr. Tretheway is one of the most published and experienced air transportation economists in the world, a field that includes the incentives of airports and how airlines and airports deal with complementary services. The Tribunal further notes that Dr. Tretheway studied in-flight catering and used in-flight catering data as part of his Ph.D. thesis. Moreover, Dr. Tretheway provided expertise on the incentives of airport authorities for an investigation by the New Zealand Commerce Commission. He also has experience working as a consultant for various airports around the world. Dr. Tretheway testified on the basis of his expertise and experience as a consultant for many airlines and many airport authorities. He considered in-flight catering to be part of airport economics and as a component of airlines' costs.

[118] In light of the foregoing, the Tribunal has no hesitation in concluding that Dr. Tretheway possesses special knowledge and experience going beyond that of the panel as the trier of fact, relating to the specific subject area on which his expertise is being offered for questions 2 and 3. The Tribunal is also satisfied that the expert evidence of Dr. Tretheway on those two questions is "reasonably necessary" in the sense that it is outside the experience and knowledge of the panel.

[119] Turning to the issues raised in question 4, they relate to VAA's "rationale" for declining to issue licences to new entrants at YVR. In his report, Dr. Tretheway was providing an opinion on one of the ultimate issues that the Tribunal has to decide, namely, the credibility and reliability of VAA's business justification for its Exclusionary Conduct. As stated above, such expert evidence is clearly inadmissible as it breaches the "necessity" rule of admissibility described in *Mohan* (*Mohan* at p 24). The Tribunal does not need expert evidence on the appropriateness or reliability of the business justification raised by VAA or on the reasonability of the business decisions made by VAA. These are issues to be determined by the panel as the trier of fact, on the basis of the evidence before it. For that reason, the portions of Dr. Tretheway's report dealing with question 4 are inadmissible and have been struck from his report.

[120] In his challenge to the admissibility of Dr. Tretheway's expert evidence and his qualifications on questions 2, 3 and 4, the Commissioner insisted on the fact that Dr. Tretheway's opinion should be set aside because he was properly qualified as an airline and airport "economist," but not properly qualified as an airline or airport "industry expert." The Tribunal does not accept this argument, and fails to see how the mere labelling of an expert as an "economist" or an "industry expert" could suffice to support a finding of inadmissibility. Labelling Dr. Tretheway as an air transportation "economist," as VAA did, rather than as an industry expert, does not alter his qualifications nor is it determinative of his status as a properly qualified expert.

[121] The Tribunal agrees that there is a general distinction between industry experts and economists. Typically, an industry expert opines "on facets of the industry in which the respondent is situated and/or the product and geographic market at issue, including market practices and conditions, pricing, supply, and demand." By comparison, an economic expert typically opines "on the anticompetitive effects, or lack thereof, of a reviewable practice and/or the relevant geographic and product market" (Antonio Di Domenico, *Competition Enforcement and Litigation in Canada*, (Toronto: Emond Montgomery Publications Limited, 2019) at p 753). However, in both cases, the expert provides evidence based on his or her qualifications and the evidence on the record.

[122] The Tribunal acknowledges that if an economist has no particular knowledge of an industry, he or she may not be qualified to provide expert opinion on that industry specifically. However, the Tribunal is aware of no authority standing for the proposition that simply describing an expert as an "economist" disqualifies him or her from providing evidence on an industry, as would an industry expert. What is relevant to determine whether an expert can properly testify on a given subject area is whether he or she has the required knowledge and experience outside the experience and knowledge of the trier of fact. This is what will determine whether he or she is a properly qualified expert (*Bingley* at para 19; *Mohan* at p 25).

[123] As such, if an economist has expertise in a particular industry that goes beyond the experience and knowledge of the Tribunal, nothing prevents that witness from providing expert opinion with regards to that industry, provided the other *Mohan* requirements are met. Whether the expert is labelled as an industry expert or an economist is not the determinative factor. It is the extent and nature of the expertise that counts.

[124] The Tribunal adds that the absence of econometric analysis or quantitative evidence is certainly not enough to disqualify Dr. Tretheway as an "economic" expert. Any expert, including economists, can provide qualitative evidence or quantitative evidence. Both types of evidence can be relied on by the Tribunal (*TREB FCA* at para 16; *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp Trib 7 ("***TREB CT***") at paras 470-471), and the same test applies whether the expert evidence provided is quantitative or qualitative. That test is whether the evidence provided is sufficiently clear and convincing to meet the balance of probabilities standard.

[125] That being said, the fact that Dr. Tretheway's expert evidence was found to be admissible on questions 2 and 3 of his report does not mean that there were no problems or issues with his analysis or with the evidence he relied on for his conclusions. However, this goes to the reliability and weight of his expert evidence, and will be addressed below in the Tribunal's reasons.

[126] More generally, the Tribunal did not find Dr. Tretheway to be as reliable and helpful as the two other expert witnesses. The Tribunal had concerns about Dr. Tretheway's impartiality and independence in light of his close business relationship with VAA. In addition, Dr. Tretheway was not as familiar as one would have expected with the evidence from airlines and in-flight caterers in this proceeding. The Tribunal also found Dr. Tretheway to be somewhat evasive and less forthcoming at several points during his cross-examination, and to have made unsupported, speculative assertions at various points in his written expert report and in his testimony. Where his evidence was inconsistent with that provided by Dr. Niels, Dr. Reitman or lay witnesses, the Tribunal found his evidence to be less persuasive, objective and reliable.

C. Documentary evidence

[127] Attached at Schedule "B" is a list of the exhibits that were admitted in this proceeding.

V. PRELIMINARY ISSUES

[128] Two preliminary matters must be addressed before dealing with the main issues in dispute in the Commissioner's Application. They are: (1) the admissibility of certain evidence from Air Transat and Jazz; and (2) VAA's concerns with late amendments allegedly made to the Commissioner's pleadings in his closing submissions. Each will be dealt with in turn.

A. Admissibility of evidence

[129] As indicated in Section II.D above, in a motion prior to the hearing, VAA challenged the admissibility of evidence to be given by two of the Commissioner's witnesses, Ms. Stewart from Air Transat and Ms. Bishop from Jazz, on the ground that it constituted improper lay opinion evidence and/or inadmissible hearsay. In the *Admissibility Decision*, the Tribunal deferred its ruling on the admissibility of this evidence until after Ms. Stewart and Ms. Bishop had testified at the hearing, noting that their testimonies will provide a better factual context to assist the Tribunal in assessing the disputed evidence.

[130] In her witness statement and in her testimony, Ms. Stewart stated that in 2015, Air Transat completed a RFP process for in-flight catering ("**Air Transat 2015 RFP**"). She then testified as to the savings allegedly realized or expected to be realized by Air Transat at airports across Canada, except for YVR, following a change from Gate Gourmet to Optimum. She also testified as to increased expenses allegedly incurred or expected to be incurred by Air Transat at YVR as a result of its inability to make a similar switch at that Airport.

[131] In her witness statement and in her testimony, Ms. Bishop stated that in 2014, Jazz conducted a RFP process for in-flight catering ("**Jazz 2014 RFP**"). Ms. Bishop testified as to Jazz's expected savings associated with switching away from Gate Gourmet to Newrest and Sky Café at YVR and eight other airports, based on an internal bid evaluation document attached as Exhibit 10 to her witness statement. She also testified as to the actual savings that would have occurred at YVR if Jazz had switched from Gate Gourmet to **[CONFIDENTIAL]**, based on a pricing analysis of actual flights volume, attached as Exhibit 13 to her witness statement.

[132] VAA claimed that the conclusions reached by both Ms. Stewart and Ms. Bishop, with respect to their evidence of alleged missed savings and increased expenses at YVR, are not within their personal knowledge and that they did not perform the calculations underlying their testimonies. VAA therefore submitted that their evidence on these issues constitutes inadmissible lay opinion evidence and/or inadmissible hearsay. At the hearing, VAA's allegations of inadmissible hearsay evidence essentially related to Ms. Bishop's reliance on Exhibits 10 and 13 of her witness statement. VAA relied on the usual civil rules of evidence in support of its position.

[133] The Tribunal does not agree with VAA. Having heard the testimonies of Ms. Stewart and Ms. Bishop, and after having cautiously reviewed their evidence, the Tribunal finds that the evidence of both Ms. Stewart and Ms. Bishop is admissible. The concerns raised by VAA with respect to their evidence go to the probative value and to the weight that the Tribunal should give to it, not to admissibility. The Tribunal will address those issues of reliability and weight later in its decision.

(1) Rules of evidence at the Tribunal

[134] At the outset, the objections voiced by VAA regarding the witness statements of Mss. Stewart and Bishop implicate the rules of evidence to be applied by the Tribunal in its proceedings, and give rise to the need for the Tribunal to clarify its approach in that respect.

[135] In *Canadian Recording Industry Association v Society of Composers, Authors & Music Publishers of Canada*, 2010 FCA 322 ("***SOCAN***"), the FCA confirmed the general principle that the strict rules of evidence do not apply to administrative tribunals (*SOCAN* at para 20). In that decision, the FCA stated that no specific exemption in legislation is needed for an administrative tribunal to deviate from the formal rules of evidence, as long as nothing in its enabling statute expresses contrary intentions.

[136] This was recognized in the *FCA Privilege Decision* where, in a matter involving the Tribunal, the FCA reiterated that the law of evidence before administrative decision-makers "is not necessarily the same as that in court proceedings" (*FCA Privilege Decision* at para 25).

However, the FCA enunciated an important caveat: "the rigorous evidentiary requirements in court proceedings do not necessarily apply in certain administrative proceedings: it depends on the text, context and purpose of the legislation that governs the administrative decision-maker" [emphasis added] (*FCA Privilege Decision* at para 87). As such, an administrative decision-maker's power to admit or exclude evidence "is governed exclusively by its empowering legislation and any policies consistent with that legislation" (*FCA Privilege Decision* at para 25).

[137] In *Pfizer Canada Inc v Teva Canada Limited*, 2016 FCA 161 ("***Pfizer Canada***"), the FCA also cautioned that the increased flexibility in rules of evidence that has developed in courts does not mean that a court or an administrative tribunal can depart from the rules of evidence at its leisure. In what can be considered as *obiter* comments (since the FCA was dealing with a Federal Court decision), the FCA had indicated that legislative authority is required in order for an administrative decision-maker to depart from the rules of evidence, such as the hearsay rule (*Pfizer Canada* at para 88):

> It is true that some administrative decision-makers can ignore the hearsay rule […]. But that is only because legislative provisions have explicitly or implicitly given them the power to do that. Absent a specific legislative provision speaking to the matter, all courts must apply the rules of evidence, including the hearsay rule.
>
> [citations omitted]

[138] It is well accepted that the Tribunal has flexible rules of procedure and is master of its own procedure. The Tribunal is specifically directed, by subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp) ("**CT Act**"), to deal with proceedings before it "as informally and expeditiously as the circumstances and considerations of fairness permit." The same wording is used in subsection 2(1) of the *Competition Tribunal Rules*, SOR/2008-141 ("**CT Rules**").

[139] However, contrary to many other administrative tribunals (see for example: *Transportation Appeal Tribunal of Canada Act*, SC 2001, c 29 at subsection 15(1) or *Canadian Human Rights Act*, RSC 1985, c H-6 at subsection 48.3(9)), there is no specific provision, whether in the CT Act or in the CT Rules, relaxing the rules of evidence to be applied by the Tribunal. Nor is there a provision explicitly or implicitly stating that the Tribunal is not bound by the ordinary rules of evidence in conducting matters before it. True, there are provisions in the CT Rules dealing with the tendering of evidence at the hearing, witness statements and expert evidence (e.g., CT Rules at sections 71-80). But, to borrow the words of the FCA in *Pfizer Canada*, there is no specific legislative provision speaking to evidentiary rules before the Tribunal. Put differently, while subsection 9(2) of the CT Act and Rule 2 of the CT Rules direct the Tribunal to have a flexible approach to its proceedings, no specific provisions in those enabling legislation and regulation direct the Tribunal to adopt flexible rules of evidence.

[140] As the Tribunal stated in *B-Filer* in the context of admissibility of expert evidence, the direction couched in subsection 9(2) of the CT Act is not sufficient to preclude the general application of the usual civil rules of evidence in Tribunal proceedings, especially when those

evidentiary rules have evolved, at least in part, so as to ensure fairness (*B-Filer* at para 258). Indeed, in many cases, the Tribunal has effectively followed the ordinary rules of evidence. For example, in *B-Filer*, the Tribunal stated that the principles of evidence applicable to court proceedings also applied to the Tribunal in the context of its assessment of the admissibility of expert evidence (*B-Filer* at para 257). In *Imperial Brush*, the Tribunal decided to strike hearsay evidence of a witness who simply repeated observations of others regarding the effectiveness of a product, on the basis that it did not meet the requirements of reliability and necessity, thus applying the principled approach governing this evidentiary rule (*Imperial Brush* at para 13). Similarly, in *Canada Pipe 2003*, the Tribunal applied the *Mohan* factors to strike a witness's affidavit on the basis that it was "not necessary and contribute[d] nothing to the determination of the issues" (*Canada Pipe 2003* at para 36).

[141] The Tribunal also underscores that the legislative history of the Tribunal, and its enabling legislation, reflect an intention to judicialize, to a substantial degree, the processes of the Tribunal. This is notably reflected in: the Tribunal's status as a "court of record" by virtue of subsection 9(1) of the CT Act; the presence of judicial members who, as Federal Court judges, have the necessary expertise to deal with evidentiary questions; the requirement that a judicial member preside over the Tribunal's hearings; and appeal rights to the FCA as if a decision of the Tribunal was a judgment of the Federal Court (*B-Filer* at para 256). In addition, subsection 9(2) of the CT Act imposes a specific limit on the Tribunal's overall flexibility, as it provides that "[a]ll proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit" [emphasis added]. Furthermore, it has been repeatedly recognized in recent decisions that the judicial-like nature of the Tribunal, and the important impact that its decisions can have on a party's interests, mean that the Tribunal must act with the highest degree of concern for procedural fairness: "[t]he Tribunal resides very close to, if not at, the 'judicial end of the spectrum', where the functions and processes more closely resemble courts and attract the highest level of procedural fairness" (*FCA Privilege Decision* at para 29; *CT Privilege Decision* at para 169).

[142] In *B-Filer*, the Tribunal stated that the language of subsection 9(2) of the CT Act is "consistent with the fact that the Tribunal is not precluded from departing from a strict rule of evidence when it considers that to be appropriate" (*B-Filer* at para 258). The Tribunal considers that this general principle remains valid. However, considering the recent decisions of the FCA in *Pfizer Canada* and *FCA Privilege Decision*, the significance that the legislative framework places on the rules of fairness, and the absence of specific provisions allowing the Tribunal to depart from the ordinary rules of evidence, the Tribunal is of the view that the range of circumstances where it will be appropriate to adopt more relaxed rules of evidence in its proceedings is now more narrow. Having regard to those considerations, a more cautious approach needs to be favoured. In short, the Tribunal considers that in the absence of an agreement between the parties, it must adhere more strictly and more closely to the usual rules of evidence applied in court proceedings. This is especially the case with respect to evidentiary rules that appear to be anchored in a concern for procedural fairness.

[143] As such, absent consent, the Tribunal will be reluctant to depart from the regular and usual rules of evidence when the underlying rationale for the evidentiary rules is procedural fairness, as is the case for the hearsay rule or for the rules governing expert evidence (*Pfizer Canada* at paras 95-98; *Imperial Brush* at para 13). In the same vein, the more critical the

evidence will be and the more it will go to the core of the issue before the Tribunal, the more closely the Tribunal will adhere to the rules of evidence. When applying other evidentiary rules that are not based on procedural fairness, the Tribunal may be prepared to be more flexible (*FCA Privilege Decision* at para 87), considering that regular admissibility rules have been increasingly liberalized by the courts (*Pfizer Canada* at para 83).

[144] In the case at hand, even considering and applying the ordinary civil rules of evidence governing lay opinion evidence and hearsay evidence, the Tribunal is satisfied that the evidence of Mss. Stewart and Bishop disputed by VAA is admissible.

(2) Lay opinion evidence

[145] Turning first to VAA's argument on lay opinion evidence, the general rule is that a lay witness may not give opinion evidence but may only testify to facts within his or her knowledge, observation and experience (*White Burgess* at para 14; *TREB FCA* at para 78). The main rationale for excluding lay witness opinion evidence is that it is not helpful to the decision-maker and may be misleading (*White Burgess* at para 14). This principle is reflected in Rules 68(2) and 69(2) of the CT Rules, which both state that "[u]nless the parties otherwise agree, the witness statements shall include only fact evidence that could be given orally by the witness together with admissible documents as attachments or references to those documents."

[146] The SCC has however recognized that "[t]he line between 'fact' and 'opinion' is not clear" (*Graat v The Queen*, [1982] 2 SCR 819, 144 DLR (3d) 267 at p 835). The courts have thus developed greater freedom to receive lay witnesses' opinions when the witness has personal knowledge of the observed facts and testifies to facts within his or her observation, experience and understanding of events, conduct or actions. In that respect, the FCA recently stated, again in the context of a Tribunal proceeding, that opinion from a lay witness is acceptable "where the witness is in a better position than the trier of fact to form the conclusions; the conclusions are ones that a person of ordinary experience can make; the witnesses have the experiential capacity to make the conclusions; or where giving opinions is a convenient mode of stating facts too subtle or complicated to be narrated as facts" (*TREB FCA* at para 79). As such, when a witness has personal knowledge of observed facts such as a company's relevant, real world, operations, its evidence may be accepted by a court or the Tribunal even if it is opinion evidence (*TREB FCA* at para 80; *Pfizer Canada* at paras 105-108).

[147] Furthermore, it has been recognized that lay witnesses can provide opinions about their own conduct and their own business (*TREB FCA* at paras 80-81). The FCA however specified that there are limits to such lay opinion evidence: "lay witnesses cannot testify on matters beyond *their own conduct* and that of *their businesses* in the 'but for' world" and they "are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the 'but for' world, nor do they have the experiential competence" [emphasis in original] (*TREB FCA* at para 81).

[148] In other words, when a witness had "an opportunity for observation" and was "in a position to give the Court real help," the evidence may be admissible and the real issue will be the assessment of weight (*Imperial Brush* at para 11). In the same vein, the SCC has stated, in

the context of expert opinion evidence, that the lack of an evidentiary basis affects the weight to be given to an opinion, not its admissibility (*R v Molodowic*, 2000 SCC 16 at para 7; *R v Lavallée*, [1990] 1 SCR 852, 108 NR 321 at pp 896-897).

[149] In this case, the Tribunal is satisfied that both Mss. Stewart and Bishop had the required personal knowledge, observation and experience to testify on the issues challenged by VAA.

[150] Ms. Stewart was responsible for all procurement activities regarding in-flight catering at Air Transat from 2014 to 2017, including the Air Transat 2015 RFP process. She also set out the background information and testified about her role in this RFP process, and she notably stated that she had "personal knowledge of the matters" discussed in her evidence. In her testimony, it was clear that Ms. Stewart was testifying about Air Transat's own business, that she was intimately involved in the RFP process, and that she had the experiential competence to help the panel.

[151] Turning to Ms. Bishop, she had day-to-day responsibility for the Jazz 2014 RFP process and provided strategic direction to the 2014 RFP process team. She also mentioned that she conducted monthly reviews to maintain targets and costs in all areas and oversaw the budget and billings for all in-flight catering. Furthermore, she provided some background information with respect to the missed savings and increased expenses allegedly incurred by Jazz at YVR. Like Ms. Stewart, Ms. Bishop also stated that she had "personal knowledge of the matters" discussed in her evidence.

[152] With regards to Ms. Bishop's statements about the expected savings from switching away from Gate Gourmet, she had personal knowledge of the RFP bid evaluation and of the actual savings that would have resulted from switching away from Gate Gourmet at YVR. As the director of in-flight catering services and on-board products at Jazz, she ran and oversaw the RFP process and supervised a team of people involved in the process. She attended meetings and calls with the bidders and reviewed all the supporting documentation. Her testimony demonstrated that the bid evaluation was prepared at her request and that she was familiar with how the bids were evaluated. More specifically, Exhibit 10 was prepared at her request by three persons directly reporting to her (i.e., Mr. Keith Lardner, Mr. Trevor Umlah and Ms. Pamela Craig), in order to evaluate the bids that were received and to determine who would be awarded the stations at stake. In her testimony before the Tribunal, Ms. Bishop was able to discuss the document. Similarly, Exhibit 13 was prepared by a person reporting to her (i.e., Ms. Craig), at her request, in order to determine the foregone in-flight catering cost savings or losses and to do the pricing analysis. While Ms. Bishop "did not get into the weeds" of the numbers, she was familiar enough with both Exhibits to testify extensively about their contents and to explain how the analyses contained in them were performed (Transcript, Conf. B, October 3, 2018, at p 128).

[153] The Tribunal acknowledges that Ms. Bishop confirmed that she did not prepare Exhibits 10 and 13 herself and did not directly perform the calculations that underlay the conclusions reached in those two Exhibits. However, the Tribunal considers that the fact that she could not reconcile many figures or explain the discrepancies with other numbers cited solely affects the weight to be given to the evidence, not its admissibility.

[154] Having heard the two witnesses, their examination by counsel for the Commissioner, their cross-examination by counsel for VAA and the questioning by the panel, the Tribunal is not persuaded that the evidence disputed by VAA was not within the respective knowledge, understanding, observation or experience of Mss. Stewart and Bishop, or that those witnesses did not observe the facts contained in their respective witness statements with respect to the disputed evidence. There is therefore no ground to declare any portion of their evidence inadmissible as improper lay opinion evidence.

(3) Hearsay evidence

[155] VAA further argued that Ms. Bishop's evidence concerning Exhibits 10 and 13 constitutes inadmissible hearsay.

[156] It is not disputed that hearsay evidence is presumptively inadmissible. The essential defining features of hearsay are "(1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant" (*R v Khelawon*, 2006 SCC 57 ("***Khelawon***") para 35). As such, statements that are outside the witness' personal knowledge are hearsay (*Canadian Tire Corp Ltd v PS Partsource Inc*, 2001 FCA 8 at para 6). Moreover, documentary evidence that is adduced for the truth of its contents is hearsay, given that there is no opportunity to cross-examine the author of the document contemporaneously with the creation of the document (Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 5th edition (Toronto: LexisNexis Canada, 2018) at §18.9). The fundamental objection to hearsay evidence is the inability to test the reliability of hearsay statements through proper cross-examination. It is a procedural fairness concern.

[157] The presumptive inadmissibility of hearsay may nevertheless be overcome when it is established that what is being proposed falls under a recognized common law or statutory exception to the hearsay rule. For example, business records are a recognized exception under both section 30 of the *Canada Evidence Act*, RSC 1985, c C-5 and the common law (*Cabral v Canada (Citizenship and Immigration)*, 2018 FCA 4 at paras 25-26). Hearsay evidence may also be admissible when it satisfies the twin criteria of "necessity" and "reliability" under the principled approach developed by the SCC and the courts (*R v Bradshaw*, 2017 SCC 35 ("***Bradshaw***") at para 23; *R v Mapara*, 2005 SCC 23 at para 15). These hearsay exceptions are in place to facilitate the search for truth by admitting into evidence hearsay statements that are reliably made or can be adequately tested.

[158] Under the principled approach, the onus is on the person who seeks to tender the evidence to establish necessity and reliability on a balance of probabilities (*Khelawon* at para 47). "Necessity" relates to the relevance and availability of the evidence. The "necessity" requirement is satisfied where it is "reasonably necessary" to present the hearsay evidence in order to obtain the declarant's version of events. "Reliability" refers to "threshold reliability," which is for the trier of fact to determine. Threshold reliability "can be established by showing that (1) there are adequate substitutes for testing truth and accuracy (procedural reliability) or (2) there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability)" (*Bradshaw* at para 27). The function of the trier of fact is to determine whether the particular hearsay statement exhibits sufficient indicia of necessity and

reliability so as to afford him or her a satisfactory basis for evaluating the truth and trustworthiness of the statement.

[159] The principles of necessity and reliability are not fixed standards. They are fluid and work together in tandem. If specific evidence exhibits high reliability, then necessity can be relaxed; similarly, if necessity is high, then less reliability may be required.

[160] In this case, having heard the testimony of Ms. Bishop, the Tribunal is satisfied that Ms. Bishop's evidence with respect to Exhibits 10 and 13 of her witness statement meets the criteria of necessity and reliability and does not amount to inadmissible hearsay. Even assuming that the documents constitute hearsay evidence (as Ms. Bishop was not the author of these tables), the Tribunal notes that they were prepared and recorded in the usual and ordinary course of business, in the context of the Jazz 2014 RFP process, at the request of Ms. Bishop. In her supervising capacity, Ms. Bishop had sufficient personal knowledge and understanding of their contents. The testimony and cross-examination of Ms. Bishop at the hearing demonstrate that VAA had the required opportunity to test the truth and accuracy of the two tables relied on by Ms. Bishop in support of her testimony regarding alleged missed savings and increased expenses at YVR. In addition, the Tribunal finds that this evidence was relevant, and that Ms. Bishop was sufficiently familiar with it to afford the panel a satisfactory basis for evaluating the truth of the evidence. Stated differently, the circumstances in which the documents were created give the panel the necessary comfort that they are sufficiently reliable to be admitted in evidence. Those circumstances offered a sufficient basis to assess the documents' trustworthiness and accuracy, namely, through the testimony and cross-examination of Ms. Bishop.

(4) Conclusion

[161] In light of the foregoing, the Tribunal concludes that the portions of Ms. Stewart's and Ms. Bishop's evidence disputed by VAA are not inadmissible. However, as will be detailed in Section VII.E below in the discussion pertaining to paragraph 79(1)(*c*), the Tribunal has serious concerns with respect to the weight to be given to this particular evidence in light of the numerous inaccuracies and discrepancies in the figures and analyses that were revealed on cross-examination.

B. Alleged late amendments to pleadings

[162] The second preliminary issue relates to late amendments allegedly made by the Commissioner to his pleadings.

[163] In his closing submissions, counsel for the Commissioner advanced the alternative argument that a bundled "In-flight Catering" market, comprising both Catering and Galley Handling services, may be relevant for the purposes of his abuse of dominance allegations. Counsel for VAA objected and argued that the Commissioner very clearly pleaded two and only two relevant markets in his Application, namely, the Airside Access Market and the Galley Handling Market. Counsel for VAA raised an issue of procedural fairness, and submitted that liability under section 79 could only be imposed on VAA if the Tribunal finds that Galley

Handling, not In-flight Catering, is the relevant market, as the latter was not a relevant market pleaded by the Commissioner.

[164] Counsel for VAA also took issue with the fact that, in his closing submissions and final argument, the Commissioner referred to a third ground demonstrating the existence of VAA's PCI in the relevant market. In support of his position on VAA's PCI, the Commissioner pointed to evidence showing that VAA would earn additional aeronautical revenues from the new flights or the incremental additional flights that it would be able to attract as a result of avoiding a disruption of competition in the relevant market and ensuring a stable and competitive supply of in-flight catering services. Counsel for VAA argued that the Commissioner has only pleaded two facts supporting VAA's competitive interest in the Galley Handling Market at YVR, namely, the Concession Fees and the land rents it receives from in-flight catering firms. Counsel for VAA thus submitted that the Commissioner cannot suddenly rely on a third fact in final argument, as it was not part of his pleadings. VAA therefore asked the Tribunal to disregard any attempt by the Commissioner to prove a PCI based on facts other than the Concession Fees and the land rents that were pleaded.

[165] The Tribunal does not agree with either of these two objections advanced by VAA.

(1) Analytical framework

[166] It is well established that, as long as there is no "surprise" or "prejudice" to the parties when an issue that was not clearly pleaded is raised, a court or a decision-maker like the Tribunal can issue a decision on a question that does not fit squarely into the pleadings. In other words, a court or the Tribunal may raise and decide on a new issue if the parties have been given a fair opportunity to respond to it. A breach of procedural fairness will only arise if considering a new issue inflicts prejudice upon a party.

[167] In *Tervita Corporation v Commissioner of Competition*, 2013 FCA 28 ("***Tervita FCA***"), rev'd on other grounds 2015 SCC 3, the FCA provided a useful summary of this principle, at paragraphs 71-74:

> [71] In the normal course of judicial proceedings, parties are entitled to have their disputes adjudicated on the basis of the issues joined in the pleadings. This is because when a trial court steps outside the pleadings to decide a case, it risks denying a party a fair opportunity to address the related evidentiary issues. […]
>
> [72] However, this does not mean that a trial judge can never decide a case on a basis other than that set out in the pleadings. In essence, a judicial decision may be reached on a basis which does not perfectly accord with the pleadings if no party to the proceedings was surprised or prejudiced. […]
>
> [73] A trial judge must decide a case according to the facts and the law as he or she finds them to be. Accordingly, there is no procedural unfairness where a trial judge, on his or her own initiative or at the initiative of one of the parties, raises and decides an issue in a proceeding that does not squarely fit within the

> pleadings, as long as, of course, all the parties have been informed of that issue and have been given a fair opportunity to respond to it. […]
>
> [74] These principles also apply to contested proceedings before the Tribunal. It acts as a judicial body: section 8 and subsection 9(1) of the *Competition Tribunal Act*. Though the proceedings before the Tribunal are to be dealt with informally and expeditiously, they are nevertheless subject to the principles of procedural fairness: subsection 9(2) of the *Competition Tribunal Act*. […]
>
> [citations omitted]

[168] Furthermore, in order to analyze whether there is a "new issue," courts have considered all aspects of the trial and have not limited themselves to what was pleaded in the statement of claim and other pleadings. This includes the evidence adduced during the hearing and the arguments made at the hearing, as long as the parties have been given a fair opportunity to respond.

(2) Expansion of relevant markets

[169] In this case, the Tribunal has no hesitation to conclude that a bundled "In-flight Catering" market was a live issue throughout the case at hand, even though it was not specifically pleaded by the Commissioner.

[170] Although the Commissioner did not identify a market broader than Galley Handling services in his initial pleadings, an expanded market comprised of Catering and Galley Handling was put in play by VAA in its Amended Response to the Commissioner's Application, as well as in its Concise Statement of Economic Theory and in its final written argument. Moreover, in his Reply to VAA's initial pleadings, the Commissioner asserted that "VAA has engaged in and continues to engage in an abuse of dominant market position relating to the supply of In-flight Catering at the Airport" [emphasis added] (Commissioner's Reply, at para 19), which he defined to include both Galley Handling and Catering services.

[171] The issue of a bundled or combined "In-flight Catering" market was also discussed at various stages in the evidentiary portion of the hearing. In his first report, Dr. Niels considered the issue of separate or bundled Galley Handling and Catering markets. Dr. Niels opined that it did not matter how one delineates the downstream markets because the essential input of airside access was required no matter what definition was adopted to be able to put food on an airplane. He therefore left the issue open. During the hearing, Dr. Niels was explicitly cross-examined on the issue of whether the relevant product market is for Galley Handling and Catering bundled together, rather than each constituting a separate relevant market.

[172] In addition, Dr. Reitman recognized the issue and commented on it in his report, ultimately concluding that if the Commissioner's definitions are accepted, he viewed Galley Handling and Catering services as being in separate markets.

[173] Moreover, as a result of the differences between the parties concerning the linkage between Galley Handling and Catering services, the panel explicitly requested the parties to clarify the legal and factual link between those complementary services, at the outset of the hearing of this Application. The Tribunal further observes that on discovery, VAA asked whether or not the Commissioner considered "catering services provided to airlines" to be a relevant market and whether the contention was that VAA had restricted competition in that market. The Commissioner's representative replied in the negative to both of those questions (Exhibits R-190, CR-188 and CR-189, Brief of Read-Ins from the Examinations for Discovery and Answers to Undertakings of Kevin Rushton (Volume 1 of 3), at pp 129-130).

[174] In summary, VAA cannot say that it was taken by surprise by the relevancy of this expanded "In-flight Catering" market. Rather, it actually maintained that some form of a bundled "In-flight Catering" market, including both the preparation of food and its loading/unloading onto the aircraft, was the relevant market based on the evidence provided by the market participants. In the circumstances, the Tribunal is satisfied that VAA had a fair opportunity to address the issue of whether the relevant market in which Galley Handling services are supplied includes some or all Catering services, and that VAA was not prejudiced by the fact that the Commissioner did not plead such a broader relevant market in the alternative to a relevant market consisting of Galley Handling alone (*Tervita FCA* at paras 72-73; *Husar Estate v P & M Construction Limited*, 2007 ONCA 191 at para 44).

[175] The cases cited by VAA in support of its objection can be distinguished. First, the *Kalkinis (Litigation Guardian of) v Allstate Insurance Co of Canada* (1998), 41 OR (3d) 528, 117 OAC 193 (ONCA) matter dealt with a failure to plead a particular "cause of action." In the present case, VAA does not argue that a cause of action has not been pleaded by the Commissioner but complains about the different definitions of the relevant product market proposed by the Commissioner. In the case at hand, VAA has always maintained that the Commissioner's distinction between Catering and Galley Handling was artificial and arbitrary. In fact, it has proposed that the two functions of preparing the food and loading it into the aircraft are inextricably linked and should be in the same product market, whether that be a "Premium Flight Catering" market or a "Standard Flight Catering" market. The outcome of a Tribunal's finding in favour of a bundling of the Catering and Galley Handling components has been a real possibility based on the evidence and argument advanced by VAA itself.

[176] VAA also cites the FCA's decision in *Weatherall v Canada (Attorney General)*, [1989] 1 FC 18, 41 CRR 62 at pages 30-35. However, this precedent is not of much assistance to VAA as it relates to an issue (i.e., the constitutional validity of a particular regulatory provision) that the appellant had not had the opportunity to address at trial as it was not put in play at all. Again, in the present case, whether or not the relevant market should be defined in terms of a bundled Catering and Galley Handling market was in issue throughout the hearing before the Tribunal.

[177] Finally, the Tribunal observes that it is aware of no case in which the proposition advanced by VAA has been accepted based on the fact that the initial pleading pertaining to a relevant market was subsequently modified, whether to a smaller or larger market.

(3) Additional ground for VAA's PCI

[178] Turning to the additional fact raised by the Commissioner in his closing argument to anchor VAA's competitive interest, this is simply evidence that emerged during the hearing and which arose from the expert opinion provided by VAA's own witness, Dr. Tretheway.

[179] It bears reiterating that a trier of fact like the Tribunal can not only decide a case on a basis other than those set out in the pleadings, but it can also rely on all the facts in evidence before it, even when those particular facts have not been specifically mentioned in the pleadings. In other words, the Tribunal is allowed to make findings arising directly from the evidence and the final submissions of the parties at trial. In fact, it routinely happens in hearings before the courts or the Tribunal that examinations or cross-examinations reveal the existence of evidence supporting the position of one party, and that was not necessarily contemplated in the pleadings. Nothing prevents a party, a court or the Tribunal from relying on additional elements revealed by the evidence in support of an argument (*Tervita FCA* at paras 73-74).

[180] Once again, it is not disputed that the question of VAA's competitive interest in the Galley Handling Market has been a central issue in this proceeding and the Commissioner did not raise a "new issue" unknown to VAA by pointing out to other elements in the evidence supporting, in his view, the existence of VAA's PCI. The Commissioner simply made reference to another piece of relevant evidence in the record which supports his position on this front. Moreover, this evidence arose from one of VAA's own witnesses. The Tribunal is aware of no evidentiary rule or principle that could lead it to disregard or set aside such evidence in its assessment of VAA's PCI.

[181] The Tribunal considers that what occurred in this case is far different from instances where a party raised a new issue or argument in respect of which the other side did not have an opportunity to respond. Referring to new or unexpected evidence in the record does not amount to raising a new issue and certainly does not raise a potential breach of procedural fairness.

(4) Conclusion

[182] For all the foregoing reasons, the Tribunal concludes that there is no merit to VAA's objections regarding the Commissioner's closing submissions.

VI. ISSUES

[183] The following broad issues are raised in this proceeding:

- Does the RCD apply to exempt or shield VAA from the application of section 79 on the basis that the impugned conduct was undertaken pursuant to a validly enacted legislative or regulatory mandate?;

- What is or are the relevant market(s) for the purpose of this proceeding?;

- Does VAA substantially or completely control a class or species of business in any area of Canada, as contemplated by paragraph 79(1)(*a*) of the Act?;

- Has VAA engaged in, or is it engaging in, a practice of anti-competitive acts, as contemplated by paragraph 79(1)(*b*) of the Act? More specifically:

    a. Does VAA have a PCI in the relevant market in which the Commissioner has alleged that competition has been, is being or is likely to be prevented or lessened substantially by a practice of anti-competitive acts?;

    b. Was the "overall character" of VAA's impugned conduct anti-competitive or legitimate? If the latter, does that continue to be the case?;

- Has the impugned conduct had the effect of preventing or lessening competition substantially in the market that is relevant for the purposes of paragraph 79(1)(*c*) of the Act, or is it having or likely to have that effect?;

- What costs should be awarded?

[184] Each of these issues will be discussed in turn.

VII. ANALYSIS

A. Does the RCD apply to exempt or shield VAA from the application of section 79 on the basis that the impugned conduct was undertaken pursuant to a validly enacted legislative or regulatory mandate?

[185] A threshold issue to be determined in this proceeding is whether the RCD can serve to exempt or shield VAA from the application of section 79. On this issue, the burden is on the party relying on the RCD, namely, VAA.

[186] For the reasons set forth below, the Tribunal concludes that, as a matter of law, the RCD does not apply to section 79 of the Act, as this provision does not contain the "leeway" language required to allow the doctrine to be invoked and the rationales which supported the development of the doctrine are not present in respect of section 79. Furthermore, as a matter of fact in this case, no validly enacted statute, regulation or subordinate legislative instrument required, directed or authorized VAA, expressly or by necessary implication, to engage in the impugned conduct. Moreover, even if a federal regulation or other subordinate legislative instrument had required, directed or authorized the impugned conduct, the RCD would not have been available because the conflict between such subordinate instrument and the Act would have to be resolved in favour of the Act.

(1) The RCD

[187] At its origin, the RCD began as a common law doctrine that provided a form of immunity from certain provisions in the precursors of the Act for persons alleged to have contravened these provisions. The doctrine evolved to be applied where the conduct giving rise to the alleged contravention was required, directed or authorized, expressly or impliedly, by other validly enacted legislation.

[188] In practice, the RCD developed as a principle of statutory interpretation to resolve an apparent conflict between criminal provisions of the federal competition legislation (i.e., the Act and its predecessor statutes) and validly enacted provincial regulatory regimes (*Hughes v Liquor Control Board of Ontario*, 2018 ONSC 1723 ("***Hughes***") at para 202, aff'd 2019 ONCA 305; *Law Society of Upper Canada v Canada (Attorney General)* (1996), 28 OR (3d) 460, 134 DLR (4th) 300 ("***LSUC***") at p 468 (ONSC)). The general purpose of the doctrine was to avoid "criminalizing conduct that a province deems to be in the public interest" (*Hughes v Liquor Control Board of Ontario*, 2019 ONCA 305 ("***Hughes CA***") at para 38).

[189] In that context, the principle underlying the RCD is that "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes" (*Garland v Consumers' Gas Co*, 2004 SCC 25 ("***Garland***") at para 76, quoting *Attorney General of Canada v Law Society of British Columbia*, [1982] 2 SCR 307, 72 OR (3d) 80 ("***Jabour***") at p 356).

[190] There are two general preconditions to the application of the RCD. First, Parliament must have indicated, either expressly or by necessary implication, a clear intention to grant "leeway" to those acting pursuant to a valid provincial regulatory scheme (*Garland* at para 77; *Hughes* at paras 204-205). In other words, the language of the federal legislation must leave room for the provincial legislation to operate and for conduct that otherwise would be prohibited to escape the operation of the prohibition (*Hughes CA* at para 16; *Hughes* at para 200). Such leeway has been found to have been provided by words such as "in the public interest" or "unduly" (preventing or lessening competition) contained in the federal legislation in question (*Garland* at para 75; *Jabour* at p 348; *R v Chung Chuck*, [1929] 1 DLR 756, 1 WWR 394 ("***Chung Chuck***") at pp 759-761 (BCCA)). Where such words have been present, the courts have said in various ways that compliance with the edicts of a validly enacted provincial measure can hardly amount to something that is "contrary to the public interest" or to something that is "undue" (*Jabour* at p 354). Conversely, in the absence of such leeway language, the RCD is not available, even in respect of conduct that may advance the public interest, as defined or implicitly contemplated by a province (*Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 ("***PHS***") at paras 54-56).

[191] When it can be determined that the federal enactment, through such leeway language, leaves room for the provincial legislation or the provincially-regulated activity to operate without being criminalized, there is no conflict between the federal criminal enactment and the provincial legislation or regulatory regime (*Hughes* at paras 201, 204). In that sense, the RCD effectively seeks to reconcile federal and provincial jurisdictions to ensure that the Act serves its objectives without interfering with validly enacted provincial regulatory schemes.

[192] Where the requisite leeway language in the federal legislation is found to exist, the analysis must turn to the assessment of the second precondition to the application of the RCD. This precondition requires that the conduct that would otherwise be prohibited by the Act be required, compelled, mandated or at least authorized by validly enacted provincial legislation (*Jabour* at pp 354-355; *Hughes CA* at paras 19-20; *R v Independent Order of Foresters* (1989), 26 CPR (3d) 229, 32 OAC 278 ("***Foresters***") at pp 233-234 (ONCA); *Hughes* at para 220; *Fournier v Mercedes-Benz Canada*, 2012 ONSC 2752 ("***Fournier Leasing***") at para 58; *Industrial Milk Producers Assn v British Columbia (Milk Board)*, [1989] 1 FC 463, 47 DLR (4th) 710 ("***Milk***") at pp 484-485 (FCTD); *LSUC* at pp 467-468).

[193] In this regard, the impugned conduct must be specifically required, directed or authorized, whether "expressly or by necessary implication," by or pursuant to a validly enacted legislative or regulatory language (*Hughes CA* at paras 20-21, 23; *Hughes* at para 200). A general power to regulate an industry or a profession will not suffice (*Jabour* at pp 341-342; *Fournier Leasing* at para 58). Thus, "[i]f individuals involved in the regulation of a market situation use their statutory authority as a springboard (or disguise) to engage in anti-competitive practices beyond what is authorized by the relevant regulatory statutes then such individuals will be in breach of the [Act]" (*Milk* at pp 484-485). In other words, "[s]imply because an industry is regulated does not mean that all anti-competition practices are authorized within that industry" (*Cami International Poultry Incorporated v Chicken Farmers of Ontario*, 2013 ONSC 7142 ("***Cami***") at para 52; see also *R v Canadian Breweries Ltd*, [1960] OR 601, 34 CPR 179 at p 611). This is so even where the power to regulate exists. Unless the power has been exercised by requiring, compelling, mandating or specifically authorizing particular activities, those activities will not benefit from the protection of the RCD.

[194] The level of specificity necessary for the requirement, direction or authorization is not particularly high. In *Jabour*, the enabling provincial legislation did not specifically authorize the law society to prohibit advertising by lawyers and did not contain provisions directly limiting advertising. The SCC nevertheless concluded that the general broad powers and broad mandate the law society had to govern the legal profession in the public interest and to ensure good professional conduct was a sufficient basis to give the law society the power to control and ban advertising by lawyers (*Jabour* at p 341; *Hughes CA* at paras 20, 23, 27). This determination of specificity is highly contextual and will depend on how the particular conduct or activities are regulated, and on the specific wording of the relevant provisions in question.

[195] In determining whether particular conduct or activities have been required, compelled, mandated or authorized, "one must have regard not only for the relevant statutes, but also for the Orders-in-Council and the Regulations" (*Sutherland v Vancouver International Airport Authority*, 2002 BCCA 416 ("***Sutherland***") at para 68). That is to say, the requirement, direction or authorization can come from subordinate legislation. Although this principle was articulated in the context of a discussion of the tort law defence of statutory authority, the Commissioner has not identified a principled basis for excluding it from the scope of the RCD.

[196] The Tribunal observes that, in recent years, the RCD has been extended beyond the area of competition law (*Garland* at paras 76, 78).

[197] It bears underscoring that the RCD essentially developed in the context of alleged contravention of the criminal provisions of the Act and of other federal criminal statutes. Whether the doctrine can be extended to the civil or non-criminal provisions of the Act has remained an open question. In one case, the RCD was applied to prevent an inquiry into allegations that a provincial law society may have engaged in conduct contemplated by various non-criminal provisions of the Act (*LSUC* at pp 463, 474). However, that case proceeded on the basis of the parties' agreement that the RCD could in fact be applied to resolve an apparent conflict between the non-criminal provisions of the Act and validly enacted provincial legislation (*LSUC* at pp 468, 471-472). (The only issues in dispute appear to have been whether the Law Society of Upper Canada's application for a declaration that the Act did not apply to its impugned activities was premature, and whether those activities were in fact authorized, as contemplated by the RCD.) The Tribunal is not aware of any precedents, and the parties have not cited any, where a court has clearly considered and recognized, in a contested proceeding, that the RCD could be applied in the context of the civil provisions of the Act. Conversely, to the Tribunal's knowledge, no case has expressly found that the RCD could not be applied to conduct challenged under the civil provisions of the Act.

[198] In *LSUC*, the effect and explicit intention of the court's ruling to prevent the inquiry from continuing was to invoke the RCD to exempt the impugned conduct from the operation of the Act, rather than to provide a defence. Likewise, in *Society of Composers, Authors & Music Publishers of Canada v Landmark Cinemas of Canada Ltd*, 45 CPR (3d) 346, 60 FTR 161 ("***Landmark***") at p 353 (FCTD), the court applied the RCD to "exempt" an impugned conduct from the operation of the conspiracy provision of the Act. This is how VAA would like the RCD to be applied in this case.

[199] Although some courts have characterized the RCD as an exemption (see e.g., *Waterloo Law Association et al v Attorney General of Canada* (1986), 58 OR (2d) 275, 35 DLR (4th) 751 at p 282; *Foresters* at pp 233-234; *Wakelam v Johnson & Johnson*, 2011 BCSC 1765 ("***Wakelam***") at para 99, rev'd on other grounds, 2014 BCCA 36, leave to appeal to SCC refused, 35800 (4 September 2014)), others maintain that the RCD is or may be a defence (*Milk* at pp 484-485; *Hughes* at para 205). The term "defence" is also employed in subsection 45(7) of the Act.

[200] Notwithstanding that the RCD evolved to address conflicts between the Act and provincial legislation, it has also been applied on at least one occasion to resolve an apparent conflict between two federal statutes (*Landmark* at pp 353-354). Other courts have also entertained or identified the possibility that the RCD may be available in a context where the authorizing legislation is federal (*Rogers Communications Inc v Shaw Communications Inc*, 2009 CanLII 48839, 63 BLR (4th) 102 ("***Rogers***") at para 63 (ONSC); *Fournier Leasing* at para 58; *Hughes* at para 220; *Milk* at p 475). However, one court has observed that the availability of the RCD where the authorizing legislation is federal "is not free from doubt" (*Wakelam* at para 100).

(2) The parties' positions

(a) VAA

[201] Relying on the RCD, VAA submits that section 79 of the Act does not apply to the Practices that the Commissioner is challenging. In this regard, VAA asserts that it has been broadly authorized to engage in the Practices, and in particular the Exclusionary Conduct, both as part of its public interest mandate and pursuant to its specific authority to control access to the airside at YVR.

[202] With respect to its public interest mandate, VAA relies on four distinct sources in support of its RCD claim, namely, (i) VAA's Statement of Purposes, which is set forth in its Articles of Continuance; (ii) the 1992 OIC; (iii) the 1992 Ground Lease; and (iv) the membership of VAA's Board of Directors. In addition, VAA asserts that its not-for-profit nature reinforces its mandate to manage the Airport in the public interest and that this mandate is further reflected in its "mission," its "vision" and its "values." In this latter regard, it states that its mission is to connect British Columbia proudly to the world, its vision is to be a world-class sustainable gateway between Asia and the Americas, and its values are to promote safety, teamwork, accountability and innovation. More broadly, VAA maintains that when an entity acts pursuant to a legislative mandate, as VAA has always done, its actions are deemed to be in the public interest and not subject to the Act.

[203] With specific regard to its control over airside access, VAA also relies on section 302.10 of the Canadian Aviation Regulations.

[204] In its closing submissions and final argument, VAA also submitted that section 79 contains sufficient leeway language to allow the RCD to be available in this case.

[205] The Tribunal pauses to note that VAA's public interest arguments will also be addressed in the context of the assessment of its legitimate business justifications, in Section VII.D.2 below.

(b) The Commissioner

[206] In response to VAA's submissions, the Commissioner advances five principal arguments.

[207] First, he submits that the RCD does not apply to the non-criminal provisions of the Act pertaining to "reviewable matters," which are also sometimes referred to as the Act's "civil" provisions.

[208] Second, he asserts that even if the RCD could be available for some reviewable matters, Parliament did not provide the requisite leeway language in section 79 to enable VAA to avail itself of the RCD in this proceeding.

[209] Third, he maintains that the RCD does not apply where the impugned conduct is alleged to be authorized by federal, as opposed to provincial, legislation.

[210] Fourth, he submits that VAA's conduct has not been required, directed or authorized (expressly or impliedly) by any statute, regulation or subordinate legislative instrument, as contemplated by the RCD jurisprudence.

[211] Finally, the Commissioner states that VAA cannot avail itself of the RCD because it is a corporation (specifically, a not-for-profit corporation), rather than a regulator.

[212] The Tribunal notes that the first two arguments of the Commissioner relate to the first component of the RCD (i.e., the leeway language) whereas the following two concern the second component (i.e., the requiring, directing or authorizing legislation or regulatory regime).

(3) Assessment

(a) Is the required leeway language present?

[213] Throughout this proceeding, VAA's position with respect to the RCD essentially focused on the second precondition to the operation of the RCD, namely, how VAA's public interest mandate (and the legislative and regulatory regime framing it) authorizes it to engage in the Exclusionary Conduct. However, in its closing submissions, VAA also submitted that the wording of section 79 contains the requisite leeway to meet the first precondition to the operation of the doctrine.

[214] In this latter regard, VAA submits that it cannot be found to have engaged in "a practice of anti-competitive acts" because those words contemplate an anti-competitive purpose, which VAA cannot have if it is simply acting pursuant to its public interest mandate. VAA acknowledges that the kind of language that has been held to provide such leeway has been somewhat different, namely, the word "unduly" or the words "in the public interest." However, it maintains that subsection 79(1) contains what can be considered as analogous language.

[215] The Tribunal disagrees. The Tribunal accepts the Commissioner's position that section 79 does not contain the required leeway language. In addition, the Tribunal finds more generally that the principal rationales underlying the development of the RCD do not apply in the context of section 79.

(i) The wording of section 79

[216] In *Garland*, the SCC noted that the leeway language that had always provided scope for the application of the RCD were the words "unduly" or "in the public interest" (*Garland* at paras 75-76). Whenever the federal legislation contained such wording, the courts held that conduct that was required, compelled, mandated or authorized by a validly enacted provincial statute could not be said to be "undue" or to operate "to the detriment or against the interest of the public," as contemplated by the criminal competition law (*Chung Chuck* at pp 759-760; *Re The Farm Products Act (Ontario)*, [1957] SCR 198, 7 DLR (2d) 257 ("***Farm Products***") at pp 205, 239, 258; *Jabour* at pp 348-349, 353-354; *Milk* at pp 476-477). In the absence of those words, or other language indicating that Parliament had, expressly or by necessary implication, intended to

grant leeway to persons acting pursuant to a valid regulatory scheme, the application of the RCD was precluded (*Garland* at paras 75-76, 79).

[217] There is no merit to VAA's argument that its general public interest mandate can serve to shield it from the application of section 79. Acting pursuant to a public interest mandate does not preclude the possibility that an entity such as VAA may take actions that have an exclusionary, disciplinary or predatory purpose. One needs to look no further than *Arriva The Shires Ltd v London Luton Airport Operations Ltd*, [2014] EWHC 64 (Ch) ("***Luton Airport***"), where the English High Court of Justice noted that the defendant airport operator had an incentive to favour one bus service operator to the exclusion of another, because it could thereby derive an important commercial and economic benefit by doing so. The court proceeded to find that the defendant had engaged in conduct that constituted an abuse of dominant position, assuming that it was in fact a dominant entity (*Luton Airport* at para 166).

[218] To the extent that the mandate of an entity such as VAA may include generating revenues to fund capital expenditures, the entity may well consider it to be consistent with that mandate to engage in similar or other conduct that has an exclusionary purpose. This is not to suggest in any way that VAA has done so in relation to the Galley Handling Market. This is a matter that will be assessed later in this decision.

[219] It bears reiterating that, in and of itself, acting in the public interest pursuant to a provincial regulatory regime does not necessarily preclude the application of the Act or exempt a conduct from the operation of criminal law. To trigger the application of the RCD, it is necessary to demonstrate, among other things, that Parliament has "expressly or by necessary implication […] granted leeway to those acting pursuant to a valid provincial regulatory scheme" [emphasis added] (*PHS* at para 55, quoting *Garland* at para 77). Put differently, Parliament's intent to exempt activities that fall within the scope of the RCD from the operation of the Act "must be made plain" in the federal legislation (*R v Jorgensen*, [1995] 4 SCR 55, 129 DLR (4th) 510 at para 118). No such plain intent appears in the language of section 79, whether in paragraph 79(1)(*b*) or elsewhere.

[220] In contrast to the jurisprudence having applied the RCD or to the language contained in subsection 45(7) of the Act, which explicitly preserves the RCD in respect of the offences established by subsection 45(1), there is no language that expressly grants the requisite leeway in relation to subsection 79(1) of the Act.

[221] The situation here is different from what it was when courts were confronted with, on the one hand, criminal competition law provisions that required a demonstration that competition had been prevented or lessened "unduly," and on the other hand, conduct engaged in pursuant to a validly enacted provincial regulatory regime. The courts were able to resolve the conflict by finding that Parliament could not have intended such conduct to be within the scope of the competition law provisions, having regard to the fact that the word "unduly" had been interpreted to mean "improperly, excessively, inordinately" and even "wrongly" (*R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 93 DLR (4th) 36 ("***PANS***") at p 646; *R v Elliott* (1905), 9 CCC 505, OLR 648 at p 520 (ONCA)). In essence, the courts were unwilling to find that conduct required, compelled, mandated or authorized by a valid provincial statute could be characterized as being improper, inordinate, excessive, oppressive or wrong.

[222] The Tribunal further finds no merit to the argument that the required leeway language could flow from the language of paragraph 79(1)(*b*), and that the anti-competitive purpose contemplated by the provision can be said to constitute a type of leeway language analogous to "unduly." For greater certainty, the Tribunal further notes that the required leeway language is not provided by the words "substantially" or "may" in subsection 79(1). The Tribunal acknowledges that the words "undue" and "substantial" both contemplate a degree of importance and convey a sense of seriousness or significance. But the word "unduly" has other connotations that are not associated with the word "substantially." In particular, the latter does not have the nuances that have troubled the courts in the past, namely, those of "improper, inordinate, excessive, oppressive" or "wrong." Another important difference between subsection 79(1) and the former criminal provisions that contained the word "unduly" and that were at issue in the seminal RCD cases is that paragraph 79(1)(*c*) is not based on the same "substratum of values" as those latter provisions (*PANS* at p 634). While "substantially" may arguably be considered as an imprecise flexible word, the Tribunal does not find that it is comparable to the types of words which, according to the SCC in *Garland*, need to be present to indicate an express or implied intention to leave room to those acting pursuant to a valid provincial legislative scheme.

[223] Moreover, it does not appear to the Tribunal that such leeway can be found to exist by necessary implication in section 79. The situation here is different from what it was in cases where the courts had to determine whether activities taken pursuant to a validly enacted provincial statute could be said to operate "to the detriment or against the interest of the public," as was expressly set forth in previous versions of the Act and in its predecessor statute, namely, the *Combines Investigation Act*, RSC 1927, c 26. In those cases, the courts understandably concluded that, by necessary implication, Parliament could be taken to have intended that such activities do not operate to the detriment of the public interest. That conclusion was required in order to resolve what would otherwise have been a conflict between the federal statute, which criminally penalized certain conduct that operated "to the detriment or against the interest of the public," and the provincial legislation, which was deemed to be in the public interest.

[224] In the legal and factual matrix presented in the current case, the conflict between paragraph 79(1)(*b*) and the manner in which VAA interprets its mandate does not require a finding that Parliament intended, by necessary implication, that paragraph 79(1)(*b*) give way to such a mandate. The provisions set forth in paragraph 79(1)(*b*) can be readily interpreted in a manner that permits the various objectives underlying the Act to be largely achieved. Indeed, the presumption that Parliament has enacted legislation that is coherent requires such an interpretation (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2014) ("***Sullivan***") at §11.2). The same applies to the legislation, subordinate legislation and other instruments upon which VAA relies in asserting the RCD.

[225] The Tribunal recognizes that interpreting the Act and VAA's mandate in this way may impose a limit on the ability of VAA and other entities exercising statutory powers to pursue their respective public interest mandates. However, that limit is very narrow and simply precludes such entities from engaging in a practice of anti-competitive acts that prevents or lessens competition substantially, or is likely to do so in the future. By contrast, allowing entities to rely on the RCD to avoid the remedies contemplated by subsections 79(1) and (2) would undermine the operation of "a complete regulatory scheme aimed at eliminating commercial practices which are contrary to healthy competition across the country, and not in a specific

place, in a specific business or industry" [emphasis in original] (*General Motors of Canada Ltd v City National Leasing Ltd*, [1989] 1 SCR 641, 58 DLR (4th) 255 ("***General Motors***") at p 678, quoting *R v Miracle Mart Inc* (1982), 68 CCC (2d) 242, 67 CPR (2d) 80 at p 259 (QCCS)).

[226] The Tribunal pauses to add that, given that "[t]he deleterious effects of anti-competitive practices transcend provincial boundaries" (*General Motors* at p 678), the fact that an entity such as VAA may operate in a highly local environment cannot be relied upon to justify resolving in its favour any conflict between its mandate and the Act, which is a national law of general application.

[227] The Tribunal's conclusion that section 79 does not include the leeway language discussed in the jurisprudence provides a sufficient basis upon which to reject VAA's reliance on the RCD.

(ii) The rationales underlying the RCD

[228] The Tribunal further considers that the two rationales which supported the development of the RCD do not apply to the abuse of dominance provision and, by extension, to the other reviewable matters provisions of the Act more generally.

[229] The first of those two rationales is that "to perform an act which the Legislature is empowered to and has authorized cannot be an offence against the state" (*Farm Products* at p 239, quoted with approval in *Jabour* at p 352; *Chung Chuck* at p 756). This may be characterized as the "criminal law" rationale. In other words, "the idea that individuals could be guilty of a criminal offence for engaging in conduct specifically mandated to them by a legislature was not one which the courts were willing to accept" (*Milk* at p 476).

[230] Given that there is no need to establish criminal intent under section 79, and given that this provision does not contemplate criminal consequences or criminal stigma, this rationale is inapplicable in this context. It is one thing to expose someone to potential consequences such as imprisonment and the social stigma associated with a criminal conviction for engaging in conduct that is contrary to the Act. It is quite another to merely allow for the issuance of an administrative monetary penalty or an order requiring a respondent to cease engaging in such conduct, or to take other action contemplated by the remedial provisions in section 79 and the other reviewable matters sections of the Act, when such conduct has anti-competitive effects.

[231] The second rationale that underpinned the development of the RCD was based on specific wording of criminal competition provisions that no longer exists. That wording required a demonstration of conduct that "unduly" prevented or lessened competition, that had other specified "undue" effects, or that operated to the "detriment of or against the interest of the public" (*Garland* at paras 75-76; *Jabour* at p 352). Given the analogy that some courts have made between these latter words and the word "unduly," this may be characterized as the "public interest" rationale. Considering that the words "unduly" and "to the detriment of or against the interest of the public" are not present in section 79, or indeed in any of the other reviewable matters provisions of the Act, this second rationale for the RCD is also not available to support the application of the doctrine to conduct contemplated by those provisions.

[232] It has been suggested that one of the underlying purposes of the Act as a whole is to promote the public interest in competition, and the various objectives set forth in section 1.1 of the Act. From this, it is further suggested that the RCD could be available in respect of all of the provisions of the Act, civil or criminal. However, if that were so, the same would be true with respect to all legislation that is animated by a concern for the public interest. The Tribunal does not consider that the "leeway" doctrine was intended to apply in the absence of specific language, such as "unduly" or "to the detriment of the public interest."

[233] In the absence of the principal justifications that underpinned the courts' resort to the RCD in respect of the criminal provisions of the Act in past cases, any conflict between section 79 (or other reviewable matters) and the provisions of validly enacted provincial or federal legislation would fall to be resolved in accordance with other principles of statutory interpretation. These include the principles discussed at paragraphs 257-262 below. VAA has not identified any different principles that support its position.

[234] Notwithstanding the foregoing, VAA relies on *LSUC*, various cases in which the courts have recognized the potential application of the RCD in a civil action for damages brought pursuant to section 36 of the Act, and *Edmonton Regional Airports Authority v North West Geomatics Ltd*, 2002 ABQB 1041 ("***Edmonton Airports***").

[235] For the reasons set forth at paragraph 197 above, the Tribunal does not consider *LSUC* to be particularly strong authority for the proposition that the RCD is available to shield conduct pursued under the reviewable matters provisions of the Act. In brief, that aspect of the case proceeded on consent, so that the court could focus on other issues. The Tribunal's conclusion in this regard is reinforced by the fact that *LSUC* preceded the SCC's decision in *Garland*, where the requirement of leeway language for the application of the RCD was established.

[236] Regarding the cases that involved section 36 of the Act, they are distinguishable on the basis that, in each case, the underlying conduct in respect of which damages were sought by the plaintiffs was not a civilly reviewable conduct but conduct to which one or more of the criminal provisions of the Act would have applied, but for the RCD. In that context, it would have made no sense to deprive the defendants of the benefit of that RCD, when it provided a defence or an exemption to a prosecution under the criminal provisions of the Act for the same conduct. As one court observed:

> […] an aggrieved party cannot bring a successful civil action based on a breach of s. 45 of the *Competition Act* if the accused party has a complete defence to a prosecution under s. 45. In such a case there would be no misconduct on which to base the civil action. Thus, if the regulated conduct defence provides a complete defence to a prosecution under s. 45, then a civil action under s. 36 cannot succeed.
>
> *Cami* at para 50. See also *Milk* at p 476 and *Hughes* at paras 223-230.

[237] Turning to *Edmonton Airports*, VAA relies on the statement therein to the effect that the Act cannot "apply to legal entities incorporated by statute and required by statute to operate in

the public interest" (*Edmonton Airports* at para 127). However, that statement was made in the context of a discussion of the court's assessment of a defence to a claim of tortious conspiracy that appears to have been based on a breach of the criminal conspiracy provisions of the Act. Moreover, it has subsequently been made clear that in the absence of leeway language in the Act, the RCD does not operate to shield conduct engaged in pursuant to provincial legislative schemes, even where they are designed to advance the public interest (*PHS* at paras 54-56).

[238] In summary, the Tribunal considers that the RCD is not available to exempt or shield conduct that is challenged under section 79. This conclusion provides a second distinct basis upon which to reject VAA's reliance on the RCD.

[239] The Tribunal notes that, in his submissions, the Commissioner more generally argued that the RCD is not available, as a matter of law, to conduct pursued not only under section 79 but under all of the reviewable matters provisions of the Act. The Tribunal does not have to decide this larger issue in this Application; this will be for another day. The Tribunal nonetheless offers the following remarks.

[240] To begin, although the wording of each reviewable matter differs and varies, none of the provisions pertaining to those matters contains the words "unduly" or "in the public interest," discussed above.

[241] In addition, the Tribunal notes that the amendments made to the conspiracy provisions of the Act in 2009 appear to reflect Parliament's intent not to extend the RCD to the most recently enacted reviewable matter provision of the Act, namely, section 90.1 on "agreements or arrangements that prevent or lessen competition substantially." While the 2009 amendments related to one specific civil provision of the Act and not to the "reviewable matters" generally, they are nonetheless instructive. The Tribunal underlines that, as is the case for other reviewable matters under Part VIII of the Act, such as abuse of dominance or mergers, the presence of anti-competitive effects attributable to the conduct is a key and essential feature of the impugned practice subject to review before the Tribunal under section 90.1.

[242] When the new section 45 was adopted, Parliament included subsection 45(7), which reads as follows:

Conspiracies, agreements or arrangements between competitors	**Complot, accord ou arrangement entre concurrents**
45 (1) […]	**45 (1)** [...]
Common law principles — regulated conduct	Principes de la common law — comportement réglementé
(7) The rules and principles of the common law that render a requirement or authorization by or under another Act of	**(7)** Les règles et principes de la common law qui font d'une exigence ou d'une autorisation prévue par une autre loi

Parliament or the legislature of a province a defence to a prosecution under subsection 45(1) of this Act, as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under subsection (1).	fédérale ou une loi provinciale, ou par l'un de ses règlements, un moyen de défense contre des poursuites intentées en vertu du paragraphe 45(1) de la présente loi, dans sa version antérieure à l'entrée en vigueur du présent article, demeurent en vigueur et s'appliquent à l'égard des poursuites intentées en vertu du paragraphe (1).

[243] The 2009 amendments thus expressly provided for a statutory RCD for the criminal provisions under section 45, despite the absence of the word "unduly." However, no parallel, companion provision was enacted to complement the new section 90.1 on civil conspiracies. Stated differently, Parliament did not see fit to provide for the application of the RCD for the civil collaborations between competitors; it only did so for the new criminal *per se* conspiracy offence.

[244] If Parliament had intended to extend the RCD to the civil agreements between competitors governed by section 90.1, it would have said so expressly by adding language similar to subsection 45(7) in structuring this new civil provision. It did not. The plain wording and structure of section 90.1 speak for themselves. Under the implied exclusion rule of statutory interpretation, and even under the plain meaning rule, it is apparent that Parliament's intent was not to extend the RCD to this most recent civil provision and to make it available for this reviewable matter.

(iii) Conclusion on the leeway language

[245] For the reasons set forth above, the Tribunal finds that section 79 of the Act does not contain the leeway language required to open the door to the potential application of the RCD in the context of this Application.

(b) Is the conduct required, directed or authorized by a validly enacted legislation or regulatory regime?

[246] The Tribunal now turns to the second precondition to the application of the RCD, namely, the requirement that the impugned conduct be required, directed or authorized, expressly or by necessary implication, by a validly enacted statute, regulation or subordinate legislative instrument.

[247] From the outset of this proceeding, VAA primarily relied on the alleged public interest mandate under which it manages and operates YVR to support its position that the Act does not apply to its conduct. To anchor its claim that the RCD is available to it and authorizes its Exclusionary Conduct, VAA essentially invoked its Statement of Purposes, the 1992 OIC, the

1992 Ground Lease, the membership of VAA's Board of Directors and other general aspects of its mission, values and vision. In its closing submissions, VAA also submitted that it was relying on section 302.10 of the Canadian Aviation Regulations.

[248] The Tribunal is not persuaded by VAA's arguments. For the reasons set forth below, the Tribunal instead finds that VAA has been unable to point to any express provision or necessary implication in the regulatory regime in place that requires, directs or authorizes it to engage in the Exclusionary Conduct, as contemplated by the RCD jurisprudence. Put differently, no specific aspect of either VAA's mandate or the regulatory regime under which VAA operates required, directed or authorized it to refrain from licensing one or more additional in-flight caterers, whether for the reasons it has identified, or otherwise.

(i) Conduct authorized by a federal legislative regime

[249] Before turning to the specific sources identified by VAA, the Tribunal observes that the legislative regime upon which VAA relies to avail itself of the RCD is federal. The Commissioner maintains that, as a matter of principle, the RCD does not apply where the impugned conduct is alleged to be authorized by federal, as opposed to provincial, legislation.

[250] The Tribunal disagrees with the Commissioner on this point. However, given the conclusions that the Tribunal has reached in this case with respect to the two preconditions to the application of the RCD, nothing turns on this.

[251] To begin, the Tribunal notes that several courts have entertained or identified the possibility that the RCD can be available in a context where the authorizing legislation is federal (*Rogers* at para 63; *Fournier Leasing* at para 58; *Hughes* at para 220; *Milk* at p 475), and at least one has even applied it in such context (*Landmark* at pp 353-354).

[252] Furthermore, with the adoption of subsection 45(7), Parliament has now clarified that the RCD can be applied in the context of federal legislation. Subsection 45(7) expressly states that the "rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province a defence to a prosecution under subsection 45(1) of this Act […] continue in force and apply in respect of a prosecution under subsection (1)" [emphasis added]. This most recent legislative amendment thus explicitly recognizes that the "rules and principles" of the RCD encompass situations where conduct is regulated by federal laws, just as it applies for conduct regulated by provincial laws.

[253] Indeed, even the September 2010 Bureau's bulletin entitled *"Regulated" Conduct* ("***RCD Bulletin***") implicitly acknowledges that the RCD could be available in a context where the conduct is authorized by a federal legislative regime. In this regard, the *RCD Bulletin* mentions that the Bureau's enforcement approach would not be similar and would not be conducted in the same manner for conduct regulated by federal laws, compared to conduct regulated by provincial laws (*RCD Bulletin* at pp 1, 7).

[254] However, the fact that the RCD is potentially available to resolve an apparent conflict between the Act and other federal legislation is not the end of the analysis. The particular circumstances and context governing the federally-regulated regime have to be considered to

determine whether, in each particular case, the RCD is required to resolve a conflict between the two federal legislative schemes.

[255] The Commissioner submits that the RCD is not available in the particular context of a federal regulatory regime like the one invoked by VAA. He maintains that, where conduct challenged under section 79 of the Act is allegedly authorized by a federal legislative regime, the Tribunal should apply the ordinary principles of statutory interpretation to resolve any conflict that may arise between such regime and a provision of the Act. The Commissioner adds that, according to those ordinary principles, federal statutes applicable to the same facts will concurrently apply absent some unavoidable conflict (*Sullivan* at §11.30-§11.33). The Commissioner also submits that on the particular facts of the current case, there is no such unavoidable conflict.

[256] The Tribunal agrees with this aspect of the Commissioner's position. Where there is an apparent conflict between a provision of the Act and other federal legislation (including any subordinate legislative provisions), the Tribunal should first apply the ordinary principles of statutory interpretation, rather than the RCD, to try to resolve the conflict. In this regard, the Tribunal should begin by applying the fundamental principle that legislation should be interpreted in its entire context, and in its grammatical and ordinary sense, harmoniously with its objects, the legislative scheme and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, 154 DLR (4th) 193 at para 21).

[257] If that initial step does not resolve the conflict, the Tribunal should next seek to ascertain whether the conflict can be resolved "by adopting an interpretation which would remove the inconsistency" (*Lévis (City) v Fraternité des policiers de Lévis Inc*, 2007 SCC 14 at para 58). In other words, an interpretation that permits two federal statutes to operate and to achieve their respective objectives is to be preferred to an interpretation that yields a conflict (*Apotex Inc v Eli Lilly and Company*, 2005 FCA 361 at paras 22-23, 28, 32). This is simply another way of stating the principle that Parliament is presumed to have legislated coherently (*Friends of Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 88 DLR (4th) 1 ("***Oldman River***") at p 38). The Tribunal observes in passing that this presumption has been described as being "virtually irrebuttable" (*Sullivan* at §11.4).

[258] Where the conflict still cannot be resolved, and arises between an Act of Parliament and subordinate federal legislation, the Tribunal must give precedence to the former (*Oldman River* at p 38; *Sullivan* at §11.56).

[259] Where the application of the foregoing principles fails to resolve the conflict, the availability of the RCD would appear to depend on whether the conflict concerns a criminal or a non-criminal provision of the Act. For the reasons set forth at paragraphs 216-245 above, the Tribunal considers that the RCD is not available in respect of section 79. For the present purposes, it is unnecessary to say more, particularly given that the application of the principles described above with respect to the second component of the RCD is sufficient to resolve the alleged conflict between subsection 79(1) of the Act and the legislative regime upon which VAA relies to assert the RCD, as explained immediately below.

[260] The Tribunal pauses to observe that in the *RCD Bulletin*, the following is stated:

> [T]he Bureau will not pursue a matter under any provision of the Act where Parliament has articulated an intention to displace competition law enforcement by establishing a comprehensive regulatory regime and providing a regulator the authority to itself take, or to authorize another to take, action inconsistent with the Act, provided the regulator has exercised its regulatory authority in respect of the conduct in question.

[261] The Tribunal further observes in passing that, in the criminal context, one of the two principal rationales that have supported the application of the RCD in the past would continue to support its application. That is to say, it could be inferred that Parliament did not intend that conduct required, directed or authorized by federal legislation be subject to criminal sanction under the Act (see paragraphs 228-230 above). This may be why Parliament saw fit to preserve, in subsection 45(7) of the Act, the RCD for conduct prohibited by subsection 45(1), notwithstanding the elimination of the word "unduly" from the latter provision. The Tribunal recognizes that the absence, in the other criminal provisions of the Act, of language similar to that found in subsection 45(7) presents a complicating factor that will likely have to be addressed by the courts at some point in the future.

(ii) The grounds invoked by VAA

[262] The Tribunal now turns to the various sources relied on by VAA to demonstrate that its Exclusionary Conduct has been required, directed or authorized, expressly or by necessary implication, by a validly enacted legislation.

- <u>VAA's Statement of Purposes</u>

[263] VAA's Statement of Purposes is set forth in VAA's Articles of Continuance. For convenience, the Tribunal will repeat the "purposes" that are potentially relevant to this proceeding. They are :

> (a) to acquire all of, or an interest in, the property comprising the Vancouver International Airport to undertake the management and operation of [that airport] in a safe and efficient manner for the general benefit of the public;
>
> (b) to undertake the development of the lands of the [airport] for uses compatible with air transportation;
>
> […]
>
> (d) to generate, suggest and participate in economic development projects and undertakings which are intended to expand British Columbia's transportation facilities, or contribute to British Columbia's economy, or assist in the movement of people and goods between Canada and the rest of the world;

[…]

[264] The Tribunal considers that none of the three foregoing "purposes" explicitly requires, directs or authorizes VAA to engage in the Exclusionary Conduct. Further, they can readily be interpreted in a way that does not give rise to any irreconcilable conflict with the Act and that permits VAA's purposes to be achieved.

[265] With respect to paragraph (a), the only language that may be said to relate to the Exclusionary Conduct are the words "to undertake the management and operation of [YVR] in a safe and efficient manner for the general benefit of the public" [emphasis added].

[266] As will be discussed in Section VII.D below, in relation to paragraph 79(1)(*b*), VAA's justifications for engaging in the Exclusionary Conduct did not include any considerations related to safety. Moreover, the relief sought by the Commissioner is specifically confined "to any firm that meets customary health, safety, security and performance requirements." Thus, if that relief was granted by the Tribunal, VAA would not in any way be constrained to pursue the safety aspect of its mandate.

[267] Turning to VAA's "purpose" to "undertake the management and operation of [YVR] in […] [an] efficient manner for the general benefit of the public" [emphasis added], there are at least three problems with VAA's reliance on this language.

[268] First, the words "in […] [an] efficient manner" are insufficiently specific to meet the requirements of the RCD. Put differently, they are "a far cry" from the specificity that is required to reach a conclusion that activities taken in furtherance of the "purpose" have been "authorized," as contemplated by the RCD (*Jabour* at pp 341-342; *Fournier Leasing* at para 58; *Milk* at 478-479, 483; *LSUC* at p 474; *Hughes* at paras 144-145, 163-164, 198, 240-244. See also *Sutherland* at paras 77-84, 107, 117). The Tribunal is not aware of any case which would support VAA's position that such a general "purpose" has the sufficient degree of specificity to provide what is, in essence, an exemption from the requirements of the Act.

[269] Second, the reference to efficiency can readily be interpreted in a manner that leaves VAA broad latitude to fulfill that "purpose" without conflicting with the Act, and in particular with subsection 79(1) of the Act (*Garland* at para 76). In other words, there is no irreconcilable conflict between those words and the Act.

[270] Third, the Tribunal is not aware of any authority for the proposition that a statement of purposes or any other provision in an entity's Articles of Continuance or its other corporate documents, taken alone, can provide the basis for the assertion of the RCD.

[271] Insofar as paragraph (b) of VAA's Statement of Purposes is concerned, the entire provision is potentially relevant to the allegation that VAA has tied access to the airside to the leasing of land at YVR. However, VAA's justifications for engaging in the Exclusionary Conduct did not include any considerations related to the development of the lands of YVR for uses compatible with air transportation, although Mr. Richmond testified that VAA has a preference for in-flight catering firms to be located at YVR.

[272] With respect to paragraph (d) of VAA's Statement of Purposes, essentially the same problems exist. That is to say, those words are not sufficiently specific to meet the requirements of the RCD, there is no irreconcilable conflict between the words of that provision and section 79 of the Act, and the Tribunal is not aware of any authority for the proposition set forth in paragraph 270 above.

- The 1992 OIC and the 1992 Ground Lease

[273] One of the recitals in the 1992 OIC states that Her Majesty in right of Canada desired to transfer to local authorities in Canada the management, operation and maintenance of certain airports "in order to foster the economic development of the communities that those airports serve and the commercial development of those airports through local participation." With respect to VAA in particular, the operative provision in the 1992 OIC "authorizes the Minister of Transport, on behalf of Her Majesty in right of Canada, to enter into an Agreement to Transfer with [VAA] substantially in accordance with the draft agreement annexed hereto," namely, the 1992 Ground Lease. In turn, one of the provisions in the latter document states that VAA shall "manage, operate, and maintain the Airport […] in an up-to-date and reputable manner befitting a First Class Facility and a Major International Airport, in a condition and at a level of service to meet the capacity demands for airport services from users within seventy-five kilometres." VAA states that since it was established, it has re-invested all revenues net of expenses back into the Airport.

[274] The Tribunal agrees that, in principle, subordinate legislation like Orders-in-Council may provide a basis for the authorization contemplated by the RCD (*Sutherland* at para 68). However, having regard to a contrary observation made by the SCC in *Oldman River*, at page 38, the language in the subordinate legislation would have to be very clear. Even then, the issue is by no means free from doubt. In any event, insofar as VAA's reliance on the RCD is concerned, the 1992 OIC and the 1992 Ground Lease suffer from some of the same shortcomings as the Statement of Purposes in VAA's Articles of Continuance.

[275] First, the wording upon which VAA relies from the 1992 OIC and the 1992 Ground Lease is once again insufficiently specific to meet the requirements of the RCD. There is nothing in these two instruments that can be read as expressly or by necessary implication, requiring, directing or authorizing the impugned conduct.

[276] Second, there is no irreconcilable conflict between the words quoted above from those two documents and the Act (*Garland* at para 76). On the contrary, those words can readily be interpreted in a manner that gives broad latitude to VAA to foster the economic development of the local community it serves, to foster the commercial development of YVR, and to "manage, operate, and maintain [YVR] […] in an up-to-date and reputable manner," as described above. It is difficult to imagine how this mandate might be undermined to any material degree by VAA having to refrain from conduct that is contemplated by section 79 of the Act. The Tribunal's position in this regard is reinforced by the fact that the 1992 OIC was issued pursuant to subsection 2(2) of the Airport Transfer Act, which simply provides that the Governor in Council may, by order:

> (a) designate any corporation or other body to which the Minister is to sell, lease or otherwise transfer an airport as a designated airport authority; and
>
> (b) designate the date on which the Minister is to sell, lease or otherwise transfer an airport to a designated airport authority as the transfer date for that airport.

[277] Moreover, section 8.06.01 of the 1992 Ground Lease explicitly stipulates that VAA must "observe and comply with any applicable law now or hereafter in force." The Tribunal observes that Mr. Richmond conceded during discovery that this means that VAA has to comply with the laws of Canada. The laws of Canada include the Act.

[278] Third, even if it could be said that there is an irreconcilable conflict between the Act and the 1992 OIC or the 1992 Ground Lease, precedence would have to be given to the Act, which ranks above subordinate federal legislation and contracts entered into by the federal government (*Oldman River* at p 38).

[279] The Tribunal notes that the situation is quite different from *Sutherland*, relied on by VAA. In *Sutherland*, there was no doubt that the statutory scheme had expressly authorized the construction of the specific airport runway at issue at YVR, in the exact location it occupies. The precise location and configuration of the runway were clearly identified in the lease and in the airport certificate (*Sutherland* at paras 78, 107). No such level of specificity exists in the sources put forward by VAA to support its claim that the RCD should be available to exempt its Exclusionary Conduct from section 79 of the Act.

- VAA's Board of Directors

[280] VAA asserts that its public interest mandate is also reflected in the fact that most of the members sitting on its Board of Directors are nominated by various levels of government and local professional organizations.

[281] However, the Tribunal is unable to ascertain how this fact assists VAA to establish that the conduct that is the subject of this proceeding has been "authorized" by validly enacted legislation or by subordinate legislation.

- VAA's additional public interest arguments

[282] VAA's reliance on the RCD is also not assisted by the other arguments that it has advanced with respect to its public interest mandate. More specifically, VAA's "mission," "vision" and "values," as described in paragraph 202 above, do not even remotely authorize VAA to engage in the Exclusionary Conduct. Moreover, as corporate statements, they cannot displace the Act.

[283] VAA also asserts that its actions can be deemed to be in the public interest and therefore not subject to the Act, because it acts pursuant to a legislative mandate. However, this is not

sufficient to enable VAA to avail itself of the RCD. Conduct that is contemplated by the Act must be required, compelled, mandated or specifically authorized, expressly or by necessary implication, before it may be shielded from the operation of the Act by the RCD (see cases cited at paragraphs 192-200 above).

- The Canadian Aviation Regulations

[284] In its closing argument at the hearing, VAA also relied upon section 302.10 of the Canadian Aviation Regulations, which provides as follows:

> 302.10 No person shall
>
> […]
>
> (c) walk, stand, drive a vehicle, park a vehicle or aircraft or cause an obstruction on the movement area of an airport, except in accordance with permission given
>
> (i) by the operator of the airport, and
>
> (ii) where applicable, by the appropriate air traffic control unit or flight service station.

[285] VAA asserts that this provision specifically authorizes it to control access to the airside at YVR, and that this authorization is sufficient to permit VAA to avail itself of the RCD. The Tribunal disagrees. Although paragraph 302.10(c) of the Canadian Aviation Regulations specifically grants VAA the authority to control access, it does not specifically authorize VAA, directly or indirectly, to limit the number of in-flight catering firms and to engage in the Exclusionary Conduct that is the subject of this proceeding. Indeed, it is difficult to see how that provision even broadly or implicitly authorizes VAA to engage in such conduct.

[286] It bears reiterating that regulators and others who exercise statutory authority cannot use such "authority as a springboard (or disguise) to engage in anti-competitive practices beyond what is authorized by the relevant regulatory statutes" (*Milk* at pp 484-485). As the Tribunal has observed, the relief sought by the Commissioner is specifically confined "to any firm that meets customary health, safety, security and performance requirements." Thus, if that relief were to be granted by the Tribunal, VAA would not be prevented from controlling access to the airside at YVR in a manner that ensures that these legitimate requirements are met. However, VAA cannot use these or other considerations as a pretext to engage in conduct that is contemplated by section 79 of the Act.

[287] As with the other provisions upon which VAA relies in asserting the RCD, there is no irreconcilable conflict between section 79 of the Act and paragraph 302.10(c) of the Canadian Aviation Regulations. In brief, the latter can easily be interpreted to allow VAA to control access to the airside at YVR in a manner that is based on the types of considerations that guide such

decisions at other airports in Canada, and that does not contravene the Act. Contrary to VAA's assertions, subjecting it to the Act will not require it to "agree to any and all requests for access" (VAA's Amended Response, at para 22). Like others, VAA simply has to abide by the Act.

[288] Finally, as subordinate federal legislation, paragraph 302.10(c) cannot be relied upon to shield anti-competitive conduct that is contemplated by the Act.

(iii) Conclusion on the second component of the RCD

[289] For all those reasons, the Tribunal finds that there is no statute, regulation or other subordinate legislative instrument that requires, directs, mandates or authorizes VAA, expressly or by necessary implication, to engage in the impugned conduct. Therefore, as with the first precondition to the application of the RCD, the second precondition is also not satisfied.

(4) Conclusion

[290] For all of the above reasons, the Tribunal concludes that VAA cannot avail itself of the RCD in this proceeding.

[291] In summary, section 79 does not provide the requisite leeway language that must be present before the RCD may be relied upon to exempt or shield conduct from the application of the Act. Furthermore, the two rationales that have historically supported the application of the RCD are not present in the context of section 79. In addition, the legislation, subordinate legislation and other provisions upon which VAA relies to assert the RCD do not require, compel, mandate or authorize the Exclusionary Conduct, in the manner required by the jurisprudence. In each case, the broad language in those provisions is not sufficiently specific to permit VAA to avail itself of the RCD in this proceeding. Moreover, those provisions can be interpreted in a manner that gives VAA broad latitude to fulfill its mandate, without conflicting with section 79. Finally, those provisions are found in subordinate federal legislation or other instruments that cannot displace the Act.

[292] Given the foregoing conclusion, it is unnecessary to address the Commissioner's argument with respect to VAA's status as a not-for-profit corporation.

[293] The Tribunal pauses to underscore that even though the RCD does not apply in this case, a respondent's compliance with a statutory or regulatory requirement may nonetheless constitute a legitimate business justification, under paragraph 79(1)(*b*), for conduct that is potentially anti-competitive. In *TREB FCA*, the FCA held that if a respondent engages in a practice that is required by a statute or regulation, this could constitute a legitimate business justification and allow the Tribunal to conclude that the conduct is not an "anti-competitive" act under paragraph 79(1)(*b*) (*TREB FCA* at para 146). In *TREB*, the respondent's argument failed because the evidence demonstrated that it did not implement the impugned conduct in order to comply with the privacy statute invoked to justify the restrictions being imposed.

[294] This issue will be addressed in more detail in Section VII.D.2 below in the Tribunal's discussion of VAA's claims that it had legitimate business considerations to support its Exclusionary Conduct.

B. What is or are the relevant market(s) for the purposes of this proceeding?

[295] The next issue to be determined by the Tribunal is the identification of the relevant market(s) for the purposes of this proceeding. For the reasons set below, the Tribunal concludes that there are two relevant markets, namely, the Airside Access Market and the Galley Handling Market at YVR. Each of those markets is a class or species of business for the purposes of paragraph 79(1)(*a*) of the Act, while only the Galley Handling Market is relevant for the purposes of paragraph 79(1)(*c*).

[296] The Tribunal recognizes that there are considerations that support viewing the market in which such Galley Handling services are offered as including at least some Catering services. However, other considerations support confining that market to Galley Handling services. In the Tribunal's view, it does not matter whether the relevant market for the purposes of paragraph 79(1)(*c*) is confined solely to Galley Handling services or includes some Catering services, because Galley Handling and Catering services are complements, rather than substitutes.

(1) Analytical framework

[297] Paragraph 79(1)(*a*) contemplates a demonstration that one or more persons substantially control, throughout Canada or any area thereof, a class or species of business. The underlined words have consistently been interpreted to mean the geographic and product dimensions of the relevant market in which the respondent is alleged to have "substantial or complete control" (*Canada (Commissioner of Competition) v Canada Pipe Company Ltd*, 2006 FCA 236 ("***Canada Pipe FCA Cross Appeal***") at paras 16, 64, leave to appeal to SCC refused, 31637 (10 May 2007); *TREB CT* at para 164).

[298] As the Tribunal has previously discussed, the relevant market for the purposes of paragraph 79(1)(*a*) can be different from the relevant market contemplated by paragraph 79(1)(*c*) (*TREB CT* at para 116). Indeed, one of the markets that VAA is alleged to control in this proceeding, the Airside Access Market, is different from the market in which a substantial prevention or lessening of competition has been alleged for the purposes of paragraph 79(1)(*c*), namely, the Galley Handling Market. Accordingly, it will be necessary for the Tribunal to assess each of those alleged markets.

[299] In most proceedings brought under section 79 of the Act, the Tribunal's approach to market definition has focused upon whether there are close substitutes for the products "at issue" (*TREB CT* at para 117). However, in this proceeding, the principal focus of the Tribunal's assessment has been upon whether the supply of Galley Handling services constitutes a distinct relevant market, or should be expanded to include complementary services that are typically sold together with Galley Handling services, namely, some or all Catering services.

[300] In assessing the extent of the product and geographic dimensions of relevant markets in the context of proceedings under section 79 of the Act, the Tribunal considers it helpful to apply the hypothetical monopolist analytical framework. In *TREB CT* at paragraphs 121-124, the Tribunal embraced the following explanation of that framework set forth in the Bureau's 2011 *Merger Enforcement Guidelines*:

> Conceptually, a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area, in which a sole profit-maximizing seller (a "hypothetical monopolist") would impose and sustain a small but significant and non-transitory increase in price ("**SSNIP**") above levels that would likely exist in the absence of the merger.

[301] In applying the SSNIP test, the Tribunal will typically use a test of a 5% price increase lasting one year. In other words, if sellers of a product or of a group of products in a provisionally defined market, acting as a hypothetical monopolist, would not have the ability to profitably impose and sustain a 5% price increase lasting one year, the product bounds of the relevant market will be progressively expanded until the point at which a hypothetical monopolist would have that ability and degree of market power. Essentially the same approach is applied to identify the geographic dimension of relevant markets.

[302] Given the practical challenges associated with determining the base price in respect of which the SSNIP assessment must be conducted in a proceeding brought under section 79 of the Act, market definition in such proceedings will largely involve assessing indirect evidence of substitutability, including factors such as functional interchangeability in end-use; switching costs; the views, strategies, behaviour and identity of buyers; trade views, strategies and behaviours; physical and technical characteristics; and price relationships and relative price levels (*TREB CT* at para 130).

[303] In a case where the focus of the Tribunal's assessment is upon whether to include complements within the same relevant market, additional factors to consider include whether the products in question are typically offered for sale and purchased together, whether they are sold at a bundled price, whether they are produced together, whether they are produced by the same firms and whether they are used in fixed or variable proportions.

[304] In the geographic context, transportation costs and shipment patterns, including across Canada's borders, should also be assessed.

[305] In defining the scope of the product and geographic dimensions of relevant markets, it will often neither be possible nor necessary to establish those dimensions with precision. However, an assessment must ultimately be made (at the paragraph 79(1)(*c*) stage of the analysis) of the extent to which products and supply locations that have not been included in the relevant market provide or would likely provide competition and act as constraining factors to the products and locations that have been included in the market (*TREB CT* at para 132).

(2) The product dimension

(a) The parties' positions

[306] In his Application, the Commissioner alleges that VAA substantially or completely controls both the Airside Access Market and the Galley Handling Market.

[307] The Commissioner describes airside access as comprising access to runways and taxiways, as well as the "apron" where, among other things, an aircraft is parked, Catering products and ancillary supplies, as well as baggage and cargo, are loaded and unloaded, and passengers board.

[308] The Commissioner characterizes the Galley Handling Market as consisting primarily of the loading and unloading of Catering products, commissary products (typically non-food items and non-perishable food items) and ancillary products (such as duty-free products, linen and newspapers) on commercial aircraft, as well as warehousing; inventory management; assembly of meal trays and aircraft trolley carts (including bar and boutique assembly); transportation of Catering, commissary and ancillary products between an aircraft and warehouse or Catering kitchen facilities; equipment cleaning; handheld point-of-sale device management; and trash removal. In providing the foregoing description, the Commissioner observes that Galley Handling services and Catering are the two principal bundles of products that together comprise In-flight Catering.

[309] In its amended response, VAA takes issue with this approach to the two bundles of complementary products that the Commissioner described as Galley Handling and Catering, respectively. In essence, as explained by Dr. Reitman, whereas the Commissioner defined separate markets for two bundles of horizontal complements, VAA maintains that the relevant markets ought to be defined in terms of vertical bundles of products, namely, (i) the preparation of fresh meals and other perishable food items, and the loading of those meals/items onto the aircraft (which it described in terms of "**Premium Flight Catering**"); and (ii) the provision of non-perishable food items and drinks, including other items such as duty-free products, as well as the loading of those products onto the aircraft (which it characterized as "**Standard Flight Catering**"). In adopting that position, VAA appears to assume that pre-packaged meals, including frozen meals, are not perishable food items and are not substitutable for fresh meals.

[310] With respect to the Airside Access Market, VAA denies that it is in a position of "substantial or complete control," which is something that will be addressed separately in Section VII.C below, in relation to paragraph 79(1)(*a*). However, it does not appear to have taken issue with the Commissioner's definition of that market. Indeed, in its Concise Statement of Economic Theory, VAA stated that one of its key responsibilities in executing its public interest mandate is to control access to the airside at VAA. It explained: "[i]n addition to ensuring safety at the airport, this control allows [it] to authorize an efficient number of providers across the full range of complementary service providers, including Catering and Galley Handling." It further characterized airside access as being "an input to Catering" and to "any Galley Handling that occurs at the Airport" (VAA's Concise Statement of Economic Theory, at paras 3, 5).

[311] The parties maintained their respective positions throughout the proceeding. However, in his final argument, the Commissioner took the position that it did not matter whether the market was defined in terms of Galley Handling or as In-flight Catering. In either case, he asserted that this is a relevant market that VAA substantially or completely controls.

[312] For VAA's part, in addition to maintaining the distinction between Premium Flight Catering and Standard Flight Catering, it emphasized that Galley Handling and Catering (as defined by the Commissioner) are inextricably linked and comprise imprecise bundles of complementary services that are difficult, if not impossible, to precisely identify and circumscribe.

(b) The Airside Access Market

[313] The Commissioner submits that there is a distinct Airside Access Market situated immediately upstream from the Galley Handling Market. In support of this position, he maintains that firms supplying Galley Handling services must first source access to the tarmac, and more specifically to the "apron," where aircraft are parked. To obtain such access, they must enter into an In-flight Catering licence agreement with VAA.

[314] Among other things, the terms and conditions of such licence agreements provide for the payment of **[CONFIDENTIAL]**. Under the existing licence agreements that VAA has entered into with in-flight caterers, the Concession Fees are presently set at **[CONFIDENTIAL]%** of gross revenues earned from services provided at YVR, **[CONFIDENTIAL]**. As previously noted, it appears that those Concession Fees are usually passed on, in whole or in part, by in-flight caterers to their airline customers, in the form of a "port fee" that they charge, over and above the cost of their Galley Handling and Catering services.

[315] In addition, VAA's in-flight catering licences provide for the payment of rent in respect of any facilities leased by the in-flight caterer at YVR. Generally speaking, the amount of rent payable pursuant to the licence is a function of the market value of the space rented by VAA, if any. (VAA does not require in-flight caterers to operate a flight kitchen at YVR in order to obtain an in-flight catering licence. In this regard, while Gate Gourmet and CLS operate a flight kitchen at YVR, dnata does not.) For the purposes of this analysis of the alleged Airside Access Market, it is not necessary to further discuss the rental payments charged by VAA.

[316] Based on the foregoing, the Commissioner's position is that the upstream "product" supplied to in-flight caterers is access to the airside of aircraft landing and departing at YVR, and that the price at which that product is supplied is **[CONFIDENTIAL]** Concession Fees described above. The Commissioner maintains that there are no acceptable substitutes for access to the airside for the supply of Galley Handling services, and that therefore, an actual or hypothetical monopolist would have the ability to profitably impose and sustain a SSNIP in respect of the supply of airside access.

[317] Dr. Niels supported the Commissioner's position regarding the existence of a distinct Airside Access Market based on the fact that access to the airside is "a very important (or even essential) input for the provision of in-flight catering services at YVR" (Exhibits A-082, CA-083 and CA-084, Expert Report of Dr. Gunnar Niels ("**Niels Report**"), at para 2.64). Put differently,

he maintained that Galley Handling "clearly requires airside access" (Niels Report, at para 2.71). He asserted that a hypothetical substitute would require Catering to be loaded and unloaded from an aircraft at an off-Airport location, which would imply the transport of the aircraft out of the airport's premises. He stated that, for "logistical, financial (and probably legal) reasons, this would not be possible" (Niels Report, at para 2.71, footnote 34).

[318] In his report, Dr. Reitman took the position that it is not necessary to define a distinct upstream market for the supply of airside access, in order to assess whether control of airside access gives VAA substantial control of the downstream market. Accordingly, he explicitly declined to analyze the alleged Airside Access Market. Instead, he conceded that "[s]ince VAA controls airside access at YVR, and since Premium Flight Catering at YVR is a relevant antitrust market, VAA would have control over the premium flight catering market" (Exhibits R-098, CR-099 and CR-100, Supplementary Expert Report of Dr. David Reitman ("**Reitman Report**"), at para 69). Dr. Reitman maintained that position on cross-examination.

[319] Given that airside access can legitimately be characterized as an input into the alleged Galley Handling Market, and given that VAA charges a price for that input, in the form of Concession Fees, the Tribunal is prepared to find that there is a market for airside access at YVR. Having regard to the fact that there are no substitutes for that input, the Tribunal is satisfied that the alleged Airside Access Market is indeed a relevant market, for the purposes of paragraph 79(1)(*a*) of the Act. That said, the Tribunal observes that nothing turns on this, as it is also satisfied that Galley Handling is a market that is controlled by VAA, for the reasons that will be discussed below.

(c) The Galley Handling Market

[320] In support of the position that there is a distinct relevant Galley Handling Market, the Commissioner advances three principal arguments. First, he states that the hypothetical monopolist test can be met without including Catering products, which are complements for Galley Handling services in the relevant market. Second, he asserts that airlines can purchase Catering products separately from Galley Handling services, and that they have been increasingly doing so in recent years. Third, he maintains that industry documentation, as well as the terminology used within the industry, distinguishes between Galley Handling and Catering, and supports the proposition that Galley Handling and Catering are viewed as different products.

[321] In response, VAA submits that the evidence demonstrates that airlines generally demand, and in-flight caterers generally supply, a bundle of services that includes both Catering and Galley Handling. For this reason, Dr. Reitman maintained that it would be arbitrary to define separate markets for Catering and Galley Handling. VAA adds that the evidence also demonstrates that airlines consider Catering and Galley Handling together, particularly in considering the costs they incur for these services. In addition, VAA asserts that the bundle of products around which the Commissioner defined the Galley Handling Market is imprecise, and that this makes it difficult, if not impossible, to precisely define which products do and do not fall within the boundaries of that market. Finally, VAA submits that, if any distinction is to be made within the overall in-flight catering business, it should be the distinction proposed by Dr. Reitman, namely, between Premium Flight Catering and Standard Flight Catering.

[322] The Tribunal acknowledges that the evidence relied upon by VAA suggests that airlines continue to prefer to purchase Catering and Galley Handling services together. The Tribunal further acknowledges that this factor, together with the weak level of demand substitution between fresh/perishable foods and frozen/non-perishable foods on certain types of flights operated out of YVR, would support the position advanced by VAA.

[323] Nevertheless, for the reasons that follow, the Tribunal considers that the evidence as a whole demonstrates, on a balance of probabilities, that the Galley Handling Market, as defined by the Commissioner, is a relevant market for the purposes of section 79 of the Act. More specifically, the application of the hypothetical monopolist framework, with the support of extensive evidence with respect to the following assessment factors, supports this conclusion: the behaviour, views and strategies of airlines and in-flight caterers; the manner in which Galley Handling and Catering services are produced; and the price relationships and relative price levels between these categories of services.

(i) The hypothetical monopolist framework

[324] The Commissioner asserts that the test at the heart of the hypothetical monopolist framework can be met by applying that framework solely to the bundle of products that he claims comprises the Galley Handling Market. The Tribunal agrees.

[325] Pursuant to that framework, and for the purposes of section 79 of the Act, the product dimension of a relevant market is defined in terms of the smallest group of products in respect of which a hypothetical monopolist would have the ability to impose and sustain a SSNIP above levels that would likely exist in the absence of an impugned practice.

[326] The "smallest group" principle is an important component of the test because, without it, there would be no objective basis upon which to draw a distinction between a smaller group of products in respect of which a hypothetical monopolist would have the ability to profitably impose a SSNIP and a larger group of products in respect of which that monopolist may also have such an ability (*TREB CT* at para 124). For example, in the absence of the smallest group principle, there would be no objective basis upon which to choose between a group of products A, B, C and D, in respect of which a hypothetical monopolist would have the ability to profitably impose a SSNIP, and a larger group of products consisting of products A, B, C, D, E and F, in respect of which the monopolist may also have such an ability. In such circumstances, the choice between the smaller group and the larger group would be arbitrary, assuming that other considerations remained equal.

[327] Accordingly, as Dr. Reitman acknowledged during the hearing, even if it were established that a hypothetical monopolist of two separate bundles of products would have the ability to profitably impose and sustain a SSNIP, the smallest market principle requires the product dimension of the relevant market to be limited to the smallest group of products in respect of which that monopolist would have such an ability. In this proceeding, that would be the bundle of products that comprises Galley Handling services. This is so even though a hypothetical monopolist of both that bundle and the additional bundle of Catering services would

also have the ability to impose a SSNIP in respect of those two bundles of complementary products, combined.

[328] The Tribunal pauses to observe that although Dr. Niels testified that he applied the logic of the hypothetical monopolist approach throughout his analysis, he stated that he considered it to be unnecessary to reach a conclusion as to whether Galley Handling and Catering services, respectively, are separate relevant markets.

[329] VAA maintains that Dr. Niels' failure to explicitly conclude that Galley Handling is a separate relevant market should be fatal to the Commissioner's case. VAA further submits that the Tribunal should draw an adverse inference from Dr. Niels' failure to provide a specific opinion as to whether Galley Handling is a relevant market, as asserted by the Commissioner. Specifically, VAA maintains that because Dr. Niels confirmed on cross-examination that he considered this issue, the Tribunal should infer that had he provided an opinion, it would have been that Galley Handling is not a relevant market.

[330] The Tribunal disagrees. In brief, the Tribunal has no difficulty determining, without the benefit of Dr. Niels' evidence on this particular point, that the Commissioner has established on a balance of probabilities that Galley Handling is a relevant product market. The Tribunal would simply add that Dr. Niels stated that the conclusions he reached in his report would remain the same, regardless of whether Galley Handling and Catering services are separate relevant markets, or form a single combined relevant market.

[331] During cross-examination, Dr. Niels clarified that although he considered this issue, he rapidly concluded that it did not matter whether Galley Handling is a distinct relevant market or formed part of a broader relevant market that includes Catering services. In either case, the conclusions he reached in his report would remain the same. For this reason, he explained that he did not address in any detail whether the relevant market should be defined in terms of Galley Handling alone, or Galley Handling plus Catering. He stated that this, together with the fact that the Commissioner did not allege any anti-competitive effects in respect of Catering, also explains why he did not conduct any analysis on Catering prices.

[332] Given the foregoing explanation provided by Dr. Niels, the Tribunal does not consider it to be appropriate to draw an adverse inference from Dr. Niels' failure to explicitly state that Galley Handling services is a relevant market. It is readily apparent from the testimony discussed above that he did not spend much time on that particular issue or consider it in any detail, as he viewed it to be unnecessary.

(ii) Evidence supporting a distinct relevant market

[333] The Tribunal now turns to the assessment factors that are typically considered in defining the product dimension of relevant markets.

- Functional interchangeability

[334] The Tribunal has previously observed that "functional interchangeability in end-use is a necessary but not sufficient condition for products to be included in the same relevant market" (*TREB CT* at para 130). However, this statement applied only to the assessment of alleged product substitutes. It does not apply to the assessment of whether product complements should be included in the same relevant market. This is because product complements are by definition not functionally interchangeable. Accordingly, in the context of assessing whether product complements are in the same relevant market, the absence of functional interchangeability between them is not relevant. In other words, this assessment factor merits a neutral weighting.

- The behaviour of airlines and in-flight caterers

[335] The evidence regarding the manner in which airlines purchase Catering and Galley Handling services, respectively, was largely provided by the four domestic carriers who participated in the hearing. As discussed in greater detail below, that evidence demonstrates that their behaviour varies, depending to a large extent on whether they are sourcing fresh or frozen/non-perishable products. In brief, while they appear to continue to prefer a "one-stop" approach for the former, they are increasingly sourcing the latter directly from multiple suppliers. With respect to foreign airlines, the little evidence provided to the Tribunal indicates that they prefer to obtain their Catering and Galley Handling needs together, in a "one-stop shop."

[336] As for in-flight caterers, the evidence suggests that full-service entities prefer to supply Catering and Galley Handling services together. However, they are increasingly prepared to unbundle those services, in part at the behest of domestic airlines, and in part as a competitive response to innovative new, lower-cost, service providers.

Air Canada

[337] According to Mr. Yiu, Air Canada sources a broad range of non-perishable and perishable products (e.g., BOB sandwiches and meal items) directly from third-party suppliers. This includes the frozen meals and bread that it serves to business class passengers on all North American and Caribbean flights, as well as to economy class passengers on international flights. Those meals are sourced from **[CONFIDENTIAL]**, and shipped to airports across Canada. Air Canada also directly sources the meals that it provides to people with dietary restrictions. At YVR and several other airports, these perishable and non-perishable products are loaded onto Air Canada's airplanes for a fee by Gate Gourmet. However, **[CONFIDENTIAL]**.

[338] Mr. Yiu testified that sourcing products directly from third parties, rather than from in-flight catering firms, enables Air Canada to save on its catering costs. In this regard, he confirmed that "[b]y sourcing **[CONFIDENTIAL]**, Air Canada has been able to improve its cost structure and stay competitive with domestic, North American and international airlines who are undertaking the same or similar practices" (Exhibits A-010 and CA-011, Witness Statement of Andrew Yiu ("**Yiu Statement**"), at Exhibit 1, para 27). Among other things, this

[CONFIDENTIAL] has enabled Air Canada and other domestic airlines to substitute high-quality frozen meals for fresh meals, for premium passengers, except on very long-haul international (i.e., overseas) routes.

Jazz

[339] Turning to Jazz, it appears to have sourced a broad range of Catering products directly from a large number of third parties, prior to when it assigned its Catering supply contracts to Air Canada in May 2017. However, at nine airports in Canada, including YVR, it also sourced certain fresh and other products **[CONFIDENTIAL]**. Specifically, pursuant to contracts awarded to Strategic Aviation and Gate Gourmet in 2014, Jazz sourced fresh meals for business class passengers on certain types of aircraft, some perishable BOB items (such as sandwiches), snacks for crew members and certain other products as part of broader arrangements that included the procurement of Galley Handling services.

WestJet

[340] With respect to WestJet, for several years after it launched operations in 1996, it did not provide meals on any of its flights. It simply provided free snacks and non-alcoholic beverages. However, beginning in 2004, it began offering BOB food (e.g., sandwiches, fruit bowls and non-perishable snacks) on flights that were longer than 2.5 hours in duration. At that time, it sourced that food directly, from local delicatessens and other third parties. It did the same for its non-food in-flight commissary products.

[341] For many years, WestJet also self-supplied its Galley Handling requirements at its busiest airports, through its Air Supply division ("**Air Supply**"). However, at airports where it did not make sense for WestJet to invest in Galley Handling equipment and staff, it was more cost-effective for WestJet to obtain its Galley Handling services from in-flight catering firms, such as Gate Gourmet or "whoever was available" (Transcript, Public, October 10, 2018, at p 372).

[342] **[CONFIDENTIAL]**, it conducted a nationwide RFP in 2013. In that RFP, **[CONFIDENTIAL]**. Ultimately, it awarded a national catering contract to Optimum, which does not directly provide Galley Handling services. **[CONFIDENTIAL]**.

[343] As WestJet continued to evolve from a low-cost carrier to an international airline, it added longer routes to its network and wider-body aircraft to its fleet. **[CONFIDENTIAL]**, it began to contract with Gate Gourmet to provide the Galley Handling services that had traditionally been supplied by Air Supply. As at the date of the hearing in this proceeding, WestJet obtained those Galley Handling requirements from Gate Gourmet at its five principal airports (including YVR), while it procured Galley Handling services from other third parties at nine smaller airports in Canada. **[CONFIDENTIAL]**.

[344] The foregoing varied approaches to meet its Galley Handling needs **[CONFIDENTIAL]**. WestJet does not procure any Catering services at approximately **[CONFIDENTIAL]** smaller airports at which it operates.

Air Transat

[345] Air Transat directly sources from manufacturers, distributors and wholesalers its non-perishable food and beverage requirements, disposable products that are used in connection with the provision of in-flight catering, reusable items that need to be cleaned before reuse and duty-free products.

[346] With respect to perishable food, it has now replaced its fresh long-haul meals, including for premium passengers, with frozen meals that are prepared by Fleury Michon in Quebec and shipped to airports across Canada for loading onto its aircraft. However, it continues to source sandwiches, sushi, fruit and certain other fresh food from in-flight caterers at the airports where it operates.

[347] Between 2009 and 2015, for the ten larger airports at which it operates in Canada, Air Transat sourced its local Catering requirements together with Galley Handling services from Gate Gourmet and its predecessor Cara. At another eight airports, Air Transat obtained those Catering and Galley Handling requirements from local firms, but not necessarily from the same supplier.

[348] Subsequent to a competitive bidding process that it conducted in 2015, Air Transat began to source its Catering and Galley Handling needs from Optimum at nine of the ten airports where it had previously sourced those needs from Gate Gourmet Canada. In turn, Optimum sub-contracts Air Transat's Catering and Galley Handling needs to third parties. (In the case of Galley Handling, that third party is primarily Sky Café.) At YVR, it continues to source Catering and Galley Handling services from Gate Gourmet.

Firms supplying Catering and Galley Handling services

[349] As noted above, the Tribunal heard evidence from representatives of five firms that directly or indirectly supply Catering and/or Galley Handling services: Gate Gourmet, Strategic Aviation, Optimum, Newrest and dnata.

[350] According to Mr. Colangelo, Gate Gourmet **[CONFIDENTIAL]**. He believes that most airlines prefer to deal with a single supplier for Catering and Galley Handling services. In his experience, most airlines also conduct a single RFP for those services, although some conduct separate RFPs for Catering and Galley Handling services, respectively. In any event, for airlines that are participating in the trend away from serving fresh food towards serving frozen food, **[CONFIDENTIAL]**, together with other food or non-food products that the airline may have sourced directly. Gate Gourmet also appears to be prepared to supply Galley Handling services alone, without Catering services, as it does so for WestJet and for Air Transat.

[351] With respect to Strategic Aviation, Mr. Brown, its CEO, testified that airlines prefer to have a "one-stop shop," although they are less concerned about whether the Catering and Galley Handling services are actually produced by the entity with which they contract, or are sub-contracted to third parties. **[CONFIDENTIAL]**. He added that this model enables airlines to obtain their Galley Handling and Catering needs at lower cost. **[CONFIDENTIAL]**. Mr. Brown

echoed Mr. Colangelo's evidence that where airlines purchase frozen meals and BOB directly from third-party suppliers, they then simply engage someone to provide Galley Handling services in respect of those items, at the airport.

[352] Optimum is essentially a logistics firm that coordinates the supply of Catering and Galley Handling services through an extended network of third parties with whom Optimum sub-contracts. According to Mr. Lineham, Optimum "simply acts as its customers' point of contact" for Catering and Galley Handling services (Exhibits A-008 and CA-009, Witness Statement of Geoffrey Lineham ("**Lineham Statement**"), at para 10). It does not have **[CONFIDENTIAL]** or equipment. As of the date of the hearing in this proceeding, Optimum serviced **[CONFIDENTIAL]** airline customers in Canada, namely, Air Transat, **[CONFIDENTIAL]**. As noted above, for one of those customers, Air Transat, Optimum contracted to supply Catering and Galley Handling services together at **[CONFIDENTIAL]** airports, **[CONFIDENTIAL]**. For its other customers, the situation in this regard is less clear.

[353] Turning to Newrest, Mr. Stent-Torriani testified that Newrest provides a one-stop supply of Catering and Galley Handling services to its customers approximately 90% of the time. Given that Newrest's customers are primarily foreign airlines, the Tribunal inferred that those carriers tend to purchase Catering and Galley Handling services together. Mr. Stent-Torriani added that when Newrest responds to tenders, it normally offers to supply all of its services together. Although Newrest is prepared to offer just Catering, it is not prepared to offer just Galley Handling services.

[354] Insofar as dnata is concerned, its representative Mr. Padgett testified that the firm **[CONFIDENTIAL]**. The Tribunal understood that for those customers, dnata typically provides a "one-stop shop" for the full range of Catering and Galley Handling services that may be required. Nevertheless, Mr. Padgett stated **[CONFIDENTIAL]** (Transcript, Conf. A, October 2, 2018, at pp 17-18). This may explain why dnata supplies "last-mile logistics" alone to customers "in many cases" (Transcript, Public, October 2, 2018, at p 143). **[CONFIDENTIAL]**. However, he added that it is not common for firms to provide only last-mile logistics services, with no Catering services, at larger airports; although this is more common at small or secondary airports, i.e., airports that have fewer than 5-10 million passengers annually and do not service trans-continental flights.

Summary

[355] Based on the foregoing, the evidence suggests that the behaviour of airlines varies, depending upon whether they are domestic or foreign. Domestic airlines prefer to source, and usually do source, a broad range of food and non-food products directly from various suppliers. These include frozen meals, which are increasingly being substituted for fresh meals, including in business class. Those suppliers then ship those products to various airports, where the airlines then pay a small fee to have them warehoused, assembled onto trays and loaded onto their aircraft by in-flight catering firms or new types of competitors, such as Strategic Aviation. In these circumstances, the airlines are essentially obtaining a Galley Handling service at the airport. This appears to be part of what Dr. Niels characterized as "a trend towards separating catering from the galley-handling function" (Niels Report, at para 2.87). However, for the longer

haul flights (which represent a small proportion of the flights they offer), domestic airlines combine the purchase of fresh meals for their premium customers, and perhaps other items, together with the purchase of Galley Handling services. In other words, for those needs on those flights, domestic airlines prefer a "one-stop shop" approach. That said, the situation appears to be fluid and complex, and is rapidly evolving.

[356] For foreign airlines, which are significantly more numerous than domestic carriers at Canada's gateway airports,[3] including YVR, the evidence provided by Messrs. Padgett and Stent-Torriani suggests that the airlines tend to obtain the full range of their Catering and Galley Handling needs together, from an in-flight caterer. To the extent that Mr. Colangelo may have been referring, at least in part, to foreign carriers when he expressed the belief that most airlines prefer to deal with a single supplier for Catering and Galley Handling services, this would provide further support for the views expressed by Messrs. Padgett and Stent-Torriani.

[357] Considering all of the foregoing, the Tribunal considers that the "one-stop shop" preference of foreign carriers, together with the similar preference of domestic carriers in relation to fresh meals and Galley Handling services on overseas routes, support the view that the relevant market should be defined as being broader than just Galley Handling services. However, the Tribunal does not consider that support to be particularly strong, because domestic carriers, which account for the vast majority of flights in Canada, unbundle their Catering requirements from their Galley Handling requirements for the substantial majority of their flights.

- The views and strategies of airlines and in-flight caterers

[358] The fact that airlines and in-flight caterers appear to generally recognize a distinction between Catering and Galley Handling services is a factor that weighs in favour of treating those services as being in different relevant markets. The Tribunal considers this to be so, even though some industry participants refer to Galley Handling as "last-mile logistics," and even though there seem to be some differences at the margins, between what is viewed as being included in Catering and what is viewed as being included in Galley Handling. At their core, Catering is the preparation of food, and Galley Handling is the provision of the various logistical services related to getting the food and the products associated with its consumption onto an airplane. Regardless of the differences in the specific terminology used and the precise contours of those respective bundles of services, a clear distinction between them appears to be recognized widely within the in-flight catering industry.

[359] A further factor that weighs in favour of treating Catering and Galley Handling services as being in different relevant markets is that they are priced differently. In particular, Catering and Galley Handling services are priced pursuant to different methodologies. For example, **[CONFIDENTIAL]**, prior to transferring its in-flight catering contracts to Air Canada in 2017, **[CONFIDENTIAL]**.

[360] The Tribunal pauses to observe that while Mr. Colangelo testified that most airlines appear to continue to conduct a single RFP for their Catering and Galley Handling needs, he also

[3] For clarity, Air Canada and WestJet account for the overwhelming majority of air traffic in Canada.

noted that some airlines are increasingly conducting separate RFPs for those respective bundles of services. **[CONFIDENTIAL]**. Thus, while the fact that most airlines continue to issue a single RFP in respect of their Catering and Galley Handling service needs weighs in favour of concluding that there is a single market for the supply of those services, this factor will be given reduced weight, in light of **[CONFIDENTIAL]**. In reducing the weight given to this factor, the Tribunal will remain mindful that Jazz ultimately awarded both its Catering and Galley Handling services requirements to the same entity at each of the airports that were the subject of its 2014 RFP.

[361] In addition to the foregoing, the evidence suggests that Catering and Galley Handling services are treated by at least some market participants as separate work streams. In this regard, Mr. Soni of WestJet stated that Galley Handling is a "distinct and separate" stream of work from what WestJet calls "In-flight Services," namely, "the preparation and provision of perishable and non-perishable food and beverages served to guests onboard WestJet's aircraft" (Exhibits A-080 and CA-081, Amended and Supplemental Witness Statement of Simon Soni ("**Soni Statement**"), at para 9). Similarly, Mr. Lineham of Optimum testified that "catering" and "provisioning" are "severable and distinct work streams" (Lineham Statement, at para 12).

[362] In summary, the Tribunal considers that the views and strategies of airlines and in-flight caterers weigh in favour of viewing the supply of Galley Handling services as a distinct relevant market. However, given that most airlines continue to issue single RFPs for their Catering and Galley Handling service needs, combined, and that even the airlines who have issued separate RFPs seem to end up awarding both scopes to the same service provider, this factor merits less weight than would otherwise be the case.

- Physical and technical characteristics

[363] When assessing whether two alleged substitutes ought to be included in the same relevant market, it is appropriate to consider their respective physical and technical characteristics (*TREB CT* at para 130). However, this factor, in and of itself, is not pertinent when considering whether product complements should be included in the same relevant market.

- The production of Galley Handling and Catering services

[364] A factor that is related to the physical and technical characteristics of products is how they are produced. Where two products or groups of complementary products are produced together, that may weigh in favour of a finding that they should be grouped together in the same relevant market. Conversely, where they are produced separately, that may weigh in favour of the opposite finding, particularly if they are produced by different firms.

[365] With respect to Catering and Galley Handling services, the fact that they are produced separately, and sometimes by firms that only produce one or the other of those bundles of services, is a factor that weighs in favour of concluding that they are supplied into different relevant markets.

[366] In brief, in addition to being produced with different equipment and personnel, the food products that are at the heart of Catering are increasingly being directly sourced by airlines from different entities, who then ship those products to airports for warehousing, assembly onto trays and trolleys, and loading onto airplanes by Galley Handling service providers. Indeed, full-service in-flight catering firms such as Gate Gourmet and dnata are prepared to provide, and have in fact provided, this Galley Handling service function for airlines, when airlines source their Catering requirements elsewhere. Strategic Aviation's affiliate Sky Café also bid to provide Galley Handling services alone, and to sub-contract Jazz's Catering needs to **[CONFIDENTIAL]**. Conversely, some firms are prepared to provide Catering services alone, without Galley Handling services. For example, **[CONFIDENTIAL]**. The Tribunal understands that other airlines have explored sourcing Catering services from independent caterers and restaurants located outside YVR. **[CONFIDENTIAL]**.

- Price relationships and relative prices

[367] Additional factors that are typically considered when assessing whether products should be included in the same relevant market are their price relationships and their relative price levels (*TREB CT* at para 130). In determining whether two or more product complements should be included in the same relevant market, further factors that are relevant to consider are whether the products are sold together, and if so, at a bundled price.

[368] With respect to price relationships, no persuasive evidence was provided to the Tribunal regarding the relationship between the prices of Galley Handling services and Catering services over time.

[369] However, there is evidence to suggest that when airlines are comparing responses to their RFPs, they are more concerned with the aggregate price they would pay for Catering and Galley Handling services combined, than with the prices they would pay for each of those two bundles of services, separately. **[CONFIDENTIAL]**.

[370] This evidence weighs in favour of concluding that there is a single relevant market for the bundle of Galley Handling and Catering services that were the subject of Air Transat's and Jazz's RFPs.

[371] Notwithstanding the foregoing, other evidence provided by Dr. Niels, pertaining to Jazz's savings at the airports where it switched providers, weighs in favour of concluding that there is a separate relevant market for Galley Handling services. In particular, in the course of analyzing Jazz's **[CONFIDENTIAL]**, he found that in the year after the switch occurred, Jazz saved approximately $**[CONFIDENTIAL]**, and that "[t]his saving is largely attributable to **[CONFIDENTIAL]**" (Niels Report, at para 1.42).

[372] Turning to relative prices, the Tribunal observes that this factor typically is more relevant to an assessment of two alleged product substitutes than it is to an assessment of two alleged product complements. For example, if it were claimed that all cars or all pens were part of a single market, the fact that the prices of luxury cars far exceed the prices of economy cars, or the fact that the prices of premium pens far exceed the price of a discount disposable pen, would

suggest that the far more expensive products are not in the same market as the economy/discount products. For product complements, the situation is less straightforward, as it may be common to purchase one or more relatively inexpensive ancillary products when purchasing an expensive complement. For example, it may be common to purchase a garage door opener when buying a new garage door. The large difference in their relative prices is not necessarily a factor that weighs in favour of a conclusion that there they are sold in different markets. If the bundled price is significantly less than the sum of their separate prices, they may well be considered to be sold in the same relevant market.

[373] In this proceeding, there was no persuasive evidence to establish that Galley Handling services are priced lower when they are sold together with Catering, than when they are purchased separately, for loading at a particular airport. The sole exception is when firms bid on multi-airport RFPs. In those cases, it appears that it is common practice to bid a lower price for Galley Handling and/or Catering services than if those services were supplied at fewer airports. Without more, that evidence is not particularly relevant to the issue of whether there is a separate relevant market for Galley Handling services, or a broader relevant market for Galley Handling and Catering services, combined.

[374] In summary, the evidence pertaining to price relationships weighs in favour of a conclusion that Galley Handling services are supplied in a broader market that includes at least some Catering services. However, the evidence that Jazz's savings from switching to Strategic Aviation were **[CONFIDENTIAL]** weighs in favour of a conclusion that Galley Handling services are supplied in a distinct relevant market. On balance, the Tribunal considers that all of this pricing evidence combined weighs in favour of the former conclusion.

- Fixed or variable proportions

[375] When considering whether two product complements, or bundles of product complements, should be grouped in the same relevant market, a final factor that is relevant to consider is whether they are used in fixed or variable proportions.

[376] In this case, the evidence demonstrates that airlines can and do source their needs for Galley Handling and Catering services, respectively, in variable proportions. In brief, airlines can and do source variable proportions of Catering services, when they consider that it is in their interest to do so. As discussed in greater detail at paragraphs 338-349 above, this is demonstrated by the behaviour of each of the domestic airlines. This weighs in favour of a conclusion that Galley Handling and Catering services, respectively, are supplied in different relevant markets.

(iii) Conclusion on the Galley Handling Market

[377] As is readily apparent from the foregoing, the various practical indicia that are relevant to the assessment of the product dimension of the relevant market do not all weigh in favour of a particular conclusion. Rather, they point to a conclusion that is very much in the "gray zone."

[378] The factors that weigh in favour of a conclusion that the market in which Galley Handling services are supplied comprises at least some Catering services (i.e., those that tend to be purchased together with Galley Handling services) include the following:

- Foreign airlines continue to purchase Galley Handling and Catering services together, on a "one-stop shop" basis, and pursuant to a single RFP, while domestic airlines also continue to buy at least some (i.e., premium) Catering services on the same basis, even where they are aware that the winning bidder may be planning to sub-contract the supply of Galley Handling services (and even the Catering services in question), to one or more third parties; and

- Airlines appear to be more concerned with the aggregate price they would pay for Catering and Galley Handling services combined, than with the prices they would pay for each of those two bundles of services, separately.

[379] However, the considerations that weigh in favour of a conclusion that there is a distinct relevant market for the supply of Galley Handling services include the following:

- The "smallest market" principle that is part of the hypothetical monopolist approach to market definition;

- The trend towards airlines purchasing an increasingly broad range of Catering products, including frozen meals, separately from their purchase of Galley Handling services;

- The willingness of in-flight catering firms to unbundle the supply of Catering and Galley Handling services, and to simply charge a small fee to warehouse, assemble and load onto airplanes Catering products that are sourced from third parties by airlines;

- The clear distinction that is widely made in the industry between Galley Handling and Catering services, notwithstanding differences in the specific terminology used and in the precise contours of those respective bundles of services;

- Airlines are increasingly conducting separate RFPs for Galley Handling and Catering services, respectively;

- Galley Handling and Catering services are treated by at least some market participants as separate work streams;

- Galley Handling and Catering services are produced and priced differently;

- Firms that bid to supply both Galley Handling and Catering services can and sometimes do choose to load certain costs, presumably common costs, into the prices they bid for

one of those bundles of services, versus the other. The evidence suggests that they are primarily loading the costs in Galley Handling, where the airlines have less choice;

- In the year following its switch to Strategic Aviation at eight airports, Jazz's alleged savings were **[CONFIDENTIAL]**. (Although the Tribunal does not consider the extent of these savings to have been demonstrated on a balance of probabilities, **[CONFIDENTIAL]** provides some support for the proposition that the latter services are distinct from Catering services;

- Galley Handling and Catering services are supplied in variable, rather than fixed, proportions, at least for domestic carriers in Canada, who account for the vast majority of airline traffic in this country.

[380] Considering all of the foregoing, and based on the evidence on the record in this proceeding, the Tribunal concludes that the Commissioner has established, on a balance of probabilities, that there is a distinct relevant market for the supply of Galley Handling services. Although this conclusion is not free from doubt, the Tribunal considers it to have been demonstrated to be more likely than not.

(3) The geographic dimension

(a) The parties' positions

[381] The Commissioner maintains that the geographic dimension of both the Airside Access Market and the Galley Handling Market is limited to YVR. VAA disagrees, although its position on this issue is not entirely clear.

[382] With respect to the geographic scope of the Airside Access Market, neither VAA nor Dr. Reitman took a specific position. However, in its Amended Response, VAA maintained that it is constrained in its ability to dictate the terms upon which it sells or supplies access to the airside for the supply of Galley Handling services at YVR. It stated that this constraint is provided by VAA's need to remain competitive with other airports, in attracting airlines. Dr. Niels characterized this constraint as being provided by an upstream "airports market," in which airports compete for the business of passengers and airlines. VAA did not subsequently pursue this "airports market" theory to any material degree during the hearing or in its final submissions. This may have been because its expert, Dr. Reitman, did not consider it necessary to assess the Airside Access Market or to address VAA's alleged upstream "airports market," other than to suggest that Dr. Niels had measured the wrong thing, and therefore had reached the wrong conclusion in his analysis. Dr. Reitman added that as a matter of economics, if the Commissioner's theory is that the purpose behind VAA's actions was to increase the revenues collected from the Concession Fees and rents charged to Galley Handling providers, then "competition between airports for airline service cannot constrain VAA's behaviour in the flight catering market" (Reitman Report, at para 63). He explained that this is because VAA could extract revenue from in-flight caterers while simultaneously reducing other fees paid by airlines, such that airlines would be no worse off and airport competition would be unaffected.

[383] Given the foregoing, and in the absence of any material evidence to suggest that any influences provided by other airports would be sufficient to constrain VAA from materially increasing the level of the Concession Fees it charges to its in-flight caterers, the Tribunal considers it unnecessary to further address VAA's alleged "airports market" in this decision.

[384] The Tribunal pauses to add for the record that Dr. Niels concluded that "competition from other airports for Pacific Rim traffic does not pose a significant constraint at YVR, because the size of the contestable market is small," and that YVR also "does not face a significant level of competition for [origin and destination] passengers from other airports" (Niels Report, at paras 2.38, 2.60).

[385] Turning to the Galley Handling Market, VAA stated in its Amended Response that YVR "is the relevant geographic market for the provision of Catering to airlines using the Airport," and that "[t]he relevant geographic market for Galley Handling is broader than" YVR, because airlines can and do (i) engage in what is known as Double Catering, and (ii) Self-supply of Galley Handling services (VAA's Concise Statement of Economic Theory, at para 4). In this connection, it appears that the term "Catering" may have been intended to connote what Dr. Reitman defined as being Premium Flight Catering, and that the term "Galley Handling" may have been intended to connote what he defined to be Standard Flight Catering.

[386] In its final written submissions, VAA took the position that if "Catering" and "Galley Handling" are considered to be supplied into distinct relevant markets, YVR is not a market for Standard Flight Catering, due to the opportunities for airlines to Self-supply and to double cater at other airports. It did not take an explicit position on the geographic scope of Dr. Reitman's "Premium Flight Catering" market. However, Dr. Reitman conceded in his report that the geographic dimension of that "market" is limited to YVR.

(b) The Airside Access Market

[387] In the absence of any geographic substitutes for the provision of airside access to aircraft on the apron at YVR, the Tribunal is satisfied that the geographic extent of the Airside Access Market at YVR is limited to YVR. By definition, airside access at YVR can only be given at YVR.

(c) The Galley Handling Market

[388] The Commissioner maintains that there are no acceptable substitutes for the purchase of Galley Handling services at YVR. With specific regard to Double Catering and Self-supply, the Commissioner asserts that they are not feasible or preferable substitutes for Galley Handling for the vast majority of airlines, including for logistical and financial reasons. In his closing argument, the Commissioner added that airlines are already "pushing the limits" as far as they can in availing themselves of these options, such that there would not be a significant amount of additional substitution to these alternatives in response to a SSNIP. For the reasons set forth below, the Tribunal agrees.

(i) Double Catering

[389] The representatives of airlines who testified in this proceeding all stated that Double Catering is not possible for certain types of flights and that there are logistical difficulties associated with increasing the use of Double Catering on other types of flights.

[390] According to Mr. Yiu, Air Canada already attempts to optimize the use of Double Catering. This is because **[CONFIDENTIAL]**, when it is able to double cater. In addition, Double Catering reduces risks for damage to an aircraft, due to the reduced number of times that Galley Handling firms approach the aircraft. Moreover, Double Catering can provide time savings by reducing ground time at the second airport, and can reduce the risk of a delayed departure at that airport.

[391] Together with Air Canada Rouge, Air Canada double caters approximately **[CONFIDENTIAL]**% of its flights departing from the **[CONFIDENTIAL]** airports where it procures in-flight catering from Gate Gourmet. (**[CONFIDENTIAL]**) This percentage is not higher because Double Catering is not possible or can present challenges in a range of situations. For example, to abide by the Public Health Agency of Canada's *Guidelines for Time and Temperature Requirements for Ready-to-Eat, Potentially Hazardous Foods*, Air Canada is not able to double cater on most international flights, or on certain domestic and U.S. trans-border flights where fresh and/or frozen foods would be onboard an aircraft for more than 12 hours total (air and ground time), and/or where the ground time is greater than three hours. In addition, if a double-catered flight is rerouted, swapped or changed to another aircraft due to a mechanical issue, certain fresh and/or frozen food items could be spoiled and Air Canada would require *ad hoc* re-servicing to the aircraft before the flight departs. Similarly, if a flight is significantly delayed, some of the food, beverages and supplies would need to be re-catered.

[392] Air Canada is further restricted in its ability to double cater by the amount of galley space available onboard an aircraft, which in most cases is already maximized on single-catered international flights.

[393] With respect to YVR, Air Canada has to originate in-flight catering at that Airport **[CONFIDENTIAL]**. Flights passing through/departing from YVR, for which Double Catering is not an option include: **[CONFIDENTIAL]**.

[394] **[CONFIDENTIAL]**. In addition, given Jazz's route structure, it "would present significant logistical complexity and burden Jazz with substantial additional costs" for Jazz to double cater into YVR from one of the nine larger airports that were the subject of the Jazz 2014 RFP (Exhibits A-004 and CA-005, Witness Statement of Rhonda Bishop ("**Bishop Statement**"), at para 26).

[395] Insofar as WestJet is concerned, Mr. Soni stated that WestJet double caters "where possible," including on flights from YVR to the south, where it may be difficult to obtain requirements to match its onboard menus (Soni Statement, at para 26). However, despite the advantages offered by Double Catering, **[CONFIDENTIAL]**, including where there are space or weight constraints on the aircraft and where it may be challenging to maintain appropriate food

safety temperatures or to ensure that fresh products remain fit for consumption. In addition, **[CONFIDENTIAL]**.

[396] With respect to Air Transat, Ms. Stewart stated that Catering is not available at four of the 22 airports from which it flies in Canada and that for flights departing from the other 18, Catering must be loaded at those locations for a number of reasons. First, most flights departing from those locations are parked overnight. Second, the airplanes then generally travel on a point-to-point route to a foreign destination, and Air Transat does not procure in-flight catering at its foreign destinations (other than ice, milk and dairy products). Third, it is more cost effective for Air Transat to procure in-flight catering in Canada, at its hub airports, than at foreign destinations. Fourth, loading in Canada reduces Air Transat's ground time at its foreign destinations, thereby allowing it to maximize its flying and aircraft utilization, while respecting noise abatement requirements at its major airports. In this latter regard, Ms. Stewart added that Air Transat tries to plan for all of its downtime to occur in Canada, where it has its own technical support staff. Finally, Air Transat often changes the aircraft it was planning to use, such that if Catering is already loaded, Air Transat would incur additional costs to switch the food from that aircraft to another aircraft. Concerning YVR in particular, Ms. Stewart added that Double Catering into that Airport "is not feasible" (Exhibits A-035 and CA-036, Witness Statement of Barbara Stewart ("**Stewart Statement**"), at para 20).

[397] In addition to these airline representatives, a number of other witnesses addressed Double Catering. In particular, Mr. Richmond from VAA stated **[CONFIDENTIAL]** (Exhibits R-108 and CR-109, Witness Statement of Craig Richmond ("**Richmond Statement**"), at paras 73-74). In this regard, it appears that he may have been using the term "Double Catering" to mean "Self-supply." With respect to **[CONFIDENTIAL]**, Mr. Gugliotta of VAA explained that those airlines double cater in **[CONFIDENTIAL]** so that they do not need catering services at YVR. The Tribunal observes that **[CONFIDENTIAL]** are small airlines representing a marginal portion of total flights departing from YVR and of total passengers at the Airport.

[398] More generally, Mr. Colangelo of Gate Gourmet stated that "[a]irlines do not typically [Double Cater] transcontinental or international flights" and the flights for which Gate Gourmet Canada provides Double Catering service "typically originate from **[CONFIDENTIAL]**" (Exhibits A-039, CA-040 and CA-041, Witness Statement of Ken Colangelo ("**Colangelo Statement**"), at paras 40, 42). He added that Gate Gourmet also double caters flights departing from YVR to **[CONFIDENTIAL]** destinations. In terms of numbers, he stated that out of a total of approximately **[CONFIDENTIAL]** flights per day out of YVR, Gate Gourmet has roughly **[CONFIDENTIAL]** "must cater" flights and approximately **[CONFIDENTIAL]** flights that it double caters on the way into that Airport. In addition, a number of other flights into YVR are double catered by other in-flight caterers. On cross-examination by counsel for VAA, Mr. Colangelo conceded that airlines will endeavour to double cater wherever they can. **[CONFIDENTIAL]**.

[399] In addition to the foregoing, Mr. Padgett of dnata testified that he typically sees Double Catering on short-to-medium haul flights of about four hours and below, although he added that Double Catering is possible for longer flights. Mr. Padgett's observations are consistent with Dr. Niels' assessment of Double Catering at YVR. Dr. Niels found that "double catering is really only feasible on flight durations of less than 200 minutes" and that "the vast majority of flights

(excluding WestJet) that run for more than 200 minutes are catered from YVR, indicating that double catering may not be feasible for such longer flights" [emphasis added] (Niels Report, at para 2.82). More specifically, he found that "for flight durations of over 400 minutes on all airlines, only a small proportion of flights departing from YVR (around 15%) are not catered at YVR, indicating that catering at YVR is necessary for a large proportion of these longer flights" [emphasis added] (Niels Report, at para 2.81). For flight durations of less than 200 minutes, he found that Double Catering is used on approximately 47% of flights, many of which are between YVR and smaller airports in British Columbia.

[400] Having regard to these results and to some of the considerations that have been identified by the airlines, including the fact that "airlines try to double cater whenever they can," Dr. Niels concluded that the existing extent of Double Catering at YVR "is probably a fair reflection of the maximum double catering that can be done in the market" (Transcript, Conf. B, October 16, 2018, at p 576). Put differently, he opined that there is a low likelihood of airlines expanding their use of Double Catering to constrain the exercise of market power by in-flight caterers at YVR.

[401] In response to questioning from the panel, Dr. Reitman agreed. Specifically, he was asked how much more airlines would likely increase their use of Double Catering in response to a SSNIP at YVR, if they are already Double Catering as much as they can right now. Dr. Reitman replied: "So I agree that if all the airlines are doing it as much as they can right now, then that probably doesn't move the needle very much" (Transcript, Conf. A, October 17, 2018, at p 391). He added that if some airlines are not currently maximizing their use of Double Catering, they could possibly do more.

[402] Finally, Dr. Tretheway stated that Double Catering is "strongly not preferred by airlines" for long-haul flights and that for continental flights, "the general preference is for origin station catering" (Exhibits R-133 and CR-134, Supplementary Expert Report of Dr. Michael W. Tretheway, at paras 2.1.7-2.1.9).

[403] Having regard to all of the foregoing, the Tribunal concludes that: (i) airlines have a strong incentive to maximize their use of Double Catering; (ii) they are already likely doing so; and (iii) they are not likely to increase their use of Double Catering on flights into YVR to a degree that would constrain a potential SSNIP in the supply of Galley Handling services at that Airport. Indeed, if the base price in respect of which such SSNIP were postulated was significantly (e.g., 5-10%) lower than prevailing prices, as one would expect if competition has already been substantially prevented (as alleged by the Commissioner), the prevailing level of Double Catering would already reflect the responses of airlines to that SSNIP.

[404] In any event, given these conclusions, the Tribunal finds that the potential for Double Catering to be increased on in-bound flights to YVR is not such as to warrant a conclusion that the geographic dimension of the market for the supply of Galley Handling services extends beyond YVR.

(ii) Self-supply

[405] Given that Self-supply is a form of countervailing power, the Tribunal considers that it would be more logical to address Self-supply in the post market definition stage of the analysis. However, because Self-supply was raised by VAA in response to the Commissioner's assertion that there is a relevant market for Galley Handling services at YVR, it will be addressed in this section of the Tribunal's reasons.

[406] The Commissioner submits that Self-supply is not a feasible or preferable substitute for Galley Handling services for most airlines, including for logistical and financial reasons. More specifically, he argues that the potential for airlines to Self-supply does not pose a sufficient constraint on providers of Galley Handling services at YVR to render unprofitable a SSNIP in respect of those services.

[407] In response, VAA maintains that the ability of airlines to Self-supply effectively limits the ability of existing in-flight caterers at YVR to impose a SSNIP in respect of what it defines to be Catering and Galley Handling services. In this regard, VAA observes that airlines are free to Self-supply at YVR without the need to obtain specific permission to do so from VAA. To the extent that they may require services such as warehousing, inventory management and trolley-loading, they can retain a third party located outside the Airport who does not require access to the airside. Dr. Reitman added that the fact that WestJet and other airlines, **[CONFIDENTIAL]**, have self-supplied **[CONFIDENTIAL]** their Galley Handling needs at YVR suggests "that self-supply would be a credible threat to constrain a price increase for standard flight catering products" (Reitman Report, at paras 55-57). However, he conceded that Self-supply is less likely to be a feasible option in relation to what he defined to be Premium Flight Catering, which includes the Galley Handling services that are required in respect of those Premium Flight catered foods.

[408] Having regard to the evidence discussed below, the Tribunal concludes that airlines operating out of YVR would not likely turn to the option of Self-supply in response to a SSNIP, at least not to a degree that would render an attempted SSNIP unprofitable.

[409] With respect to WestJet, the Tribunal discussed at paragraphs 340-344 above the fact that it previously self-supplied Galley Handling services at various airports, including YVR, through its Air Supply division. As the Tribunal noted, WestJet shut down that division and began sourcing its Galley Handling requirements from Gate Gourmet, **[CONFIDENTIAL]**. Mr. Mood testified that Air Supply neither had the expertise nor the scalability to meet WestJet's evolving needs, **[CONFIDENTIAL]** (Transcript, Conf. B, October 10, 2018, at p 449). He added that because the shut-down of the Air Supply was the first time in WestJet's history it had closed down a part of its operations, this decision was "a big thing for WestJet" (Transcript, Conf. B, October 10, 2018, at p 450). Given the foregoing, the Tribunal considers that WestJet would not likely return to self-supplying its Galley Handling requirements at YVR in response to a 5-10% price increase in its Galley Handling services.

[410] Turning to Air Canada, Mr. Yiu stated that although Air Canada self-supplied its in-flight catering needs prior to the mid-1980s, "**[CONFIDENTIAL]**" (Yiu Statement, at para 48). He explained that Air Canada **[CONFIDENTIAL]**. In this regard, he observed:

"**[CONFIDENTIAL]**" (Yiu Statement, at paras 48-49). In testimony, Mr. Yiu added that Air Canada **[CONFIDENTIAL]**. Considering all of the foregoing, the Tribunal considers that Air Canada would not likely return to self-supplying its Galley Handling requirements at YVR in response to a 5-10% price increase it its Galley Handling services.

[411] Regarding Air Transat, Ms. Stewart stated that the option of self-supplying in-flight catering services at YVR is "not feasible." She explained that in addition to not having the required expertise, it would "simply be cost-prohibitive" for Air Transat to pursue this option (Stewart Statement, at para 20(b)).

[412] Insofar as Jazz is concerned, during its 2014 RFP process, **[CONFIDENTIAL]** (Exhibit CR-007, Email from **[CONFIDENTIAL]** dated May 29, 2014, at p 3). **[CONFIDENTIAL]**, Jazz ultimately decided to remain with Gate Gourmet at that Airport. In her witness statement, Ms. Bishop explained Jazz's decision as follows (Bishop Statement, at para 46):

> It is important to note that Jazz could not "self-supply" its In-flight Catering requirements at YVR, as an alternative to paying the high prices of Gate Gourmet. Jazz's **[CONFIDENTIAL]**. Further, Jazz would have incurred substantial up-front capital costs (e.g., equipment, etc.) to set up an In-flight Catering operation at YVR. Overall, the cost to Jazz of self-supplying In-flight Catering would have **[CONFIDENTIAL]**.

[413] Although the foregoing explanation covers both Catering and Galley Handling, the Tribunal is satisfied that Jazz considered the costs and other considerations associated with self-supplying its Galley Handling requirements at YVR, and decided that they were such that Jazz's best option was to remain with Gate Gourmet. The Tribunal is satisfied that Jazz would not likely Self-supply its Galley Handling requirements in response to a further 5-10% increase in the price of its Galley Handling requirements at YVR.

[414] In addition to the above-mentioned evidence provided on behalf of WestJet, Air Canada, Air Transat and Jazz, Mr. Stent-Torriani stated in cross-examination that although there are some airlines in the world that provide some forms of Galley Handling services themselves, "they're really the exception" (Transcript, Public, October 4, 2018, at p 235). In the same vein, Mr. Colangelo stated that while Gate Gourmet is aware that a number of airlines previously self-supplied many of their in-flight catering needs, they "have since transitioned away from this line of business and contracted with caterers and/or last mile provisioning companies, or with specialized firms like Gate Gourmet Canada that can provide both services" (Colangelo Statement, at para 44). The Tribunal considers that this evidence of Mr. Stent-Torriani and Mr. Colangelo generally supports its view that airlines are unlikely to resort to self-supplying their Galley Handling requirements at YVR, in response to a SSNIP in the cost of those requirements there. In any event, that evidence does not support VAA's position on this point.

[415] The Tribunal's finding on this issue is also broadly supported by Dr. Niels, who testified that "[a]irlines cannot really avoid having or making use of the services of caterers and galley handlers who have access to the airsides of the airport." He added that his analysis of this issue is consistent with his "understanding of what the witnesses have said about [the] feasibility of

double catering and self-supply, in particular the airline witnesses" (Transcript, Conf. B, October 15, 2018, at pp 418-419).

[416] Although Dr. Reitman took the position that airlines would likely choose to Self-supply some Standard Catering Products in response to a SSNIP, he based this view primarily on the fact that airlines have chosen to Self-supply at YVR in recent years. However, based on the evidence provided by those airlines, and discussed above, the Tribunal is not persuaded by Dr. Reitman's position on this issue.

[417] In summary, in light of the evidence provided on behalf of WestJet, Air Canada, Air Transat and Jazz, as well as the evidence provided by Mr. Stent-Torriani, Mr. Colangelo and Dr. Niels, the Tribunal concludes that airlines would not likely begin to Self-supply their Galley Handling requirements at YVR, in response to a SSNIP in the prices they pay for those services there.

(iii) Conclusion on the Galley Handling Market

[418] Given the conclusions that the Tribunal has made in respect of Double Catering and Self-supply, the Tribunal concludes that the geographic dimension of the Galley Handling Market is limited to YVR.

(4) Conclusion

[419] For all the foregoing reasons, the Tribunal concludes that the relevant market for the purpose of this proceeding is the supply of Galley Handling services at YVR ("**Relevant Market**").

C. Does VAA substantially or completely control a class or species of business in any area of Canada, as contemplated by paragraph 79(1)(*a*) of the Act?

[420] The Tribunal now turns to the first substantive element of section 79, namely, whether VAA substantially or completely controls a class or species of business in any area of Canada, as contemplated by paragraph 79(1)(*a*) of the Act. For the reasons set forth below, the Tribunal finds, on a balance of probabilities, that VAA substantially or completely controls both the Airside Access Market and the Galley Handling Market at YVR.

[421] Given this conclusion, and as noted at paragraphs 313-319 of Section VII.B dealing with the relevant markets, nothing turns on whether there is a distinct market for airside access at YVR. In brief, the Tribunal's finding that VAA controls the Galley Handling Market, by virtue of its control over a critical input to that market (airside access), is sufficient to meet the requirements of paragraph 79(1)(*a*) of the Act.

(1) Analytical framework

[422] The analytical framework for the Tribunal's assessment of paragraph 79(1)(*a*) was extensively addressed in *TREB CT*, at paragraphs 162-213. It does not need to be repeated here. For the present purposes, it will suffice to simply highlight the following.

[423] Paragraph 79(1)(*a*) requires the Tribunal to find that one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business. The Tribunal has consistently interpreted the words "throughout Canada or any area thereof" and "class or species of business" to mean the geographic and product dimensions, respectively, of the relevant market in which the respondent is alleged to have "substantial or complete control" (*TREB CT* at para 164). The Tribunal has also consistently interpreted the words "substantially or completely control" to be synonymous with market power (*TREB CT* at para 165). In *TREB CT* at paragraph 173, it clarified that paragraph 79(1)(*a*) contemplates a substantial degree of market power.

[424] The words used in paragraph 79(1)(*a*) are sufficiently broad to bring within their purview a firm that does not compete in the market that it allegedly substantially or completely controls. This includes a not-for-profit entity (*TREB CT* at paras 179, 187-188; *Commissioner of Competition v Toronto Real Estate Board*, 2014 FCA 29 ("***TREB FCA 2014***") at paras 14, 18). It also includes a firm that controls a significant input for firms competing in the relevant market (*TREB FCA 2014* at para 13).

[425] The power to exclude can be an important manifestation of market power. This is because "it is often the exercise of the power to exclude that facilitates a dominant firm's ability to profitably influence the dimensions of competition" that are of central importance under the Act. These dimensions include the ability to directly or indirectly influence price, quality, variety, service, advertising and innovation (*TREB CT* at paras 175-176).

[426] To the extent that a firm situated upstream or downstream from a relevant market has the ability to insulate firms competing in that market from additional sources of price or non-price dimensions of competition, it may be found to have the substantial degree of market power contemplated by paragraph 79(1)(*a*) of the Act (*TREB CT* at paras 188-189).

(2) The parties' positions

(a) The Commissioner

[427] The Commissioner submits that VAA substantially controls both the Airside Access Market and the Galley Handling Market at YVR.

[428] With respect to the Airside Access Market, the Commissioner maintains that VAA is a monopolist, as it is the only entity from which a firm seeking to supply Galley Handling services, or more broadly in-flight catering services, may obtain approval to access the airside at YVR. The Commissioner further asserts that barriers to entry and expansion in the Airside Access Market are absolute, because no entity other than VAA may sell or otherwise supply access to

the airside at YVR. Entry of an alternative source of supply of access to the airside at YVR simply is not possible. Moreover, the Commissioner submits that VAA is generally able to dictate the terms upon which it sells or supplies access to the airside at YVR.

[429] Having regard to the foregoing, the Commissioner advances the position that VAA has a substantial degree of market power in the Airside Access Market.

[430] Given VAA's control of a critical input into the Galley Handling Market, namely, airside access, and its corresponding ability to exclude new entrants into the Galley Handling Market, the Commissioner further argues that VAA controls the Galley Handling Market as well as the broader product bundle of Galley Handling and Catering services combined. Put differently, the Commissioner submits that VAA controls the Galley Handling Market because it not only controls the terms upon which in-flight caterers can obtain authorization to access the airside at YVR, but also because it has the power to decide whether they can carry on business in the Galley Handling Market at all.

(b) VAA

[431] VAA denies that it substantially or completely controls either the Airside Access Market or the Galley Handling Market.

[432] Regarding the Airside Access Market, VAA maintains that it is not able to dictate the terms upon which it sells or supplies access to the airside at YVR, primarily because airlines are free to wholly or partially Self-supply and/or can resort to Double Catering. VAA also asserts that it is constrained, by competition with other airports, in its ability to set the terms upon which it sells or supplies access to the airside at YVR for the supply of Galley Handling services.

[433] Turning to the Galley Handling Market, once again, VAA encourages the Tribunal to reject the Commissioner's position on the basis that airlines can wholly or partially Self-supply and/or resort to Double Catering. In addition, it relies on the fact that it does not provide any Galley Handling services or own any interest in, or represent, any provider of Galley Handling services.

[434] Notwithstanding the foregoing, in its closing submissions, VAA clarified that "[f]or the purposes of argument," it assumed that it controls the provision of the specific services of loading and unloading Catering products. In making this concession, it acknowledged that without VAA's authorization, a firm other than an airline cannot access the airside to provide these services. However, it maintained that the Commissioner's definition of Galley Handling services includes a wide range of services that do not require access to the airside. In this regard, it stated that "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 other authorization by VAA" (VAA's Closing Submissions, at para 33). Therefore, it asserted that VAA cannot be said to control the market for those services.

(3) Assessment

(a) The Airside Access Market

[435] For the following reasons, the Tribunal concludes that VAA controls or substantially controls the Airside Access Market, due to its control over who can access the airside at YVR.

[436] VAA does not dispute that absent its authorization, a firm other than an airline cannot access the airside at YVR to load and unload Catering products. Indeed, at paragraph 69 of his report, Dr. Reitman explicitly recognized that "VAA controls airside access at YVR," although he later clarified that he simply made this assumption. Dr. Niels also concluded that VAA controls the Airside Access Market.

[437] VAA does not allege that there are any possible substitutes for VAA's authorization for airside access at YVR. However, it maintains that it does not control airside access because airlines can wholly or partially Self-supply Galley Handling services, or resort to Double Catering.

[438] For the reasons set forth at paragraphs 388-417 of Section VII.B above, the Tribunal has determined that the potential for airlines to wholly or partially Self-supply, or to make increasing use of Double Catering, does not exercise a material constraining influence on the prices of Galley Handling services at YVR. For the same reasons, the Tribunal has also determined that those alleged alternatives do not constrain the terms upon which VAA supplies airside access, including the Concession Fees that it charges for such access.

[439] Regarding VAA's assertion that it is constrained by the fact that it must compete with other airports to attract airlines to YVR, this position was advanced in VAA's Amended Response. However, as noted earlier, VAA did not subsequently pursue this theory to any material degree during the hearing or in its final submissions. As the Tribunal also observed, Dr. Reitman did not consider it necessary to address this theory, other than to suggest that Dr. Niels had measured the wrong thing, and therefore had reached the wrong conclusion, in addressing this aspect of VAA's position. In this latter regard, Dr. Niels concluded that "competition from other airports for Pacific Rim transfer traffic does not pose a significant constraint on YVR, because the size of the contestable market is small," and that YVR also "does not face a significant level of competition for [origin and destination] passengers from other airports" (Niels Report, at paras 2.38, 2.60).

[440] In support of its assertion regarding competition from other airports, VAA stated that the constraining influence that they exert upon it is demonstrated by the fact that it "chose not to raise the rates of the [Concession Fees] it charges to Gate Gourmet and CLS for more than a 10-year period […]" [emphasis added] (VAA's Amended Response, at para 68). However, VAA did not submit that it was unable to raise its Concession Fees without risking the loss of any particular airlines, or airline routes. Indeed, its assertion amounted to nothing more than just that – a bald assertion, without evidentiary support to demonstrate what actual or potential business it might lose, in response to any attempted increase in its Concession Fees. In the absence of such evidence, the Tribunal is unable to agree with VAA's position that other airports provide a

sufficient constraining influence on VAA to warrant a finding that VAA does not substantially control the Airside Access Market at YVR.

[441] Indeed, the Tribunal considers that the link VAA makes between the level of its Concession Fees and competition from other airports is inconsistent with evidence provided by Messrs. Richmond and Gugliotta.

[442] In particular, Mr. Richmond stated that "VAA has routinely foregone opportunities to increase its revenues – by as much as $150 million annually – because VAA's management and Board concluded that doing so was in the best interests of YVR and the communities it serves" [emphasis added] (Richmond Statement, at para 26). With respect to its Concession Fees, he added the following (Richmond Statement, at para 80):

> The current Concession Fee for both Gate Gourmet and CLS is set at **[CONFIDENTIAL]**% of gross revenues. Prior to 2006, the Concession Fee was set at **[CONFIDENTIAL]**%. It was raised to **[CONFIDENTIAL]**% following a comprehensive review of YVR's concession fees, which found that the rate charged at YVR was below the low-end of the market. The current rate of **[CONFIDENTIAL]**% is the same or lower than the fees charged at other major airports in Canada and the United States. For example, Edmonton and Portland set their concession fees at **[CONFIDENTIAL]**%, while Toronto, Calgary and Montreal all set their concession fees at **[CONFIDENTIAL]**%.

[443] Mr. Gugliotta provided a more in-depth history of the Concession Fees charged at YVR by VAA and its predecessor, Transport Canada. In so doing, he explained why VAA refrained from raising the level of those fees from **[CONFIDENTIAL]** for a period of time, when "in-flight caterers at other airports were often paying […] around **[CONFIDENTIAL]** of gross revenues" and others "were paying concession fees between **[CONFIDENTIAL]**" (Exhibits R-159, CR-160 and CA-161, Witness Statement of Tony Gugliotta ("**Gugliotta Statement**"), at para 67). The principal reason appears to have been concerns "about the viability of CLS and Cara" (Gate Gourmet Canada's predecessor) (Gugliotta Statement, at para 72). After deciding to "bring [its Concession Fees] in line with the minimum fee being charged at all other major Canadian airports," it ultimately negotiated a phased-in approach, pursuant to which its Concession Fees were **[CONFIDENTIAL]** (Gugliotta Statement, at para 74). Nowhere in his explanation did Mr. Gugliotta make any reference to a concern about losing any actual or potential business to another airport, should VAA raise the level of its Concession Fees more rapidly, or to a greater degree.

[444] The foregoing evidence from Messrs. Richmond and Gugliotta makes it readily apparent that VAA benevolently refrained for a period of time from raising the level of its Concession Fees, rather than having been constrained to do so by competition from other airports. Mr. Richmond's evidence further suggests that the existing level of the Concession Fees is not primarily attributable to the constraining influence of competition from other airports. Instead, the Tribunal finds that it is primarily attributable to VAA's pursuit of what it perceives to be the best interests of YVR and the communities that it serves. In the absence of any persuasive evidence that the existing level of the Concession Fees is primarily attributable to the

constraining influence of competition from other airports, the Tribunal rejects this assertion by VAA.

[445] In summary, considering all of the foregoing, the Tribunal concludes that VAA controls or substantially controls the Airside Access Market at VAA.

(b) The Galley Handling Market

[446] For the following reasons, the Tribunal also concludes that VAA controls or substantially controls the Galley Handling Market.

[447] VAA's position that airlines can wholly or partially Self-supply and/or resort to Double Catering is addressed at paragraphs 388-417 of Section VII.B and in this section above. It does not need to be repeated. In brief, those possibilities do not exercise a material constraining influence on the prices of Galley Handling services at YVR.

[448] This leaves VAA's assertion that it does not control or substantially control the Galley Handling Market because many of the services that are included in that market do not require access to the airside.

[449] The Tribunal acknowledges that services such as warehousing, inventory management, assembly of meal trays and aircraft trolley carts, equipment cleaning, and handheld point-of-sale device management can be provided outside of YVR. Indeed, the Tribunal recognizes that dnata will be providing at least some of those services at its off-Airport kitchen facilities near YVR, when it enters the Galley Handling Market there in 2019.

[450] Nevertheless, in the absence of an ability to load and unload Catering products onto and off aircraft at YVR, it does not appear that any firms can actually enter the Galley Handling Market there. To date, none have done so. Moreover, Mr. Padgett confirmed that if dnata had not received airside access, it would not have come to YVR to only provide the warehousing functions associated with Galley Handling.

[451] VAA emphasizes that in 2014, **[CONFIDENTIAL]**.

[452] In the absence of any more persuasive evidence that airlines would be prepared to switch to a new entrant that is not authorized to have airside access at YVR, and to Self-supply the loading and unloading functions that require such access, the Tribunal concludes that airside access is something that a new entrant requires in order to compete in the Galley Handling Market. In other words, airside access is a critical input into the Galley Handling Market. The Tribunal agrees with Dr. Niels' assessment that airlines are unlikely to switch from one of the incumbent firms (i.e., Gate Gourmet and CLS) to a new entrant that is not authorized by VAA to access the airside at YVR.

[453] Firms that are not able to obtain VAA's authorization to access the airside at YVR do not, and cannot, compete in the Galley Handling Market there. The Tribunal agrees with the Commissioner that, by virtue of its control over airside access, VAA is able to control who competes and who does not compete, as well as how many firms compete, in that market.

Indeed, it has specifically and successfully sought to do so. Through this control, VAA is also in a position to indirectly influence the degree of rivalry in the Galley Handling Market, and therefore the price and non-price dimensions of competition in that market.

[454] The Tribunal pauses to note that, in his report, Dr. Reitman assumed that "a firm that supplies a significant input can substantially control a market in which it does not compete, in the sense required for section 79 of the *Competition Act*" (Reitman Report, at para 60). Dr. Reitman also concluded that "VAA would be considered to have 'control' over the provision of premium flight catering services at YVR by virtue of its control over a key input required to provide premium flight catering services at YVR," namely, airside access (Reitman Report, at para 61). The Tribunal considers that this logic applies equally to the Galley Handling Market.

[455] Having regard to all of the foregoing, the Tribunal concludes that VAA controls or substantially controls the Galley Handling Market by virtue of its control over a critical input into that market, namely, the supply of airside access (*Canada Pipe FCA Cross Appeal* at para 13).

(4) Conclusion

[456] For the reasons set forth above, the Tribunal concludes that the Commissioner has demonstrated, on a balance of probabilities, that the requirements of paragraph 79(1)(*a*) are met and that VAA substantially or completely controls, throughout Canada or any area thereof, a class or species of business, namely, both the Airside Access Market and the Galley Handling Market at YVR. As the Tribunal has observed, the latter finding alone is sufficient to meet the requirements of paragraph 79(1)(*a*).

D. Has VAA engaged in, or is it engaging in, a practice of anti-competitive acts, as contemplated by paragraph 79(1)(*b*) of the Act?

[457] The Tribunal now turns to the determination of whether VAA has engaged in, or is engaging in, a practice of anti-competitive acts, as contemplated by paragraph 79(1)(*b*) of the Act. Since VAA does not compete in the Relevant Market, the Tribunal has approached its analysis of this issue in two steps. In the first step, the Tribunal has assessed whether VAA has a PCI in the Galley Handling Market. In the absence of such a PCI, a presumption arises that conduct challenged under section 79 generally will not have the required predatory, exclusionary or disciplinary purpose contemplated by paragraph 79(1)(*b*) (*TREB CT* at paras 279-282). In any event, where, as here, a PCI has been found to exist, the Tribunal will proceed to the second step of the analysis, namely, the assessment of whether the "overall character" of the impugned conduct was anti-competitive or rather reflected a legitimate overriding purpose.

(1) Does VAA have a PCI in the Relevant Market in which the Commissioner has alleged that competition has been, is being or is likely to be prevented or lessened substantially by a practice of anti-competitive acts?

[458] For the reasons set forth below, the judicial members of the Tribunal find, on the balance of probabilities, that VAA has a PCI in the Relevant Market.

(a) Meaning of "plausible"

[459] In *TREB CT* at paragraph 279, the Tribunal observed that "before 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" [emphasis in original]. The Tribunal elaborated as follows:

> [281] In the case of an entity that is upstream or downstream 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, or the typical interest of a customer in cultivating upstream competition for the supply of the goods or services that it purchases. Among other things, this will ensure that garden-variety refusals to supply or other vertical conduct that has no link to a plausible competitive interest by the respondent in the relevant market will not be mistaken for the type of anti-competitive conduct that is contemplated by paragraph 79(1)(*b*).
>
> [282] For greater certainty, if a respondent, who is a dominant supplier to, or customer of, participants in the relevant market, is found to have no plausible competitive interest in adversely impacting competition in the relevant market, other than as described immediately above, its practices generally will not be found to fall within the purview of paragraph 79(1)(*b*). This is so regardless of whether that entity's conduct might incidentally adversely impact upon competition. For example, an upstream supplier who discontinues supply to a customer because the customer consistently breaches agreed-upon terms of trade typically would not be found to have engaged in a practice of anti-competitive acts solely because that customer is no longer able to obtain supply (perhaps because of its poor reputation) and is forced to exit the market, or becomes a weakened competitor in the market.

[460] In essence, the requirement to demonstrate that a respondent who does not compete in the relevant market nonetheless has a PCI in such market serves as a screen. It is intended to filter out at an early stage of the Tribunal's assessment conduct that is unlikely to fall within the purview of paragraph 79(1)(*b*). In brief, in the absence of a PCI, a presumption arises that the impugned conduct does not have the requisite anti-competitive purpose contemplated by paragraph 79(1)(*b*). Unless the Commissioner is able to displace this presumption by clearly and

convincingly demonstrating the existence of such an anti-competitive purpose even though the respondent has no PCI, the Tribunal expects that it will ordinarily conclude that the requirements of paragraph 79(1)(*b*) have not been met. The Tribunal further expects that, in the absence of a PCI, a respondent would ordinarily be able to readily demonstrate the existence of a legitimate business justification for engaging in the impugned conduct, and that the "overall character" of the conduct, or its "overriding purpose," was not and is not anti-competitive, as contemplated by paragraph 79(1)(*b*) (*Canada Pipe FCA* at paras 67, 73, 87-88).

[461] In addition to the foregoing recalibration of the role of the PCI, the present Application gives rise to the need for the Tribunal to elaborate upon the meaning of the word "plausible."

[462] The Lexico online dictionary defines the word "plausible" as something that is "reasonable or probable." Lexico's online thesaurus provides the following synonyms: "credible, reasonable, believable, likely, feasible, probable, tenable, possible, conceivable, imaginable, within the bounds of possibility, convincing, persuasive, cogent, sound, rational, logical, acceptable, thinkable" (*Lexico Dictionary powered by Oxford*, "plausible," online: <https://www.lexico.com/en/synonym/plausible>). By comparison, the Merriam-Webster defines "plausible" as something that is "superficially fair, reasonable, or valuable, but often specious;" something that is "superficially pleasing or persuasive;" or something that appears "worthy of belief" (*Merriam-Webster Dictionary*, "plausible," online : <https://www.merriam-webster.com/dictionary/plausible>).

[463] Both definitions have a wide-ranging scope, and some of the foregoing synonyms would permit the PCI screen to be set at a level that would deprive it of much of its utility, either because it would screen too much conduct into the potential purview of paragraph 79(1)(*b*), or because it would have the opposite effect. It could have the former outcome by screening in a potentially significant range of conduct that is unlikely to be ever found to have the anti-competitive purpose contemplated by that provision. It could have the latter outcome by screening out conduct that may well in fact have such an anti-competitive purpose.

[464] The Tribunal considers it appropriate to calibrate the meaning of the word "plausible," as used in the particular context of section 79, to connote something more than simply "possible," "conceivable," "imaginable," "thinkable" or "within the bounds of possibility." At the same time, the Tribunal considers that it would not be appropriate to set the bar as high as to require a demonstration of a "likely," "convincing" or "persuasive" competitive interest in the relevant market. The Tribunal is also reluctant to require an interest to be demonstrated to be "economically rational," as people and firms do not always act in economically rational ways, and the purpose of the PCI screen would be undermined if businesses had to wonder about whether an economist would consider a potential course of conduct to be economically rational.

[465] To serve as a meaningful screen, without inadvertently screening out conduct that may well in fact have an anti-competitive purpose, the Tribunal considers that the word "plausible" should be interpreted to mean "reasonably believable." To be reasonably believable, there must be some credible, objectively ascertainable basis in fact to believe that the respondent has a competitive interest in the relevant market. However, in contrast to the "reasonable grounds to believe" evidentiary standard, the factual basis need not rise to the level of "compelling" mentioned in the immigration cases cited and relied on by the Commissioner (*Mugesera v*

Canada (Minister of Citizenship and Immigration), 2005 SCC 40 at para 114; *Mahjoub v Canada (Citizenship and Immigration*), 2017 FCA 157 at para 89). Such a requirement could inadvertently screen out a meaningful range of potentially anti-competitive conduct that merits more in-depth assessment.

[466] It bears underscoring that the mere fact that the PCI test has been satisfied in any particular case does not imply that the impugned conduct will likely be found to meet the elements in section 79. The demonstration of a PCI simply means that the conduct will not be screened out at an early stage. The impugned conduct will then be reviewed in much the same way as would otherwise have been the case, had the Tribunal not introduced the PCI test to screen out cases that are very unlikely to warrant the time, effort and resources required to assess each of the elements of section 79.

(b) The parties' positions

(i) The Commissioner

[467] At the outset of the hearing in this proceeding, the Commissioner took the position that the Tribunal does not need to use the PCI screen in a case such as this where the express purpose of the impugned conduct "is manifestly the exclusion of a competitor from a market" (Transcript, Public, October 2, 2018, at p 26). In the circumstances, and in the presence of such a clear exclusionary intent, he asserted that there is no need for the PCI screen. In the alternative, he maintained that if the PCI test is employed, it should have an attenuated role in determining whether the overall purpose of the impugned conduct is exclusionary.

[468] Later in the hearing, the Commissioner asserted that the PCI screen ought not to require proof that the impugned conduct could possibly or plausibly lessen competition in the relevant market. He submitted that such a requirement would effectively conflate the elements contemplated by paragraphs 79(1)(*b*) and (*c*), contrary to *Canada Pipe FCA* at paragraph 83.

[469] In response to a specific question raised by the panel, the Commissioner stated that if the Tribunal finds that VAA has a conceptual PCI in pursuing a course of action that may maintain or enhance its revenues, this would be sufficient for the purposes of the PCI screen. It would not be necessary for the Tribunal to further find, on the specific facts of this case, that VAA in fact has a competitive interest in the Galley Handling Market.

[470] Quite apart from all of the foregoing, the Commissioner submits that VAA has a competitive interest in the Galley Handling Market at YVR for two principal reasons, relating to land rents and Concession Fees, respectively.

[471] Regarding land rents, the Commissioner's position appears to be that by licensing one or more additional in-flight catering firms, VAA would be exposed to the possibility that Gate Gourmet and/or CLS would have less need for some of their existing facilities, such that VAA's revenues from rental income would decline.

[472] With respect to Concession Fees, the Commissioner's position is that, in contrast to a typical upstream supplier who would suffer from a less competitive downstream market, VAA benefits (through increased Concession Fees) by excluding additional in-flight caterers. In this regard, Dr. Niels posited that the total revenues obtained by the incumbent in-flight caterers are higher, and therefore VAA's total revenues from Concession Fees are higher, under the *status quo* than if additional in-flight caterers were permitted to enter the Galley Handling Market. In his closing submissions, the Commissioner noted that this "participation in the upside" distinguishes VAA from a typical supplier, whose profits are not formulaically linked to the revenues of the downstream supplier (Commissioner's Closing Submissions, at para 62).

[473] In his closing argument, the Commissioner also added a third ground to support VAA's PCI: the fact that VAA would earn additional aeronautical revenues from the incremental additional flights that it would be able to attract to the Airport as a result of ensuring a stable and competitive supply of in-flight catering services.

(ii) VAA

[474] VAA submits that a landlord and tenant relationship, such as the one it has with Gate Gourmet and CLS, cannot suffice to give rise to a PCI in adversely impacting competition in the market in which the tenant competes. In this regard, VAA notes that any influence that it may have on prices charged by in-flight caterers is solely through its Concession Fees, which are no different in kind from percentage-based fees charged to retailers by a shopping mall owner. VAA adds that its status as a non-profit corporation operating in the public interest is such that it cannot have a PCI in adversely impacting competition in the Galley Handling Market. It states that this is particularly so given that it is not involved in, and has no commercial interest in, that market. With the foregoing in mind, it maintains that it has no economic incentive to engage in anti-competitive conduct, and that it was not in fact motivated by a desire to increase or maintain the level of its Concession Fees.

[475] Moreover, VAA asserts that it can derive no benefit from restricting competition in the Galley Handling Market, if such restriction would render the market structure inefficient. In this regard, and as further discussed below, Dr. Reitman explained that if VAA were assumed to act rationally, and to seek to maximize fees and rents from in-flight catering firms, there are other courses of action available to it that would leave it and airlines better off. As a result, he maintained that VAA would never choose to restrict entry as an alternative to one of those other courses of action.

[476] With respect to land rents, VAA submits that Gate Gourmet and CLS each have binding long-term lease agreements that impose obligations from which they would not be entitled to be relieved in the event that they have less need of some of their facilities. In addition, VAA states that the unchallenged evidence of Mr. Richmond is that VAA would have no difficulty in finding a replacement tenant willing to pay a comparable rent for any space at YVR that Gate Gourmet or CLS might wish to give up.

[477] Finally, VAA notes that its total revenues from Concession Fees and land rents paid by in-flight caterers represent **[CONFIDENTIAL]**% of its overall revenues.

(c) Assessment

[478] The Tribunal will first address the Commissioner's submissions and then address the submissions of VAA that remain outstanding. At the outset, the Tribunal observes that the very particular factual matrix with which it has been presented in this proceeding does not fit comfortably within the purview of section 79 of the Act. Nevertheless, the Tribunal must take each situation with which it is presented, and perform its role. For the reasons set forth below, the judicial members of the Tribunal have concluded that VAA does in fact have a PCI in the Galley Handling Market, although that PCI falls very close to the lower limit of what the Tribunal considers a PCI to be.

(i) The Commissioner's submissions

[479] The Commissioner's position that the Tribunal does not need to use the PCI screen in a case such as this reflects a misunderstanding of the nature of that test. As explained above, the screen is intended to filter out, at an early stage of the Tribunal's assessment, conduct that does not appear to have a plausible basis for finding the anti-competitive intent required by paragraph 79(1)(*b*). The mere fact that an impugned practice may appear to be exclusionary on its face does not serve to eliminate the utility of the screen. This is because there may be other aspects of the factual matrix that demonstrate the absence of a credible, objectively ascertainable factual basis to believe that the respondent has any plausible competitive interest in the relevant market. The Tribunal makes this observation solely to indicate that there may be situations where conduct that is exclusionary on its face does not pass the PCI test.

[480] The Tribunal does not accept the Commissioner's alternative position that the PCI should have an attenuated role in this case, for essentially the same reason. Moreover, in its capacity as a screen, the PCI test is conducted prior to the assessment of the overall character, or overriding purpose, of the impugned conduct. It is not conducted together with that assessment.

[481] Turning to the Commissioner's position that the PCI screen does not require proof that the impugned conduct could possibly or plausibly lessen competition in the relevant market, the Tribunal agrees. Such a requirement would effectively conflate the elements contemplated by paragraphs 79(1)(*b*) and (*c*) (*Canada Pipe FCA* at para 83). However, the Tribunal does not agree with the Commissioner's position that the establishment of a conceptual PCI in the Galley Handling Market is sufficient for the purposes of that test. The Commissioner needs to go further and establish a credible, objectively ascertainable factual basis to believe that VAA has a competitive interest in that market.

[482] Regarding the Commissioner's position with respect to VAA's interest in the land rents that it receives from Gate Gourmet and CLS, the Tribunal agrees with VAA's position. That is to say, the Tribunal accepts Mr. Richmond's evidence that VAA would have no difficulty in finding one or more replacement tenants willing to pay a comparable rent for any space that Gate Gourmet or CLS may wish to give up, if they were to lose business to one or more new entrants, and therefore no longer need as much land at YVR. The Tribunal pauses to add that dnata was recently granted a licence to provide airside access at YVR, notwithstanding the fact that its flight kitchen will be located outside the Airport. In addition, pursuant to the terms of their lease

agreements, the rents paid by Gate Gourmet and CLS **[CONFIDENTIAL]**. Moreover, the Commissioner was not able to explain how Gate Gourmet or CLS might be able to escape from their obligations towards VAA under their long-term leases with VAA. Considering the foregoing, the remainder of this section will deal solely with VAA's alleged interest in its revenues from Concession Fees.

[483] With respect to VAA's Concession Fees, the Tribunal agrees with the Commissioner that VAA's "participation in the upside" of overall revenues generated by in-flight caterers at YVR, together with its ability to exclude additional suppliers from the Galley Handling Market there, distinguishes VAA's position from a typical upstream supplier who would suffer from a less competitive downstream market. As observed by the U.K.'s High Court of Justice in *Luton Airport* at paragraph 100: "[Luton Operations' stake in the downstream market] constitutes a commercial and economic interest in the state of competition on the downstream market: Luton Operations are not a neutral or indifferent upstream provider of facilities."

[484] The Tribunal does not accept VAA's position that the foregoing holding in *Luton Airport* can be distinguished on the basis of the facts in that case, or on the basis that that case did not address the issue of whether a defendant had a PCI in adversely affecting competition in the relevant market. Regarding the facts, Luton Operations, like VAA, was the operator of an airport. Furthermore, like VAA, it had the ability to decide who could compete to supply certain services at the airport. Ultimately, it was found to have abused its dominant position in the market for the grant of rights to operate a bus service at the airport, by granting an exclusive seven-year concession to a particular entity to supply those services. Contrary to VAA's assertion, the Tribunal does not consider the fact that there had previously been open access for bus service providers at Luton Airport as providing a basis for distinguishing that case from the present proceeding. In addition, the fact that the magnitude of Luton Operations' gain from the impugned conduct was far greater than what is being alleged in the current proceeding does not provide a principled basis for distinguishing that case from the case now before the Tribunal.

[485] Regarding the issue of Luton Operations' commercial and economic interest in adversely affecting competition, the Court explicitly noted that Luton Operations "share[d] in the revenue generated in the downstream market" and would "also benefit if the protection from competition conferred on National Express by the grant of exclusivity result[ed] in National Express being able to charge customers higher prices than would otherwise prevail" (*Luton Airport* at para 100).

[486] In the Tribunal's view, it is the link to this latter benefit that distinguishes the particular factual matrix in this proceeding from a typical landlord and tenant relationship, and from a range of other situations in which an upstream party leases, licenses or grants a benefit to a downstream party in exchange for a percentage of the latter's revenues from sales. That is to say, unlike VAA and Luton Operations, the typical landlord, franchisor, licensor, etc. is not in a position to potentially prevent or lessen competition substantially in a downstream market, solely through its power to refuse to license additional third parties to operate in that market. This alleged ability to benefit from a restriction on competition also distinguishes the case before the Tribunal from the situation in *Interface Group, Inc v Massachusetts Port Authority*, 816 F.2d 9, cited by VAA, where the complainant advanced no such theory, or indeed any other theory of antitrust harm.

[487] Given that VAA has this potential ability, the Tribunal considers that its status as a non-profit organization with a broad mandate to operate in the public interest does not, as a matter of law, exclude it and other similarly mandated monopolists from the purview of section 79 of the Act, unless it is able to meet the requirements of the RCD. As discussed above in Section VII.A. of these reasons, the RCD requirements are not met in this case.

(ii) VAA's submissions

[488] The Tribunal will now turn to VAA's assertion that it can derive no benefit from restricting competition in the Galley Handling Market, if such restriction would render the market structure inefficient. As noted at paragraphs 474-475 above, this assertion is based on the fact that VAA has other, allegedly more efficient, options available to it to increase its revenues from in-flight caterers. In particular, Dr. Reitman maintained that if VAA were assumed to act rationally, and to seek to maximize the fees from in-flight catering firms, then as a matter of economic theory it would never choose to restrict entry as an alternative to one of those other courses of action.

[489] The particular option that Dr. Reitman maintains would be more rational and efficient for VAA to pursue, if one makes the two assumptions he mentions, would be to raise its Concession Fees. The point of departure for Dr. Reitman's position appears to be as follows (Reitman Report, at para 85):

> [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.

[490] From this proposition, Dr. Reitman proceeds to the further proposition that "if demand is elastic, then revenues would not increase by restricting entry" (Reitman Report, at para 86). However, this ignores that the Commissioner's principal theory of harm is that competition in the Galley Handling Market has been, and is being, prevented, and is likely to be prevented in the future. Pursuant to that theory, VAA's exclusion of additional in-flight catering firms from the Galley Handling Market has prevented the reduction of prices of Galley Handling services, relative to the levels that currently prevail and will continue to prevail in the absence of the impugned conduct. In turn, this prevention of the reduction of prices in the Galley Handling Market has prevented a reduction in the Concession Fee revenues that VAA receives from Gate Gourmet and CLS.

[491] In any event, the Commissioner has not alleged that one of VAA's objectives is to maximize its Concession Fee revenues. He has simply alleged that VAA benefits financially, through its Concession Fees, from the protection from competition that it confers to Gate Gourmet and CLS.

[492] In this regard, Mr. Richmond stated that VAA's mandate is not to maximize revenues, but rather to manage YVR in the interests of the public. Moreover, the Tribunal notes that on

cross-examination, Dr. Reitman conceded that being a rational, profit-maximizing entity would be inconsistent with VAA's public interest mandate. Moreover, Dr. Tretheway testified that he does not believe that VAA is a "revenue maximizer" (Transcript, Conf. B, October 31, 2018, at pp 900-901). In any event, the Tribunal accepts Dr. Niels' evidence that it would not logically flow from the fact that a firm does not maximize profits, that it disregards profits entirely. The Tribunal also accepts Dr. Niels' evidence that VAA can have an incentive to restrict competition in the Galley Handling Market, even if it does not seek to extract maximum revenues from the incumbent in-flight caterers. The Tribunal has no reason to doubt Dr. Niels' testimony that it is "quite normal […] for not-for-profit entities to nonetheless seek commercially advantageous deals in markets," even though they may not seek profit-maximizing levels of revenues from firms in downstream markets (Transcript, Public, October 15, 2018, at p 429).

[493] The Commissioner has also not alleged that VAA is a rational economic agent.

[494] The foregoing observations also assist in responding to Dr. Reitman's proposition that there could not have been sufficient profits available in the Galley Handling Market at YVR to sustain three viable in-flight catering firms. Dr. Reitman based that proposition on the theory that VAA would already have extracted all of the economic rents available in that market, leaving Gate Gourmet and CLS with only "enough return to keep them in the market" (Reitman Report, at para 87). However, that theory depended on the two unproven assumptions addressed above. The same is true of Dr. Reitman's theory that even if the market could only support two in-flight caterers, VAA would have no incentive to limit entry, because it would thereby preclude itself from being able to extract the additional revenues that a lower-cost entrant would earn, relative to a less efficient incumbent.

[495] In addition to all of the above, Dr. Reitman maintained that even if VAA charges port fees that are low enough that demand for Galley Handling services at YVR is still on the inelastic portion of the demand curve, it would have a better alternative than to limit competition in that market. He asserted that a simpler, and superior strategy that would generate at least as much revenue for VAA, while being better for airlines and consumers, would be to allow entry and increase the Concession Fees (i.e., the port fees). The Tribunal observes that in advancing this position, Dr. Reitman did not take the position that VAA does not have any economic rationale to restrict entry into the Galley Handling Market. On cross-examination, he clarified that VAA simply has "an alternative strategy that would be even better" (Transcript, Conf. B, October 17, 2018, at p 692).

[496] In this regard, Dr. Reitman hypothesized that if one assumed a price effect of **[CONFIDENTIAL]** from the entry of a third caterer, as suggested in one of Dr. Niels' analyses, and if one assumes that market demand is inelastic, then the entry of a third caterer in 2014 would have resulted in a reduction in total catering spending by airlines of **[CONFIDENTIAL]**. In turn, Dr. Reitman estimated that this would have reduced VAA's revenues by **[CONFIDENTIAL]**, which corresponds to only **[CONFIDENTIAL]** of VAA's 2014 total gross revenues of approximately $465 million. Dr. Reitman then estimated that VAA could have recouped that loss by increasing its on-Airport Concession Fee from **[CONFIDENTIAL]**% to **[CONFIDENTIAL]**%. He observes that this would result in VAA suffering no loss of revenues, while permitting airlines to save over **[CONFIDENTIAL]**– a much more efficient outcome. (The Tribunal assumes that Dr. Reitman used the words "**[CONFIDENTIAL]**" instead of

"**[CONFIDENTIAL]**" because he assumed that in-flight caterers would pass on to airlines the small increase in the Concession Fee, as they do with existing Concession Fees.)

[497] Given the foregoing, VAA maintains that it is not credible for the Commissioner to suggest that VAA would have an economic incentive to adversely affect competition in the Galley Handling Market. Put differently, VAA states that maintaining the level of its revenues from Concession Fees would not provide a rational economic actor in its position with an incentive to exclude a third caterer from that market, and could not provide it with a PCI to adversely affect competition in that market.

[498] The judicial members of the panel find that, as appealing as the foregoing economic argument may appear at first blush, it is not consistent with certain important facts in evidence before the Tribunal.

[499] In particular, VAA's Master Plan – YVR 2037 states: **[CONFIDENTIAL]** [emphasis added] (Richmond Statement, at Exhibit 10). **[CONFIDENTIAL]** (Richmond Statement, at Exhibit 10). **[CONFIDENTIAL]**.

[500] Likewise, in its 2018-2020 Strategic Plan, VAA states: **[CONFIDENTIAL]** [emphasis added] (Richmond Statement, at Exhibit 9). In response to a question posed by the panel, Mr. Richmond stated that **[CONFIDENTIAL]** (Transcript, Conf. B, October 30, 2018, at p 874).

[501] Consistent with the foregoing, Dr. Tretheway confirmed during cross-examination that the paradox of the not-for-profit governance model is that it generally requires such entities to generate a surplus of revenues over costs, to yield "profits" that are needed to fund ongoing investments (Transcript, Public, November 1, 2018, at pp 846-847). For this reason, Mr. Norris confirmed that notwithstanding that Concession Fees represent only approximately **[CONFIDENTIAL]**% of VAA's revenues, **[CONFIDENTIAL]** (Transcript, Conf. B, November 1, 2018, at pp 1134-1135).

[502] The level of VAA's interest in its Concession Fees **[CONFIDENTIAL]** [emphasis added].

[503] In addition, evidence provided by Mr. Brown, from Strategic Aviation, in the form of an email that he sent on **[CONFIDENTIAL]** (Brown Statement, at Exhibit 9).

[504] Moreover, **[CONFIDENTIAL]** (Norris Statement, at Exhibit 30). Similarly, **[CONFIDENTIAL]** [emphasis added] (Richmond Statement, at Exhibit 19). The Tribunal notes that the above-mentioned **[CONFIDENTIAL]**.

[505] The lay member of the panel, Dr. McFetridge, takes issue with the characterization of Dr. Reitman's evidence mentioned at paragraph 496 above as being inconsistent with other evidence before the Tribunal. In Dr. McFetridge's opinion, the essence of Dr. Reitman's evidence on this point is that any revenue loss avoided by preventing entry would be small (i.e., **[CONFIDENTIAL]** or **[CONFIDENTIAL]** of VAA's 2014 total gross revenues) and could be offset by a marginal change in Concession Fees (i.e., an increase […by a trivial amount…]). Dr. McFetridge is of the view that this evidence is not contingent on assumptions about rational

maximizing behaviour nor does it require a trained economist for its explication. In addition, Dr. McFetridge does not see the documentary evidence in paragraphs 499-504 above as being inconsistent with the evidence of Dr. Reitman, although he does acknowledge that these paragraphs could be read as hinting that VAA's management might have viewed the matter differently.

[506] The judicial members of the Tribunal consider that the evidence discussed above supports the Commissioner's position that VAA has a PCI in the Galley Handling Market, because it has an interest in the overall level of the Concession Fee revenues that it obtains from in-flight caterers. In the Tribunal's view, that evidence, taken as a whole, provides some credible, objectively ascertainable basis in fact to believe that VAA has a competitive interest in the Galley Handling Market. As **[CONFIDENTIAL]** quoted at paragraph 504 above, VAA "**[CONFIDENTIAL]**". At this screening stage of its assessment, the judicial members of the Tribunal consider this, together with the other evidence discussed above, to be sufficient to meet the PCI threshold and to warrant moving to the assessment of the elements set forth in paragraphs 79(1)(*b*) and (*c*). Dr. McFetridge does not share this opinion. In his view, while VAA has an interest both in growing or at least maintaining the Concession Fee revenues it derives from the service providers operating at YVR and in their competitive performance, the revenue loss that might be avoided by preventing entry into the Galley Handling Market is too speculative, too small (indeed trivial in relative terms) and too easily offset by marginal changes in Concession Fees to qualify as a PCI for the purposes of section 79.

[507] In light of the foregoing conclusions, the Tribunal does not need to address the Commissioner's late argument that VAA's PCI is also grounded in its incentive to increase aeronautical revenues by providing a stable competitive environment for the existing in-flight catering firms.

[508] Contrary to VAA's position, the Tribunal considers that it would not be appropriate, at this screening stage of its assessment, to go further and determine whether VAA was, in fact, motivated by a desire to increase or maintain the level of its Concession Fee revenues. This is because such a requirement would draw the Tribunal deeply into the analysis of VAA's alleged legitimate business justification. In brief, a determination of whether VAA was, in fact, motivated by a desire to increase or maintain its Concession Fee revenues is inextricably linked with the assessment of the alleged business justification. The same is true with respect to evidence that VAA has benevolently refrained from raising the Concession Fees to levels charged at other airports in North America. Accordingly, the evidence that VAA has provided to support its position on this point will be assessed in connection with the Tribunal's evaluation of whether the overall character or overriding purpose of VAA's impugned conduct was anti-competitive, as contemplated by paragraph 79(1)(*b*) of the Act.

[509] In addition to all of the foregoing, VAA maintains that the Commissioner failed to adduce any economic evidence in support of his position that it has a PCI in the Galley Handling Market, and that this failure, in and of itself, is fatal to his case. The Tribunal disagrees with both of those propositions. First, Dr. Niels did provide the expert evidence referenced at paragraphs 472 and 492 above. Second, the evidence from other sources discussed above was sufficient to enable the Tribunal to conclude that VAA has a PCI in the Galley Handling Market. Dr. Niels' evidence was not necessary to enable the Tribunal to reach that conclusion.

(d) Conclusion

[510] For the reasons set forth above, the judicial members of the Tribunal conclude that VAA has a PCI in the Galley Handling Market because the evidence, taken as a whole and on a balance of probabilities, provides some credible, objectively ascertainable factual basis to believe that VAA has a competitive interest in that market.

(2) Was the "overall character" of VAA's impugned conduct anti-competitive or legitimate? If the latter, does it continue to be the case?

[511] The Tribunal now moves to the second step of its analysis under paragraph 79(1)(*b*) of the Act. For the reasons detailed below, the Tribunal finds, on a balance of probabilities, that the impugned conduct does not constitute an anti-competitive practice contemplated by this provision. This is because the "overall character" of VAA's refusal to authorize Newrest and Strategic Aviation to access the airside at YVR was, and continues to be legitimate, rather than anti-competitive.

[512] In brief, although VAA intended to, and continues to intend to, exclude Newrest, Strategic Aviation and other potential new entrants into the Galley Handling Market, the evidence demonstrates that VAA has predominantly been concerned that granting authorization to one or more new entrants would give rise to three very real risks. First, VAA has been concerned that CLS or Gate Gourmet would exit the Galley Handling Market, leaving only the other incumbent as a full-service provider. VAA had reasonable grounds to believe that if that were to happen, neither Newrest nor Strategic Aviation would fully replace the departed incumbent, at least not for a significant period of time. Second, VAA has been concerned that some airlines and consumers would suffer a significant disruption of service for a transition period of at least several months. Third, VAA has been concerned that if the first two risks materialized, its ability to compete with other airports to attract new airlines, as well as new routes from existing airline customers, would be adversely impacted, and that the overall reputation of YVR would suffer.

[513] Collectively, these concerns were and are linked to cognizable efficiency or pro-competitive considerations that are independent of any anti-competitive effects of the impugned conduct. Having regard to the conclusions reached in Section VII.E below in relation to paragraph 79(1)(*c*), the Tribunal finds that any such actual and reasonably foreseeable anti-competitive effects of the impugned conduct are not disproportionate to those efficiency and pro-competitive rationales. Indeed, the Tribunal is satisfied that, when weighed against the exclusionary negative effects of VAA's conduct, these legitimate business considerations are sufficient to counterbalance them.

(a) Analytical framework

[514] The analytical framework for the Tribunal's assessment of paragraph 79(1)(*b*) was extensively addressed in *TREB CT* at paragraphs 270-318. The FCA confirmed that this was the correct framework (*TREB FCA* at para 55). It does not need to be repeated here. For the present

purposes, it will suffice to simply reiterate the following principles, with appropriate modification to account for the fact that VAA does not compete in the Galley Handling Market.

[515] The most basic parameters of the analytical framework applicable to paragraph 79(1)(*b*) are described as follows in *TREB CT*:

> [272] […] the focus of the assessment under paragraph 79(1)(*b*) of the Act is upon the purpose of the impugned practice, and specifically upon whether that practice was or is intended to have a predatory, exclusionary or disciplinary negative effect on a competitor (*Canada Pipe FCA* at paras 67-72 and 77).
>
> [273] The term "practice" in paragraph 79(1)(*b*) is generally understood to contemplate more than an isolated act, but may include an ongoing, sustained and systemic act, or an act that has had a lasting impact on competition (*Canada Pipe FCA* at para 60). In addition, different individual anti-competitive acts taken together may constitute a "practice" (*NutraSweet* at p. 35).
>
> [274] In this context, subjective intent will be probative and informative, if it is available, but it is not required to be demonstrated (*Canada Pipe FCA* at para 70; *Laidlaw* at p. 334). Instead, the Tribunal will assess and weigh all relevant factors, including the "reasonably foreseeable or expected objective effects" of the conduct, in attempting to discern the "overall character" of the conduct (*Canada Pipe FCA* at para 67). In making this assessment, the respondent will be deemed to have intended the effects of its actions (*Canada Pipe FCA* at paras 67-70; *Nielsen* at p. 257).
>
> [275] It bears underscoring that the assessment is focused on determining whether the respondent subjectively or objectively intended a predatory, exclusionary or disciplinary negative effect on a competitor, as opposed to on competition. While adverse effects on competition can be relevant in determining the overall character or objective purpose of an impugned practice, it is not necessary to ascertain an actual negative impact on competition in order to conclude that the practice is anti-competitive, within the meaning contemplated by paragraph 79(1)(*b*). The focus at this stage is upon whether there is the requisite subjective or objective intended negative impact on one or more competitors. An assessment of the actual or likely impact of the impugned practice on competition is reserved for the final stage of the analysis, contemplated by paragraph 79(1)(*c*) (*Canada Pipe FCA* at paras 74-78).
>
> [emphasis in original]

[516] In discerning the overall character of an impugned practice, it is important to take into account and weigh all relevant factors (*Canada Pipe FCA* at para 78). This includes any legitimate business considerations that may have been advanced by the respondent. Those considerations must then be weighed against any subjectively intended and/or reasonably

foreseeable predatory, exclusionary or disciplinary negative effects on a competitor that have been established (*Canada Pipe FCA* at para 67; *TREB CT* at para 285).

[517] In *TREB CT*, the Tribunal elaborated upon this aspect of the assessment as follows:

> [293] In conducting this balancing exercise, the Tribunal will endeavour to ascertain whether, on a balance of probabilities, the actual or reasonably foreseeable anti-competitive effects are disproportionate to the efficiency or pro-competitive rationales identified by the respondent; or whether sufficiently cogent evidence demonstrates that the respondent was motivated more by subjective anti-competitive intent than by efficiency or pro-competitive considerations. In other words, even where there is some evidence of subjective anti-competitive intent on the part of the respondent, such evidence must convincingly demonstrate that the overriding purpose of the conduct was anti-competitive in nature. If there is evidence of both subjective intent and actual or reasonably foreseeable anti-competitive effects, the test is whether the evidence is sufficiently clear and convincing to demonstrate that such subjective motivations and reasonably foreseeable effects (which are deemed to have been intended), taken together, outweigh any efficiencies or other pro-competitive rationale intended to be achieved by the respondent. In assessing whether this is so, the Tribunal will assess whether the subjective and deemed motivations were more important to the respondent than the desire to achieve efficiencies or to pursue other pro-competition goals.
>
> [emphasis added]

[518] For the purposes of paragraph 79(1)(*b*), a legitimate business justification "must be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts" (*Canada Pipe FCA* at para 73; *TREB FCA* at para 148). Stated differently, to be considered legitimate in this context, a business justification must not only provide either a credible efficiency or a credible pro-competitive rationale for the impugned practice, it must also be linked to the respondent (*TREB FCA* at para 149; *Canada Pipe FCA* at para 91). Such a link can be established by, among other things, demonstrating one or more types of efficiencies likely to be attained by the respondent as a result of the impugned practice, establishing improvements in quality or service, or otherwise explaining how the impugned practice is likely to assist the respondent to better compete (*TREB FCA* at para 149; *TREB CT* at paras 303-304). Although this requirement was previously articulated in terms of better competing in the relevant market, that would obviously not be possible where the respondent does not compete in that market. Accordingly, this requirement must be understood as applying to the market(s) in which the respondent competes.

[519] The business justification must also be independent of the anti-competitive effects of the impugned practice, must involve more than a respondent's self-interest, and must include more than an intention to benefit customers or the ultimate consumer (*Canada Pipe FCA* at paras 90-91; *TREB CT* at para 294).

[520] The existence of one or more legitimate business justifications for an impugned conduct must be established, on a balance of probabilities, by the party advancing those justifications (*TREB CT* at paras 429-430). That party also has the burden of demonstrating that the legitimate business justifications outweigh any exclusionary negative effect of the conduct on a competitor and/or the subjective intent of the act, such that the overall character or overriding purpose of the impugned conduct was not anti-competitive in nature (*Canada Pipe FCA*, at paras 67, 73, 87-88; *TREB CT* at para 429).

(b) The parties' positions

(i) The Commissioner

[521] In his initial pleadings, the Commissioner submitted that VAA has engaged in and is engaging in Practices of anti-competitive acts through: (i) its ongoing refusal to authorize firms, including Newrest and Strategic Aviation, to access the airside for the purposes of supplying Galley Handling services at YVR, and (ii) the continued tying of access to the airside for the supply of Galley Handling services to the leasing of land at YVR from VAA, for the operation of Catering kitchen facilities. However, as stated before, his focus throughout the hearing of this Application was on the former of those two allegations, i.e., the Exclusionary Conduct. Indeed, the latter of those allegations was not addressed by the Commissioner during the hearing or in his closing written submissions.

[522] The Commissioner maintains that the intended purpose and effect of the Practices have been, and are, to exclude new entrants wishing to supply Galley Handling services at YVR. He further asserts that this effect was and continues to be reasonably foreseeable. He notes that one or both of Newrest and Strategic Aviation has been granted access to the airside at several other airports in Canada.

[523] In addition, the Commissioner submits that none of the explanations advanced by VAA to justify the Practices are credible efficiency or pro-competitive rationales that are independent of their anti-competitive effects. In this regard, the Commissioner asserts that VAA has not provided any evidence of cost reductions or other efficiencies that it has attained as a result of the Practices. He further asserts that prior to refusing to provide airside access to Newrest and Strategic Aviation, VAA conducted an inadequate and superficial analysis upon which it then relied on to justify its refusals. More specifically, he states that VAA did not seek information that was readily available from airlines and elsewhere and that would have demonstrated that its concerns with respect to the viability of Gate Gourmet and CLS in the face of new entry were not well-founded.

[524] In any event, the Commissioner states that such explanations are not supported by evidence and do not outweigh VAA's subjective intention to exclude potential entrants, or the reasonably foreseeable or expected exclusionary effects of the Practices. Accordingly, he asserts that the overall character of the Practices is anti-competitive.

(ii) VAA

[525] VAA submits that it has not engaged in a practice of anti-competitive acts, within the meaning of paragraph 79(1)(*b*) of the Act.

[526] Rather, VAA maintains that it had (and continues to have) valid, efficiency enhancing, pro-competitive business justifications for not permitting new entry, prior to its 2017 decision to authorize dnata to access the airside at YVR for the purposes of providing Galley Handling services there. VAA underscores that in the exercise of its business judgment, informed by its expertise and experience, it was (and remains) concerned that there is insufficient demand to justify the entry of additional firms into the Galley Handling Market at YVR. When VAA initially refused to grant airside access to Newrest and Strategic Aviation in 2014, it was concerned that the state of the Galley Handling Market remained "precarious," largely as a result of the dramatic decline in the overall revenues in that market over the previous 10-year period. Although VAA subsequently conducted a study of that market in 2017 and concluded that it could then support a third firm, it continues to be of the view that the market cannot support further new entry at this particular time.

[527] VAA asserts that its overriding concern has been to ensure that the two incumbent in-flight caterers at YVR (namely, Gate Gourmet and CLS) are able to continue to operate efficiently at YVR. Having experienced the exit of one firm (LSG) from the Galley Handling Market in 2003, VAA states that it was and has been concerned that if one or more additional firms were permitted to provide Galley Handling services at YVR, one or both of the incumbent firms would no longer be viable. Moreover, VAA has believed and continues to believe that if one or both of those firms were to exit the market, it would be difficult to attract another "on-site," full-service provider of Galley Handling services at YVR, and that quality and service levels in the market would therefore decline.

[528] VAA adds that its paramount purpose at all times was to ensure that it is able to retain and attract additional airline business to YVR by providing those airlines – in particular, long-haul carriers – with a competitive choice of at least two full-service in-flight catering firms at YVR. Stated differently, VAA maintains that it has always reasonably believed that the presence of full-service in-flight catering firms on-site at YVR is important to ensure optimal levels of quality and service to airlines. It further considers the latter to be important to ensuring the efficient operation of the Airport as a whole, including achieving VAA's public interest mandate, mission and vision. Moreover, VAA has been concerned that if airlines at YVR were unable to obtain their in-flight catering needs, YVR would suffer serious operational and reputational harm. It maintains that this would adversely impact VAA's efforts to attract new routes and new carriers, including Asian carriers.

[529] With respect to the allegation that it has tied airside access to the rental of land, VAA states that this is untrue and unsupported by any factual or legal foundation.

[530] VAA further maintains that any exclusionary negative effect on Newrest and/or Strategic Aviation is outweighed by its legitimate business justifications for refusing to authorize airside access to additional entrants into the in-flight catering business at YVR.

[531] Regarding the allegation that it failed to seek information that was readily available from airlines and elsewhere, VAA states that none of that information could have assisted it to assess the financial position of Gate Gourmet and CLS at YVR. In any event, VAA states that it had regular interactions with airlines, and that the airlines were generally not reticent to raise any concerns with VAA. More fundamentally, VAA maintains that any failure on its part to obtain additional information before making its decision to refuse to authorize airside access to additional in-flight caterers does not undermine the legitimacy of its stated purpose and does not render that purpose anti-competitive.

(c) Assessment

(i) "Practice"

[532] The Commissioner submits that VAA's sustained refusal to authorize Newrest and Strategic Aviation to access the airside at YVR constitutes a "practice." The Tribunal agrees and observes in passing that VAA did not dispute this particular point.

(ii) Intention to exclude and reasonably foreseeable effects

[533] The Commissioner submits that VAA expressly intended to exclude Newrest and Strategic Aviation from the Galley Handling Market, and that the reasonably foreseeable effect of its refusal to authorize them to access the airside to load and unload Catering products was and remains that they are excluded from the Galley Handling Market.

[534] The Tribunal agrees and does not understand VAA to be taking issue with these particular submissions.

[535] It is clear from the evidence provided by Messrs. Richmond and Gugliotta that they subjectively intended to exclude Newrest and Strategic Aviation from the Galley Handling Market at YVR, both prior to and after deciding to authorize a third caterer (dnata) to access the airside to provide Galley Handling services. It is also readily apparent that the reasonably foreseeable effect of VAA's conduct was and remains that Newrest, Strategic Aviation and other potential entrants have been excluded from the Galley Handling Market.

[536] However, that does not end the enquiry under paragraph 79(1)(*b*). The Tribunal must proceed to assess whether the "overall character," or "overriding purpose," of VAA's Exclusionary Conduct was and remains efficiency-enhancing or pro-competitive in nature (*Canada Pipe FCA* at paras 73 and 87-88). In that regard, VAA can avoid a finding that it has engaged in a practice of anti-competitive acts within the meaning of paragraph 79(1)(*b*) of the Act by demonstrating one of two things: (i) that it was motivated more by efficiency or pro-competitive considerations than by subjective or deemed anti-competitive considerations (*TREB CT* at para 293); or (ii) that the actual and reasonably foreseeable anti-competitive effects of the impugned conduct are not disproportionate to the efficiency or pro-competitive rationales identified by the respondent. That demonstration must be made with clear and convincing evidence, on a balance of probabilities.

[537] The Tribunal will address the justifications advanced by VAA for engaging in the Exclusionary Conduct, in Section VII.D.2.c.iv of these reasons below.

(iii) The tying of airside access to the leasing of land at YVR

[538] In his Notice of Application, the Commissioner submitted that VAA has maintained a practice of tying its authorization of access to the airside at YVR for the purposes of supplying Galley Handling services, to the leasing of land at the Airport for the operation of Catering kitchen facilities.

[539] In support of this position, the Commissioner stated that VAA's airside access agreements with Gate Gourmet and CLS terminate if and when each entity, as the case may be, ceases to rent land at YVR from VAA for the operation of a Catering kitchen facility. The Commissioner further asserted that VAA has consistently and purposely intended to exclude new-entrant firms from the Galley Handling Market by requiring that they lease Airport land, rather than less expensive off-Airport land, for the operation of Catering kitchen facilities.

[540] However, as stated above, the Commissioner did not address this tying allegation during the hearing, and he did not refer to it at all in his closing written and oral submissions.

[541] For VAA's part, Mr. Richmond stated that VAA has never required in-flight caterers to operate a flight kitchen at YVR in order to obtain an in-flight catering licence. He maintained that VAA simply has a preference in this regard, based on its belief that locating at YVR offers advantages for the operational efficiency of the Airport as a whole. This includes ensuring optimal levels of quality and service to the airlines and their passengers. Mr. Richmond's evidence is corroborated by the fact that VAA selected dnata during the recent RFP process that it conducted after deciding to authorize a third in-flight caterer at YVR. It did so notwithstanding the fact that dnata's flight kitchen will be located outside YVR.

[542] In the absence of evidence to the contrary, the Tribunal accepts Mr. Richmond's evidence and rejects this allegation. The balance of the decision will therefore focus solely on the Exclusionary Conduct.

(iv) VAA's justifications for the Exclusionary Conduct

- <u>The evidence</u>

[543] The evidence of VAA's justifications for excluding Newrest and Strategic Aviation from the Galley Handling Market was provided primarily by Messrs. Richmond and Gugliotta, although they attached correspondence from others as exhibits to their respective witness statements. In addition, their evidence was broadly corroborated by other industry participants, including Messrs. Stent-Torriani and Brown, as well as in an internal email exchanged between two of Jazz's employees. (Dr. Reitman and Dr. Niels were not asked to assess VAA's justifications, and so were not particularly helpful on this issue.) Although VAA requested

Dr. Tretheway to address this issue, his evidence on this point was found to be inadmissible, as explained above in Section IV.B.2. of these reasons.

The April 2014 events

[544] Mr. Richmond stated that he first became aware of Newrest's interest in entering the Galley Handling Market, and its related request for information about the authorization process, on March 31, 2014. At that time, Mr. Olivier Sadran, the Co-CEO of Newrest, wrote to him to follow up on a request that Newrest's Country Manager in Canada, Mr. Frederic Hillion, had made in that regard in December 2013. Mr. Richmond explained that after receiving Mr. Sadran's letter, he felt that it was important to refamiliarize himself with the "in-flight catering market at YVR" so that he could properly consider and respond to Newrest's inquiry (Richmond Statement, at para 93). To that end, later that same day (March 31, 2014), he requested two individuals within VAA who had expertise in that regard to advise him as to the state of that market.

[545] The first of the two individuals in question was Mr. Gugliotta, who first started working at YVR in 1985 and had developed extensive knowledge and expertise in all aspects of YVR's operations, including in respect of in-flight catering. The second individual was Mr. Raymond Segat, who had nearly 20 years' experience as Director of Cargo and Business Development at YVR, including in overseeing of the in-flight catering concessions at the Airport.

[546] The day following Mr. Richmond's request, Mr. Gugliotta sent Mr. Richmond an email. Attached to that email was a string of other emails, including from Mr. Segat and Mr. Eccott, that had been sent earlier that day (April 1, 2014) and the prior day.

[547] Among other things, Mr. Eccott's email described **[CONFIDENTIAL]** [emphasis added], Mr. Eccott stated "**[CONFIDENTIAL]**" (Richmond Statement, at Exhibit 19).

[548] These views were consistent with previous views that Mr. Eccott had expressed in an internal email dated December 12, 2013, after VAA received the initial request on behalf of Newrest from Mr. Hillion. At that time, Mr. Eccott stated the following (Richmond Statement, at Exhibit 15):

> The concession fee is the same for both current operators, and generates a lot of revenue for us. Nevertheless, over the past 8 years the flight kitchen business has been slammed with cutbacks, shrinking markets etc. the [*sic*] decision to allow a third flight kitchen operation into YVR would likely need to be made at the Sr. level, although, in all likelihood, we would recommend against it.

[549] According to Mr. Richmond, he met with Mr. Gugliotta for approximately one hour later in the day on April 1, 2014, to discuss Newrest's request. Mr. Richmond summarized the meeting as follows: "Mr. Gugliotta expressed serious concerns about how the introduction of a third caterer could affect the market for in-flight catering services at YVR" (Richmond Statement, at para 98). According to Mr. Richmond, those concerns were shared by others at VAA, including Messrs. Segat and Eccott. More specifically, "Mr. Gugliotta expressed concern

that there was not enough demand at the Airport to support three caterers and that, accordingly, the entry of a third caterer might cause one or even both of the incumbent caterers to exit the market at YVR, in whole or in part, without a comparable replacement" [emphasis added]. Mr. Richmond added: "Based on the information available to us at the time, we considered the risk of that occurring to be significant" (Richmond Statement, at para 99). Mr. Richmond added that "one factor that did not affect [his] decision was whether the entry or exclusion of a third caterer would have any impact on VAA's revenues" and noted that VAA's revenues "were never considered or discussed in [his] meeting with Mr. Gugliotta" (Richmond Statement, at para 118).

[550] By way of background and explanation, Mr. Richmond provided the following information, which represents the most fulsome account of VAA's thinking and intentions at the time, as well as the context in which its decisions with respect to Newrest Canada and Strategic Aviation were taken (Richmond Statement, at paras 101-118):

> 101. The in-flight catering market was fulfilling an important objective for VAA, namely, to provide a reliable supply of full-service in-flight catering at competitive prices. In doing so, it helped attract airlines to YVR and grow the Airport for the benefit of the public, which is at the core of VAA's mandate.
>
> 102. At the same time, there were compelling reasons to believe that the state of the in-flight catering market at YVR was precarious. The previous ten years had been tumultuous for the in-flight catering industry in Canada, which experienced significant declines in the demand for in-flight catering services. During that period, many airlines decided to eliminate fresh meal service for economy passengers and short-haul flights (where fresh meals had previously been standard) and replace them with "buy-on-board" offerings. Service of fresh meals was increasingly limited to overseas flights and the much smaller number of premium passengers (i.e. first class or business class). That contributed **[CONFIDENTIAL]**.
>
> 103. In addition, the airline industry had recently experienced several economic downturns, which significantly impacted airline traffic and passenger volumes. For example, over the previous decade, the airline industry in Canada faced significant challenges maintaining passenger volumes following events such as the September 11 terrorist attacks in 2001, the outbreak of SARS in 2003-2004, and the great recession in 2008. While there were indications that passenger volumes may have been stabilizing by late 2013, that was still uncertain given the information we had in early 2014.
>
> 104. There had previously been three in-flight caterers operating at YVR, but not since 2003. Those caterers were Cara Airline Solutions (now Gate Gourmet), CLS and LSG Sky Chefs ("Sky Chefs"). Sky Chefs primarily supplied Canadian Airlines, which was then Canada's second-largest carrier. After Canadian Airlines was acquired by Air Canada in the early 2000s, a large portion of Sky Chefs' business was redirected to Air Canada's preferred caterer at the time, Cara. As a result of a downturn in its business that followed, Sky Chefs decided to leave YVR.

105. Mr. Gugliotta advised me that, after Sky Chefs left the market in 2003, it attempted to lease the flight kitchen it had operated to another in-flight caterer. No in-flight caterer took over Sky Chefs' lease and, even more concerning, no caterer replaced Sky Chefs at YVR. The departure of Sky Chefs, without any equivalent replacement, indicated to us that, as at 2003, the in-flight catering market at YVR was not able to support three caterers.

106. After Sky Chefs left the Airport, VAA continued to have concerns about the in-flight catering market, even with two caterers. Mr. Gugliotta noted that, for several years after Sky Chefs' departure, VAA maintained Concession Fees for the two remaining in-flight caterers at rates below what many other airports were charging, in part due to concerns over the financial viability of Gate Gourmet and CLS.

107. In light of that history, Mr. Gugliotta and I discussed the **[CONFIDENTIAL]**. In that regard, attached as Exhibit "20" is a table showing revenues of in-flight caterers at YVR from 1999 to 2013.

108. Mr. Gugliotta and I noted that **[CONFIDENTIAL]**.

109. There were other factors highlighted by Mr. Gugliotta. For example, he noted that **[CONFIDENTIAL]**.

110. **[CONFIDENTIAL]**.

111. In light of all of that information, Mr. Gugliotta and I considered how the introduction of a new caterer would impact the in-flight catering market at YVR and, more broadly, the Airport as a whole. Based on the information available to us, we concluded that the in-flight catering market at YVR remained precarious and that the entry of a third caterer would result in a significant risk that one or even both of the incumbent caterers would leave YVR.

112. The consequences of an incumbent caterer leaving YVR would have been highly problematic and not in the best interests of the Airport.

113. At a minimum, it would have caused significant disruption in the availability of full-service in-flight catering at YVR. In particular, a sudden or unexpected departure of an existing caterer would leave dozens of airlines scrambling to find a new supplier for hundreds of flights. There are over 400 flights that depart YVR every day, almost all of which rely on some form of in-flight catering. 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 in-flight catering, including fresh meals. Moreover, airlines cannot shut down or suspend operations on those flights while they find a new supplier.

114. Finding a new in-flight caterer is not an easy task for an airline, especially in cases where its existing caterer leaves the market abruptly or unexpectedly.

> Other caterers at the Airport, even if they do offer the full range of services required by the airline, may not have capacity to absorb all the business of the departing caterer. And even if it is possible for one of the remaining in-flight caterers to increase its capacity or expand its service offerings, that could take a significant period of time – even months – while the caterer hires and trains new workers or expands its facilities. During that time period, the supply of in-flight catering would be disrupted.
>
> 115. In addition, it is not a simple or quick process for a new caterer to enter the market under any circumstances, including to replace a departing caterer. There are many steps that a new caterer must follow before it can begin supplying airlines at YVR, including going through multiple security checks, obtaining the requisite permits, hiring and training employees, including drivers who will access the airside, and establishing a new catering facilities [*sic*] or taking over an existing facility. Again, this process takes a considerable amount of time.
>
> 116. In light of those issues, Mr. Gugliotta and I were concerned that, given the circumstances that existed at the time, the departure of a full-service in-flight caterer would risk significant disruption in the supply of catering services at YVR. That would have been highly problematic for airlines, damaged YVR's reputation, and made it much more difficult for VAA to attract and retain airlines and routes to YVR, which is a key component of VAA's public interest mandate.
>
> 117. Having considered all the factors above, Mr. Gugliotta and I concluded that it was not in the best interests of the Airport to grant an additional in-flight catering licence at that time.
>
> 118. I should note that one factor that did not affect my decision was whether the entry or exclusion of a third caterer would have any impact on VAA's revenues. VAA's revenues were never considered or discussed in my meeting with Mr. Gugliotta. We were focused on maintaining competition, choice and reliability in in-flight catering at YVR, which was and is far more important to VAA than the relatively small amount of revenue it receives from in-flight caterers through Concession Fees and rent.

[551] According to the "table" mentioned at paragraph 107 of Mr. Richmond's witness statement above, **[CONFIDENTIAL]**.

[552] During the hearing of this Application, there was a dispute between the parties as to whether the aforementioned "table" (which was also referred to as a "spreadsheet") had in fact been prepared prior to Mr. Richmond's meeting with Mr. Gugliotta on April 1, 2014. Although both of those individuals maintained that this was in fact the document they discussed, the Commissioner demonstrated that it had been created no earlier than May 9, 2014, long after the meeting. Nevertheless, based on Mr. Gugliotta's explanation that VAA prepares similar spreadsheets on an ongoing basis, the Tribunal is satisfied that, at their April 1st meeting, Mr. Richmond and Mr. Gugliotta reviewed some form of spreadsheet containing combined revenue information of the incumbent caterers going back a number of years. The Tribunal

observes that regardless of when that particular spreadsheet was created, it confirmed the general impression and general recollection that Messrs. Richmond and Gugliotta had of the financial situation of the incumbent in-flight caterers at the April 1, 2014 meeting.

The exchanges with Newrest and Strategic Aviation

[553] On April 2, 2014, the day following his meeting with Mr. Gugliotta, Mr. Richmond wrote an email to Mr. Stent-Torriani of Newrest that stated as follows (Richmond Statement, at Exhibit 21):

> Jonathan,
>
> I have re-familiarized myself with the state of our in-flight catering, and unfortunately I can't see the need for another provider at this time. The market has been essentially flat for 10 years, with two providers, and our airlines are happy with the state of competition.
>
> I would still be happy to meet with you on the 9th or the 10th if you would like to discuss further. Please contact […] to set a time.
>
> Kind regards,
>
> Craig Richmond

[554] Later that month, Mr. Eccott wrote another internal email to Mr. Segat regarding a second request for airside access to provide Galley Handling services at YVR, this time from Mr. Brown at Strategic Aviation. At first, Mr. Richmond was not made aware of that request. (For a period of time following his initial request on April 1, 2014, Mr. Brown dealt with other individuals at VAA.) For the present purposes, the relevant passages from that email are as follows (Richmond Statement, at Exhibit 24):

> Ray - further to our earlier discussion, Brett forwarded an email from Mark Brown of Strategic Aviation Services. Mark Brown is with a company interested in bidding on an RFP Jazz (not Westjet) recently put out for their flight Kitchen business across Canada. My understanding is the contract would essentially be the loading of prepackaged food onto Jazz aircraft. As it stands at YVR only CLS and Gate Gourmet have a concession license that allows that service.
>
> Mark apparently contacted Steve Hankinson with a question about the possibility of obtaining a third concession license to carry out the work. Unfortunately, this goes to the root of the concern we had previously with the inquiry from the Newrest Grp. That is, based on past history we don't believe that YVR could support a third flight Kitchen operator. This latest inquiry from Strategic Aviation

> Services is along the same lines and would amount to a third Flight Kitchen operator at YVR.

[555] During the month of May 2014, Mr. Richmond wrote letters to Mr. Stent-Torriani as well as to the President and CEO of Air Canada and to Jazz, that provided a similar explanation for VAA's decision not to authorize a third in-flight caterer to access the airside at YVR.

[556] Mr. Richmond's evidence regarding VAA's initial refusal to provide airside access licences to Newrest and to Strategic Aviation was corroborated by Mr. Gugliotta, both in his written evidence and in his testimony before the Tribunal.

[557] The nub of Mr. Gugliotta's evidence is provided in the following passage of his witness statement (Gugliotta Statement, at paras 94-96):

> 94. Among other things, we were concerned about the significant disruptions of service that would follow the exit of either of the existing catering firms from the Airport. The departure from the Airport of a provider of in-flight catering services is disruptive to the airlines served by the departing provider. Those airlines are left in a situation of having to contract with a new provider at a time when the airline has less bargaining power due to its acute need. A new firm must also secure the necessary permits for its drivers to access the airport airside to serve airlines, and must also ramp up its capacity to serve those airlines formerly served by the departing firm.
>
> 95. Replacing a service provider that has departed involves transactional costs for the Airport, including the costs of licensing and setting up accounting systems for a new firm. As well, the departure of a service provider who is suffering difficult financial circumstances will often create significant transitional disruption as the Airport is forced to deal with creditors and competing claims on the departing firm's assets.
>
> 96. Furthermore, the 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.

[558] The Tribunal pauses to observe that considerations relating to logistics, safety and security did not feature significantly in the evidence provided by Messrs. Richmond and Gugliotta regarding VAA's intentions at that time.

[559] As noted at paragraph 543 above, the evidence provided by Messrs. Richmond and Gugliotta regarding VAA's asserted justification for refusing to grant airside access to Newrest and Strategic Aviation was broadly corroborated by Messrs. Stent-Torriani and Brown. While those individuals did not accept VAA's stated reasons for refusing access to the airside, they confirmed that these were, in fact, the reasons given by VAA at the relevant time period. In brief, Mr. Stent-Torriani explained that, when he met with Mr. Richmond, he was told that

[CONFIDENTIAL] (Stent-Torriani Statement, at para 46). **[CONFIDENTIAL]** (Stent-Torriani Statement, at para 46).

[560] Turning to Mr. Brown, **[CONFIDENTIAL]**, he stated the following (Transcript, Conf. B, October 5, 2018, at p 342):

> The point was – the discussion always was, in my mind, was, to protect the revenue, they couldn't allow – they thought that because there was less demand, in their words, for catering at the airport, because LSG had pulled out, they had to protect the two incumbent catering companies and they were worried that a third company would make one of those companies no longer viable.

[561] The Tribunal acknowledges that Mr. Brown also stated that **[CONFIDENTIAL]** (Exhibit CR-031, Email from **[CONFIDENTIAL]** dated June 27, 2014).

[562] In the ensuing months, Messrs. Stent-Torriani and Brown continued to press Mr. Richmond and others at VAA for authorization to access the airside at YVR. Notwithstanding their repeated requests for airside access at YVR, VAA maintained its position that the level of demand for in-flight catering services at the Airport was not sufficient to support a third caterer.

[563] Among other things, the correspondence during that time period includes an email to Messrs. Richmond, Gugliotta and Hankinson, dated August 13, 2014, in which Mr. Brown underscored that "Strategic Aviation/Sky Café will never compete" with Gate Gourmet and CLS for the business class and first class meals offered by large international airlines. With that in mind, Mr. Brown maintained that Strategic Aviation's entry into the Galley Handling Market would "[m]inimize any negative impact to the existing licence holders, while sending a signal that service levels an [*sic*] pricing need to improve" (Richmond Statement, at Exhibit 37). In response to questioning from the panel, Mr. Brown explained that he would be **[CONFIDENTIAL]** (Transcript, Conf. B, October 5, 2018, at pp 342-343). On cross-examination, Mr. Brown added that **[CONFIDENTIAL]**. For the present purposes, the Tribunal notes that this evidence validates VAA's concern that if Strategic Aviation's entry resulted in the exit of either CLS or Gate Gourmet, only one full-service caterer would remain in the Galley Handling Market at YVR. In this regard, Mr. Richmond stated that **[CONFIDENTIAL]** (Richmond Statement, at para 142).

[564] The Tribunal observes in passing that, on August 5, 2014, Messrs. Richmond and Gugliotta spoke by telephone with the President and CEO of Jazz, Mr. Joseph Randell, to "hear Jazz's concerns directly." Mr. Richmond stated that while he did not have a clear recollection of that telephone call, he knew that what Mr. Randell had told them did not change his "view as to whether it would be in the best interests of the Airport to license a third caterer generally, or to license Strategic specifically" (Richmond Statement, at para 149). Mr. Gugliotta added that he and Mr. Richmond explained to Mr. Randell that "the in-flight catering market at YVR was not viable enough to support a third caterer and […] that, if part of CLS's and Gate Gourmet's business was taken by a third caterer, they would not be able to remain financially viable."

Mr. Gugliotta added that "Mr. Randell did not push back in response to those points" (Gugliotta Statement, at para 125). **[CONFIDENTIAL]** (Bishop Statement, at Exhibit 14).

The August 2014 Briefing Note

[565] Later in August 2014, Mr. Gugliotta prepared a briefing note for Mr. Richmond entitled *Flight Kitchen Operations at YVR* ("**August 2014 Briefing Note**"). The conclusion of that document stated the following:

- Two flight kitchen operators at YVR seem to be the sustainable number at this point in time.
- Current flight kitchens have significant capacity to address additional business.
- A competitive environment exists at YVR as both operators indicated they would aggressively bid on any airport opportunities.
- Catering business model has undergone significant changes and YVR needs to carefully ensure that a sustainable framework remain [*sic*] in place so that the existing operators can be successful and airlines continue to receive competitive world-class service at YVR.
- It appears that Jazz's concerns and requirements will be met by Gate Gourmet.
- We will need to address Newrest's claim that YVR's refusal to grant them a license is anticompetitive.

[emphasis added]

[566] Mr. Richmond stated that he agreed with the foregoing conclusions and that the additional information contained in the August 2014 Briefing Note did not alleviate his overarching concerns about the level of demand for catering services at YVR. More specifically, that information did not alleviate his concerns about "whether the demand was sufficient to support three caterers" and "the potential adverse consequences for the Airport as a whole if VAA were to grant an [*sic*] third in-flight catering licence at that time, and if one of the existing caterers were to fail as a result" (Richmond Statement, at para 165).

[567] That said, Mr. Richmond added that it was "always [his] view that, if there were changes in the market which indicated that YVR could sustain three in-flight caterers, then three caterers would be [his] preference, as that would provide more choice for airlines while advancing VAA's objective of maintaining a competitive and sustainable in-flight catering market" (Richmond Statement, at para 166).

[568] That same month (August 2014), **[CONFIDENTIAL]** (Richmond Statement, at para 161). **[CONFIDENTIAL]**.

[569] With respect to CLS, Mr. Gugliotta stated that the Managing Director of CLS, Mr. David Wainman, informed him that CLS "**[CONFIDENTIAL]**" (Gugliotta Statement, at para 133).

[570] The Tribunal pauses to note that VAA's concerns regarding the ability of CLS and Gate Gourmet to withstand a loss of some of their business to one or more new entrants into the Galley Handling Market were also corroborated in **[CONFIDENTIAL]** (Exhibit CR-075, Email from Ken Colangelo dated August 8, 2014). In cross-examination, he confirmed that **[CONFIDENTIAL]**.

[571] In August of the following year, Mr. Stent-Torriani again wrote to Mr. Richmond. At that time, Newrest was seeking access to the airside at YVR so that it could bid on Air Transat's business there, as part of the latter's 2015 RFP process. In response to that correspondence, Mr. Richmond stated, among other things, that VAA needed "to assure competitive and financially sustainable situations are established in several areas, particularly services to airlines" (Richmond Statement, at Exhibit 41). In reply to Mr. Stent-Torriani's suggestion that Newrest would be willing to serve the airlines from facilities located outside of YVR, and pay "equivalent airport access fees that the two current providers are paying to VAA," Mr. Richmond stated (Richmond Statement, at Exhibit 41):

> […] this model would significantly undercut the very valuable investments made by these two providers at the Airport, which the VAA has determined to be efficient, and for the benefit of the public. As such, the model proposed by Newrest would significantly adversely affect the ability of the current providers to compete with Newrest, and threaten the continued investment and service levels contracted for by the VAA in furtherance of the public interest.

The 2017 events

[572] In January 2017, Mr. Richmond directed Mr. Norris, Vice President of Commercial Development at VAA, to conduct a study of the in-flight catering "market" at VAA and provide a recommendation as to whether it was in the best interests of VAA to maintain only two in-flight caterers or authorize additional caterers. (Mr. Norris succeeded Mr. Gugliotta, who retired from VAA in 2016.) This action was taken after the Commissioner filed the present Application with the Tribunal, and after passenger traffic at VAA had increased from approximately 18 million passengers (in 2013) to approximately 22.3 million (in 2016).

[573] Ultimately, the study undertaken by Mr. Norris led to the preparation of the In-flight Kitchen Report, which recommended that VAA consider providing at least one additional licence to an in-flight caterer at YVR. More specifically, the draft In-flight Kitchen Report recommended that **[CONFIDENTIAL]** (Richmond Statement, at Exhibit 48, p 3). According to Mr. Richmond, the only substantive comment he made to the draft In-flight Kitchen Report prior to forwarding it to VAA's Board of Directors, was to replace the words "consider providing" with the word "provide," to make the recommendation more definitive (Richmond Statement, at para 186).

[574] After **[CONFIDENTIAL]** firms responded to a request for expressions of interest, they were each invited to participate in a formal RFP process. Those firms were **[CONFIDENTIAL]**.

[575] Among other things, the evaluation criteria developed by VAA's evaluation committee included factors such as **[CONFIDENTIAL]**.

[576] In November 2017, the evaluation committee unanimously recommended that dnata be selected as the preferred proponent, subject to due diligence activities that remained to be conducted by the committee. That same month, an external fairness advisor reviewed VAA's 2017 RFP process and concluded that it had been fair and reasonable. dnata was therefore recommended by the evaluation committee, and then approved by Mr. Richmond and VAA's Board of Directors, notwithstanding that it was proposing to operate from a facility located outside the Airport.

[577] During the hearing of this Application, Messrs. Richmond and Norris testified that dnata was expected to commence operations at YVR in early 2019.

- The legitimacy of VAA's justifications

[578] The Commissioner submits that none of the explanations advanced by VAA to justify the Exclusionary Conduct constitutes a cognizable efficiency or a pro-competitive rationale that accrued to VAA and is independent of the anti-competitive effects of that conduct. The Tribunal disagrees.

[579] With respect to efficiencies, the Commissioner asserts that VAA failed to adduce any evidence to establish that its exclusion of new entrants (including Newrest and Strategic Aviation) into the Galley Handling Market would likely result in its attainment of any cost reductions, improvements in technology or production processes, or improvements in service. Likewise, with respect to competition, the Commissioner states that VAA did not adduce any evidence to demonstrate how excluding new entrants from the Galley Handling Market allowed VAA to offer better prices or better service to airlines. The Commissioner adds that VAA's desire to avoid disruption is simply based on its self-interest in increasing its revenues by attracting new routes.

[580] However, the evidence adduced by Messrs. Richmond and Gugliotta reflects that VAA was concerned with more than attracting new routes. As discussed below, the evidence reflects that there were three distinct aspects to its justification for refusing to grant airside access at YVR to Newrest and Strategic Aviation. The Tribunal acknowledges that VAA's motivations may not have included the attainment of efficiencies in its own operations, for example relating to cost reductions in production or operation, improvements in technology or production processes, product enhancement or improvements in the quality of services. However, legitimate business justifications can also take other incarnations, including pro-competitive explanations for why impugned conduct was undertaken. All circumstances need to be considered (*TREB CT* at para 295).

Preservation of competition

[581] The first, and principal, aspect of VAA's justification was best articulated by Mr. Richmond during the discovery phase of this proceeding. When asked what VAA's intention was when it decided not to issue licences to Newrest and Strategic, Mr. Richmond replied as follows (Exhibit CA-096, Read-in Brief of the Commissioner, Volume I, at p 1783):

> The intention was to preserve two caterers at [YVR] in order it [*sic*] preserve that competition and not suffer the very real possibility of – in our opinion, of a failure in one of those full caterers.

[582] This evidence is consistent with Mr. Richmond's testimony before the Tribunal that VAA was concerned with being "stuck with a full-service caterer and a partial-service caterer, if you will. And then you would have one caterer that dominates the market, [and] may or may not be able to pick up all of the requirements for all of the other airlines […]" (Transcript, Conf. B, October 30, 2018, at pp 885-886). In his witness statement, Mr. Richmond explained that, in his meeting with Mr. Gugliotta on April 1, 2014, "Mr. Gugliotta expressed concern that there was not enough demand at the Airport to support three caterers and that, accordingly, the entry of a third caterer might cause one or even both of the incumbent caterers to exit the market at YVR, in whole or in part, without a comparable replacement" [emphasis added] (Richmond Statement, at para 99).

[583] To the extent that VAA was concerned with preserving two full-service caterers, and avoiding the risk of winding up with only one full-service caterer in the Galley Handling Market, its motivation for refusing to grant airside access to Newrest and Strategic Aviation was pro-competitive, rather than anti-competitive, in nature. Its concern was not with maintaining two full-service firms instead of allowing for three or more such firms to emerge. Rather, its concern was with maintaining two full-service firms instead of taking the risk of finding itself in a position where there was only one such firm, even for a short period of time. In other words, it believed that it was preserving competition, choice and reliability for airlines.

Protecting YVR's reputation

[584] The first aspect of VAA's justification was and remains linked to a second consideration: VAA was very concerned that its reputation would suffer if the airlines experienced significant adverse consequences as a result of the entry of another caterer and the possible exit of CLS or Gate Gourmet Canada. As reflected at paragraphs 112-116 of Mr. Richmond's witness statement (reproduced at paragraph 550 above), VAA was concerned that a "significant disruption in the supply of catering services at YVR […] would have been highly problematic for airlines, damaged YVR's reputation, and made it much more difficult for VAA to attract and retain airlines and routes to YVR, which is a key component of VAA's public interest mandate" (Richmond Statement, at para 116). Regarding YVR's reputation, Mr. Gugliotta elaborated that VAA was concerned that the disruption that might be associated with the abrupt or unexpected departure of one of the incumbent in-flight caterers could adversely impact VAA's "reputation for stable, reliable and efficient operations," and thereby its "efforts to encourage airlines to

establish new routes" at YVR (Gugliotta Statement, at para 96). With this in mind, they "concluded that it was not in the best interests of the Airport to grant an additional in-flight catering licence at that time" (Richmond Statement, at para 117).

[585] In brief, by avoiding the significant disruption that it believed would be associated with the exit of Gate Gourmet or CLS from the Galley Handling Market, VAA wished to avoid the harm to its reputation that would have been associated with what amounts to a reduction in the level of service/quality provided to airlines and their customers at YVR. The levels of service and quality provided to airlines in the Galley Handling Market are important dimensions of competition that VAA was concerned would be adversely impacted by the exit of Gate Gourmet or CLS. Indeed, it can reasonably be inferred from VAA's concern about the prospect of there being only one "full-service" in-flight caterer at YVR, that VAA also had a more general concern about how a monopoly in the supply of Galley Handling services to international airlines would adversely impact its reputation. In turn, VAA was concerned that these adverse impacts on its reputation would harm its ability to induce airlines to establish new routes at YVR, rather than elsewhere.

[586] To the extent that this concern implicates YVR's ability to compete with other airports for such new routes, it constitutes a second legitimate pro-competitive rationale that is unrelated to an anti-competitive purpose and has a link to VAA that goes beyond VAA's mere self-interest (*Canada Pipe FCA* at paras 90-91).The Tribunal pauses to note that Dr. Niels conceded on cross-examination that it is not necessary to find that VAA is constrained by competition with other airports, to conclude that it wants to attract new airlines to YVR.

Avoiding disruption for airlines

[587] The third aspect of VAA's legitimate justification concerned its desire to avoid the prospect of airplanes departing without sufficient meals, or high-quality meals, onboard. The Tribunal considers this to be a cognizable efficiency-related rationale for engaging in the Exclusionary Conduct. The same applies to VAA's desire to avoid some of the other transactional costs associated with exit that were identified by Messrs. Richmond and Gugliotta, e.g., at paragraphs 114-115 and 94-96 of their respective witness statements (which are reproduced at paragraphs 550 and 557 above). These pro-competitive and efficiency rationales were and remain unrelated to an anti-competitive purpose.

[588] In contrast to the benefits of the Stocking Distributor Program that were at issue in *Canada Pipe FCA*, these rationales did not solely relate to improved consumer welfare (*Canada Pipe FCA* at para 90). As noted above, there was and remains an important link to VAA that goes beyond VAA's own self-interest.

[589] The Tribunal recognizes that VAA did not adduce any direct evidence from the airlines themselves to establish that the prospect of a disruption of the level of service or quality in the Galley Handling Market was a concern for any airlines operating at YVR, or that the ongoing presence of two full-service caterers affected the decision of any airline to fly out of YVR or to establish one or more new routes there. Such evidence could have been helpful. VAA similarly did not adduce any evidence to establish that LSG's exit from the Galley Handling Market at

YVR in 2003, or the exit of an in-flight caterer at Edmonton's airport between 2015 and 2017, gave rise to any adverse disruptive effects. However, the absence of such evidence does not negate the legitimacy of what the Tribunal considers to be VAA's genuine concern about preserving two full-service caterers, avoiding disruption in the supply of in-flight catering services to the airlines and their customers, and avoiding harm to its reputation.

[590] The Tribunal observes in passing that other evidence adduced in this proceeding corroborates VAA's position that a disruption in the level of in-flight catering services at an airport can have a significant adverse impact on airlines and their customers. In particular, **[CONFIDENTIAL]** (Transcript, Conf. B, October 9, 2018, at p 348). On cross-examination, **[CONFIDENTIAL]** (Transcript, Conf. B, October 3, 2018, at p 147).

[591] [CONFIDENTIAL] (Transcript, Conf. B, October 5, 2018, at p 304). **[CONFIDENTIAL]** (Exhibit CR-032, Letter from **[CONFIDENTIAL]** dated July 14, 2016).

[592] In addition to the foregoing, Ms. Stewart described a range of potential adverse impacts that Air Transat faced when Gate Gourmet was involved in a labour dispute in the summer of 2016. Those adverse impacts were sufficiently important to Air Transat that it requested that VAA grant a temporary authorization to Strategic Aviation's Sky Café division, to enable it to provide in-flight catering services at YVR. In this regard, Ms. Stewart stated (Stewart Statement, at para 40):

> I explained to Mr. Parson [at VAA] the very disruptive health, safety and passenger experience implications that would arise were a Gate Gourmet service disruption to occur. I mentioned that arriving long-haul Air Transat flights would have a large quantity of international garbage that would be without an authorized disposal option upon arrival at YVR that would need to be back hauled to Europe, and that the most Air Transat could accomplish in terms of self-supply would be to offer passengers a modest brown-bag snack of some sort. I further explained that, in such circumstances, Air Transat would be compelled to evaluate whether it could continue long-haul flight operations at YVR during the period of any in-flight catering disruption.

[593] The Tribunal pauses to note that if dnata in fact commenced operations at YVR in January 2019, this would amount to approximately 11 months from the time it was selected as the successful participant in VAA's RFP process. **[CONFIDENTIAL]** (Transcript, Conf. B, October 4, 2018, at p 213). In this regard, **[CONFIDENTIAL]** (Transcript, Conf. B, October 3, 2018, at p 126). Indeed, Mr. Brown testified that it can sometimes take "upwards of six months" just for an in-flight caterer to obtain a security clearance from the Canadian Security Intelligence Service (Transcript, Conf. B, October 5, 2018, at p 315).

[594] This evidence corroborates VAA's view that the departure of an airline catering firm and its replacement by a new entrant can give rise to significant disruptive effects on airlines and their customers.

- The adequacy and credibility of VAA's justifications

[595] The Commissioner asserts that the explanations advanced by VAA are not adequate or credible because VAA conducted only a superficial analysis and failed to consider or seek information that was readily available from airlines and elsewhere. The Commissioner maintains that such information would have demonstrated that VAA's concerns with respect to the viability of Gate Gourmet and CLS in the face of new entry were not well-founded.

[596] In particular, the Commissioner asserts that the decision not to authorize Newrest and Strategic Aviation to have airside access in the Galley Handling Market was taken after a single meeting that lasted only one hour, **[CONFIDENTIAL]**. While explicitly not suggesting that VAA's decision to deny airside access to Newrest and Strategic Aviation was taken in bad faith, the Commissioner maintains that the decision was made on such a superficial basis that the justification that VAA has advanced cannot be considered credible or given significant weight. In support of his submission, the Commissioner underscores that VAA failed to seek the views of any of its airline customers, other than Jazz. He maintains that if VAA had been truly concerned about the potential adverse consequences to the airlines of allowing one or more additional entrants into the Galley Handling Market at YVR, it would have sought their views.

[597] In addition, the Commissioner submits that VAA failed to consider other readily available information that would have demonstrated that its concerns about the ability of the incumbent caterers at YVR to survive additional competition were not well-founded. In this regard, the Commissioner conceded in response to questions from the panel that firms in VAA's position do not necessarily "have to Google … [or] conduct a market analysis," or "retain an expert to conduct a study." However, the Commissioner maintains that a firm cannot simply say: "Just trust us, we knew what we were doing." In any event, the Commissioner asserts that the extent of due diligence conducted by a firm that wishes to justify its conduct is relevant in assessing the credibility of the justification, and should be sufficient to be able to justify a rationally held belief. The Commissioner adds that VAA's failure to consider readily information before refusing to grant airside access to Newrest and Strategic Aviation vitiates the credibility of its justification for doing so. He maintains that this is particularly the case because VAA conceded on cross-examination that that decision was a "major" one.

[598] The readily available information that the Commissioner states ought to have been considered by VAA before making its decision includes a 2013 report published by the International Air Transport Association ("**2013 IATA Report**") as well as information that had been publicly filed by Gategroup Holding AG (Gate Gourmet's parent company) and LSG. Moreover, the Commissioner notes that VAA prepared the August 2014 Briefing Note well after it initially declined the requests that Newrest and Strategic Aviation had made for an airside access licence, and only after **[CONFIDENTIAL]** (Stent-Torriani Statement, at Exhibit 13). He adds that the 2017 In-flight Kitchen Report "was clearly conducted at least in part because the Commissioner had commenced this application" and was in any event "fundamentally flawed" (Commissioner's Closing Submissions, at para 45).

[599] For the reasons set forth below, the Tribunal does not agree with the Commissioner and considers that, in the very particular circumstances of this case, VAA's justifications for engaging in the Exclusionary Conduct are in fact adequate and credible.

[600] Before explaining its reasons in this regard, the Tribunal makes the following observation. It agrees with the general proposition that an asserted business justification for engaging in anti-competitive conduct will not suffice for the purposes of paragraph 79(1)(*b*) unless the evidence is sufficiently clear, convincing and cogent to support the justification, on a balance of probabilities (*FH v McDougall*, 2008 SCC 53 at paras 45-47; *TREB CT* at paras 288-289). For example, in *TREB CT* at paragraph 390, the Tribunal concluded that the privacy concerns relied upon by the respondent in that case were an afterthought and a pretext for its adoption and maintenance of the anti-competitive practices that were challenged in that case. Accordingly, those considerations did not suffice to demonstrate that the overall character of the impugned conduct was legitimate. However, in the present case, the Tribunal is satisfied, based on the evidence before it, that the justifications that VAA has advanced in this case are in fact sufficient in that regard. Those justifications were present from the outset and dominated VAA's motivations since April 1, 2014, when it first decided to reject Newrest's request for airside access at YVR. They were not a pretext or an after-the-fact fabrication. While VAA's failure to seek additional information from the airlines and other readily available sources may raise questions about its decision-making processes, it does not, on the specific facts of this case, negate the credibility and adequacy of its justifications. Having heard the testimonies of Messrs. Richmond and Gugliotta, both of whom the panel found to be persuasive and reliable witnesses, the Tribunal is satisfied, on a balance of probabilities, that VAA's business justification is credible and adequate.

[601] Regarding the Commissioner's position that VAA made its initial decision after a meeting of only one hour on April 1, 2014, the Tribunal considers that this is not necessarily an indication that its decision not to authorize one or more additional in-flight caterers to access the airside at YVR was "superficial" in nature. Leaders of complex organizations make numerous decisions every day, sometimes in meetings that are even shorter than one hour. Indeed, counsel for the Commissioner noted that the Commissioner may well decide to bring an application before the Tribunal after "a quick 30-minute briefing from the staff" (Transcript, Public, November 13, 2018, at p 972).

[602] In this proceeding, Mr. Richmond testified that his one-hour meeting with Mr. Gugliotta was "very, very intense and in-depth" (Transcript, Conf. B, October 30, 2018, at p 830). He also noted that VAA had been "continuously close to the [the In-flight Catering] file for many years" due to its discussions with the caterers regarding the level of the Concession Fees (Transcript, Conf. B, October 30, 2018, at p 829). Turning to Mr. Gugliotta, when pressed on this point during cross-examination, he pointed out that he "had been dealing with the flight kitchens for the past 20 years at the airport […] so it wasn't just that one hour. It's – it was the totality of our experience in managing the airport that led us to that conclusion" (Transcript, Conf. B, November 1, 2018, at pp 1014-1015). Moreover, Mr. Richmond specifically requested to be briefed for the meeting and received the information described at paragraph 550 above from Mr. Eccott, together with a spreadsheet **[CONFIDENTIAL]**.

[603] Mr. Richmond explained that he needed to "refamiliarize" himself with the "in-flight catering market at YVR," so he sought the input of the individuals who had the expertise that would assist him to make an informed decision (Richmond Statement, at para 93). This is precisely what one would expect a leader in his position to do. After reviewing the information received from Messrs. Gugliotta (who appears to have been the most knowledgeable person at

VAA on the subject), Segat and Eccott, and then discussing it in a "very intense and in-depth" fashion over the course of an hour, he and Mr. Gugliotta jointly decided not to authorize Newrest to access the airside at YVR. Mr. Eccott then relied on that decision to make a similar determination a few weeks later in respect of Strategic Aviation's similar request. In the absence of any suggestion or evidence that they willfully ignored information that might not support their decision, the Tribunal is reluctant to impose a greater burden of pre-decision research, study or due diligence upon those individuals, and upon others who may find themselves in their position in the future.

[604] Based on the foregoing evidence, the Tribunal does not accept the Commissioner's position that the one-hour duration of the meeting, in and of itself, supports the view that VAA's decision was superficial in nature or lacking in credibility.

[605] VAA's decision not to consult airlines or third-party sources may look cavalier or complacent to outside observers. However, the Tribunal is satisfied that this cannot be equated with an anti-competitive purpose or willful blindness. In determining whether explanations from business people amount to legitimate business justifications, as contemplated by paragraph 79(1)(*b*), the Tribunal considers that it should not insert itself into or second-guess the decision-making process of businesses and impose upon them an arbitrary burden that they would not otherwise impose upon themselves, when acting in good faith The Tribunal instead has to be persuaded, based on its assessment of the evidence, that the justifications are credible and adequate on a balance of probabilities. Here, the combined evidence regarding the internal deliberations among Messrs. Richmond, Gugliotta, Eccott and others, their regular contacts and exchanges with airlines and the declining revenues of in-flight caterers, collectively demonstrates that VAA conducted a sufficient exercise of due diligence to allow the Tribunal to find that VAA had a rationally-held belief to support its decision to limit the number of in-flight caterers. Given the considerable experience of Mr. Gugliotta in particular, the Tribunal is reluctant to conclude that the due diligence conducted by VAA before it engaged in the Exclusionary Conduct was insufficient.

[606] Collectively, the VAA leadership team might have been wrong in their assessment that the airlines would be better off, and more likely to establish new routes at YVR, if VAA refrained from permitting Newrest and Strategic Aviation to enter the Galley Handling Market. Indeed, the Tribunal acknowledges that it might look somewhat surprising to some observers that VAA failed to contact a single airline other than Jazz, before making its decisions regarding Newrest's and Strategic Aviation's subsequent requests later in 2014 and 2015. In the same vein, the fact that the airlines had not previously complained about the number of caterers may not look, to some observers, as a sufficient justification for failing to seek their views, particularly given their letters of support for Newrest and Strategic Aviation. The Tribunal however notes that, according to Messrs. Richmond and Gugliotta, VAA had continuous and regular interactions with airlines operating at YVR, that airlines were not shy to flag issues to YVR, and that no airline had raised directly with VAA a specific concern with respect to in-flight catering services at the Airport.

[607] Some observers might also have drawn conclusions different than VAA's based on **[CONFIDENTIAL]** that Messrs. Richmond and Gugliotta assessed during their one-hour meeting. The same might further be said regarding the significance of LSG's exit from the

market in 2003, because that occurred after the company lost its principal customer in Canada, following Canadian Airlines' acquisition by Air Canada, rather than as a result of any weakness on LSG's part. In addition, at that time, LSG had a 40 percent ownership interest in CLS, which was increased to 70 percent in 2008.

[608] However, the question is not whether VAA's senior management was as correct and as thorough as the Commissioner would have preferred or some observers might expect. Rather, it is whether the individuals in question made a genuine and good faith decision on the basis of information that was sufficiently robust to withstand an allegation of having been so superficial that it lacked credibility or was otherwise inadequate. On the basis of the information set forth above, the Tribunal finds in favour of VAA on this issue.

[609] The Tribunal considers that the adequacy and credibility of VAA's justification strengthened after it took its initial decision in April 2014. This is because, after Newrest and Strategic Aviation continued to press VAA for an authorization to enter the Galley Handling Market, Mr. Richmond requested Mr. Gugliotta to prepare the August 2014 Briefing Note. This was followed by the more detailed 2017 In-flight Kitchen Report, which was prepared after the Commissioner had filed the present Application, and after VAA had three additional years of data reflecting the recovery trend towards increased in-flight catering revenues at YVR.

[610] Turning to the Commissioner's submission that VAA's failure to conduct additional "due diligence" vitiated the credibility of its justifications for excluding Newrest, Strategic Aviation and others from the Galley Handling Market, the Tribunal is not persuaded by the Commissioner's position.

[611] As noted at paragraph 598 above, the readily available information that the Commissioner maintains ought to have been considered by VAA included the 2013 IATA Report as well as information that the Gate Group and LSG had publicly filed. Among other things, the 2013 IATA Report stated that in-flight caterers and other airline suppliers around the world had earned an average return of approximately 11% over the period 2004-2011, while having a weighted average cost of capital of approximately 7-9%. In addition, that document reported that the volatility of in-flight caterers' returns, on a global basis, was much less over that period than it was for the airlines. In this regard, the report noted that the in-flight caterers studied represented approximately 40-50% of total global revenues of all in-flight caterers (Exhibit A-151, IATA Economics Briefing N.4: Value Chain Profitability, at pp 19, 27, 47).

[612] Regarding information reported by the Gate Group, the Commissioner noted that its Annual Results 2013 projected an increase in revenue growth of 2% to 4% and an earnings before interest, tax, depreciation and amortization ("**EBITDA**") margin of 6% to 7% for its North American operations, as well as expected total revenue growth out to 2016 of 8% to 10% and expected EBITDA in the range of 8% to 9% for that region. (Exhibit A-152, Profitability and the Air Transportation Value Chain, June 2013, at pp 23, 25). In addition, the Commissioner noted that in the Gate Group's Annual Report 2013, it was stated that "[a]ll parts of the Group contributed to the positive result" for 2013, and that "the business in North America continued to experience revenue growth at international hub locations through the increase in volume from international carriers" (Exhibit A-154, Gategroup Annual Report 2013, at pp 4, 19).

[613] With respect to LSG, the Commissioner similarly noted that its Annual Review 2013 reported that the company had increased its revenues "in every one of [its] regions, even in the mature markets of Europe and North America." That document also expressed confidence in the future, in part based on an expectation that "passenger volumes will continue to climb" and in part based on a forecast "that market volume will increase in conventional airline catering […]" (Exhibit A-157, LSG Sky Chefs 2013 Annual Review, at pp 2, 6).

[614] The Commissioner maintains that the foregoing information was readily available and demonstrated that VAA's concerns about the potential exit of either Gate Gourmet or CLS (which is a subsidiary of LSG) were not well-founded or credible. The Commissioner adds that **[CONFIDENTIAL]**.

[615] The Tribunal does not agree with the Commissioner's position that VAA's failure to obtain the foregoing information vitiated the credibility of its justifications for refusing to authorize airside access at YVR for Newrest and Strategic Aviation. As with VAA's failure to contact any of its international airline customers, its omission to take the little amount of time that would have been required to seek out and review the foregoing information may look surprising to some observers. However, it does not vitiate the credibility of the justifications that it had and continues to have for refusing to authorize airside access to Newrest, Strategic Aviation or other potential entrants (apart from dnata). Once again, in the absence of any suggestion (or evidence) that it willfully ignored information that might not support its decision, the Tribunal is reluctant to find that VAA had a burden to conduct research for additional information that might undermine or contradict the genuine decision that it reached. This reluctance is based on (i) the substantial knowledge and expertise of multiple members of its senior management, who participated in the decisions to refuse to authorize new entrants; (ii) VAA's on-going business relationship and contacts with airlines; and (iii) the information that VAA had received from Gate Gourmet and CLS, including in relation to their revenues and other aspects of their financial circumstances. VAA's due diligence did not have to be perfect or even comprehensive; it needed to be credible and adequate. The Tribunal finds that it met that standard.

[616] Regarding the passenger and revenue data that was relied upon by Messrs. Richmond and Gugliotta, the Tribunal observes that Dr. Niels conducted a viability analysis that led him to conclude that the available catering business at YVR could have supported a third firm as far back in time as 2014. The panel did not find this aspect of Dr. Niels' evidence to be robust. Among other things, the Tribunal notes that the average profitability of three providers would have been below Dr. Niels' benchmarks for viability in his extended static analysis of effects of a new entrant with kitchen, with a price effect of **[CONFIDENTIAL]**%. That said, the analysis conducted by Messrs. Richmond and Gugliotta was not very robust either. The Tribunal is therefore left with the sense that reasonable people could differ on the issue of whether the markets for in-flight catering services and Galley Handling services at YVR could support a third competitor as far back as 2014.

[617] The Commissioner further maintains that the scope of VAA's 2017 In-flight Kitchen Report was also not adequate or credible. In this regard, he notes that VAA **[CONFIDENTIAL]**.

[618] However, for the same reasons provided above, and even though the Tribunal acknowledges that there were some shortcomings in this study (for example, **[CONFIDENTIAL]**), the Tribunal is reluctant to find that VAA had a burden to ensure that the 2017 In-flight Kitchen Report was more robust.

[619] The Tribunal pauses to observe that, for many years now, **[CONFIDENTIAL]**. It was not unreasonable for Messrs. Richmond and Gugliotta to have considered this trend to be reflective of a weakening or uncertain situation for those firms at YVR.

(v) The "overall character" of VAA's conduct

[620] The Commissioner maintains that even if VAA's justifications for engaging in the Exclusionary Conduct may be said to be legitimate, the overall character or overriding purpose of that conduct is and remains anti-competitive, given VAA's intent to exclude competitors and the reasonably foreseeable exclusionary effects of that practice.

[621] The Tribunal disagrees. Based on the evidence summarized in the preceding sections above, the Tribunal considers that VAA's overarching, overriding purpose in refusing to authorize airside access to Newrest and Strategic Aviation was and remains legitimate in nature. From the very outset, dating back to April 1, 2014, VAA's consistent and predominant concerns have been to (i) ensure that airlines operating at YVR are served by at least two full-service caterers; (ii) avoid the disruptive effects that it believes would be associated with the exit of one of the incumbent caterers; and (iii) avoid harm to its reputation. In turn, VAA has consistently believed that such harm to its reputation would adversely impact its ability to compete for and attract new routes to YVR. For greater certainty, the evidence does not establish that the impugned practice was primarily motivated by a predatory, exclusionary or disciplinary intent towards a competitor. Moreover, the Tribunal finds that VAA was not motivated by a desire to adversely impact competition in order to increase or maintain its Concession Fees or rent revenues.

[622] The mere fact that a practice may be exclusionary is not a sufficient basis upon which to conclude that the practice has an overriding anti-competitive purpose or character. It all depends on the factual context and on the evidence of each particular case.

[623] The Tribunal acknowledges that, in this case, VAA intended to exclude, and is in fact continuing to exclude Newrest and Strategic Aviation from the Galley Handling Market. However, the evidence establishes, on a balance of probabilities, that VAA's overriding purpose has never been to exclude those entities from the Galley Handling Market. Its focus has always been on the legitimate considerations described above. The Tribunal considers that those considerations have always neutralized and outweighed VAA's subjective intention to exclude Newrest and Strategic Aviation from the Galley Handling Market. For this reason, they establish a valid business justification for excluding those entities from that market (*Canada Pipe FCA*, at paras 73 and 87-88).

[624] Therefore, the Tribunal concludes that the "overall character" of VAA's conduct was legitimate, and not anti-competitive, in nature.

[625] The Tribunal considers it appropriate to reiterate that the exercise of pre-existing market power to exclude entry (or even to raise prices) does not necessarily constitute an anti-competitive act, as contemplated by paragraph 79(1)(*b*). As the Tribunal has previously observed, "[…] section 79 is not intended to condemn a firm merely for having market power. Instead, it is directed at ensuring that dominant firms compete with other firms on merit and not through abusing their market power" (*Canada (Director of Investigation and Research) v Tele-Direct (Publications) Inc et al*, [1997] CCTD No 8, 73 CPR (3d) 1 (Comp Trib) at p 179). In this regard, Dr. McFetridge notes that any limitation in the supply of licences for airside access by VAA could be construed as the mere exercise of its pre-existing market power in the Airside Access Market.

(d) Conclusion

[626] For the reasons set forth above, the Tribunal concludes that the Exclusionary Conduct is not anti-competitive in nature. Although VAA has consistently intended to exclude, and has in fact excluded, Newrest and Strategic Aviation from the Galley Handling Market since April 2014, it has provided legitimate business justifications for such exclusion. VAA has also established that those justifications were more important in its decision-making process than any subjective or deemed anti-competitive intent, or any reasonably foreseeable anti-competitive effects of the Exclusionary Conduct. In other words, the evidence that was adduced in support of the alleged legitimate business justifications that VAA has demonstrated outweighs the evidence of subjective anti-competitive intent and reasonably foreseeable exclusionary effects of the impugned conduct. Accordingly, the overall character, or overriding purpose, of the Exclusionary Conduct was not anti-competitive, as contemplated by paragraph 79(1)(*b*).

[627] The Tribunal's conclusion in this regard is reinforced by its view that VAA's business justifications for limiting the number of in-flight caterers made economic and business sense. In this regard, the Tribunal was provided with persuasive evidence demonstrating that, leaving aside the anti-competitive effects of VAA's Exclusionary Conduct, its decision to exclude in-flight caterers conferred what were considered to be important benefits to the Airport (*TREB CT* at paras 430-431).

[628] Based on the foregoing, the Tribunal concludes that the Commissioner has not demonstrated, on a balance of probabilities, that the requirements of paragraph 79(1)(*b*) have been met and that VAA has engaged in, and continues to engage in, a practice of anti-competitive acts. This conclusion provides a sufficient basis upon which to dismiss the Commissioner's Application.

[629] Nevertheless, for completeness, the Tribunal will provide its views on the assessment of the third element of section 79, namely, whether the impugned conduct has prevented or lessened competition substantially, or is likely to do so in the future.

E. Has the impugned conduct had the effect of preventing or lessening competition substantially in the market that is relevant for the purposes of paragraph 79(1)(*c*) of the Act, or is it having or likely to have that effect?

[630] The Tribunal now turns to the third element of the abuse of dominance provision, namely, whether VAA's Exclusionary Conduct has prevented or lessened competition, is preventing or lessening competition, substantially, or is likely to have that effect, in the Relevant Market as contemplated by paragraph 79(1)(*c*) of the Act. For the reasons detailed below, the Tribunal finds, on a balance of probabilities, that the Commissioner has not demonstrated this to be the case.

[631] As stated above in Section VII.B above, only the Galley Handling Market at YVR is relevant for the purposes of paragraph 79(1)(*c*).

(1) Analytical framework

[632] The analytical framework for the Tribunal's assessment of paragraph 79(1)(*c*) was extensively addressed in *TREB CT*, at paragraphs 456-483. It does not need to be repeated here. For the present purposes, it will suffice to simply highlight the following.

[633] In brief, paragraph 79(1)(*c*) requires the Tribunal to conduct a two-stage assessment. First, it must compare, on the one hand, the level of competition that exists, or would likely exist, in the presence of the impugned practice and, on the other hand, the level of competition that likely would have prevailed in the past, present and future in the absence of the impugned practice. In other words, the Tribunal must determine what likely would have occurred "but for" the impugned practice (*Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 ("***Tervita SCC***") at paras 50-51; *TREB FCA* at para 86; *Canada Pipe FCA* at paras 44, 58). To make this assessment, the Tribunal must compare the state of competition in the relevant market with a counter-factual scenario in which the impugned practice did not take place. The Tribunal's approach under paragraph 79(1)(*c*) thus contemplates an assessment that emphasizes the comparative and relative state of competition in past, present and future time frames, as opposed to the absolute state of competition at any of these points in time (*TREB FCA* at para 66; *Canada Pipe FCA* at paras 36-37).

[634] At the second stage of the analysis, the Tribunal must determine whether the difference between the level of competition in the presence of the impugned conduct, and the level that would have existed "but for" the impugned conduct, is substantial. The issue is whether competition likely would have been or would likely be substantially greater, for example as a result of even more entry or innovation, "but for" the implementation of the impugned practice (*Canada Pipe FCA* at paras 36-37, 53 and 57-58). In conducting this exercise, the Tribunal looks at the general level of competition in the relevant market, in the actual world and in the hypothetical "but for" world (*TREB FCA* at para 70).

[635] Paragraph 79(1)(*c*) has two distinct and alternative branches. The first requires the Tribunal to determine whether an impugned practice has had, is having or is likely to have the effect of preventing competition substantially in a market. The second requires the Tribunal to

ascertain whether the practice has had, is having or is likely to have the effect of lessening competition substantially in a market.

[636] Despite the similarity in the general focus of the Tribunal when considering the two branches of paragraph 79(1)(*c*), there are nevertheless important differences in its assessment of the "prevent" and "lessen" branches (*Tervita SCC* at para 55). Specifically, in assessing whether competition has been, is or is likely to be lessened, the more particular focus of the assessment is upon whether the impugned practice has facilitated, is facilitating or is likely to facilitate the exercise of new or increased market power by the respondent(s). Where the respondent does not compete in the relevant market, this focus is upon the firms that do so compete in that market. In this assessment, the Tribunal typically will endeavour to determine whether the intensity of rivalry has been, is being or is likely to be diminished or reduced, as a result of the impugned practice. Where the Tribunal determines that this is not likely to be the case, it generally will conclude that competition has not been, is not and is not likely to be lessened at all, let alone substantially.

[637] By contrast, in assessing whether competition is likely to be prevented, the Tribunal's particular focus is upon whether the impugned practice has preserved, is preserving or is likely to preserve any existing market power enjoyed by the respondent(s), by preventing or impeding new competition that otherwise likely would have materialized in the absence of the impugned practice. In this assessment, the Tribunal typically will endeavour to determine whether the intensity of rivalry likely would have increased, "but for" the implementation of that practice. As noted immediately above, where the respondent does not compete in the relevant market, the focus is on the firms that do so compete in that market. Where the Tribunal determines that this is not likely to be the case, it generally will conclude that competition has not been, is not and is not likely to be prevented at all, let alone substantially.

[638] The extent of an impugned practice's likely effect on market power is what determines whether its effect on competition is likely to be "substantial" (*Tervita SCC* at para 45; *TREB FCA* at paras 82, 86-92). Again, the test is relative and requires an assessment of the difference between the level of competition in the actual world and in the "but for" world (*TREB FCA* at para 90).

[639] "Substantiality" can be demonstrated by the Commissioner through quantitative or qualitative evidence, or both (*TREB CT* at paras 469-471). The Commissioner must however always adduce sufficiently clear and convincing evidence to demonstrate, on a balance of probabilities, that competition has been, is or is likely to be prevented or lessened substantially (*Tervita SCC* at para 65; *TREB FCA* at para 87; *Canada Pipe FCA* at para 46).

[640] In conducting its assessment of substantiality under paragraph 79(1)(*c*), the Tribunal will assess both the degree of the prevention or lessening of competition as well as its duration (*Tervita SCC* at paras 45, 78). Where a prevention or lessening of competition does not extend throughout the relevant market, the Tribunal will also assess its scope and whether it extends throughout a "material" part of the market (*The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14 ("***CCS***") at paras 375, 378, rev'd 2013 FCA 28, rev'd 2015 SCC 3).

[641] With respect to degree, or magnitude, the Tribunal assesses whether the impugned practice has enabled, is enabling or is likely to enable the respondent to exercise materially greater market power than in the absence of the practice (*Tervita SCC* at paras 50-51, 54). The Tribunal has not found it useful to apply rigid numerical criteria in conducting this assessment. What constitutes "materially" greater market power will vary from case to case and will depend on the facts of the case (*Tervita SCC* at para 46; *TREB FCA* at para 88). In assessing whether the degree or magnitude of prevention or lessening of competition is sufficient to be considered "substantial," the Tribunal will consider the overall economic impact of an impugned practice in the relevant market. With respect to the duration aspect of its assessment, the test applied by the Tribunal is whether this material increase in prices or material reduction in non-price dimensions of competition resulting from an impugned practice has lasted, or is likely to be maintained for, approximately two years (*Tervita SCC* at para 80; *CCS* at para 123).

[642] For greater certainty, when assessing whether competition with respect to prices has been, is or is likely to be prevented or lessened substantially, the test applied by the Tribunal is to determine whether prices were, are or likely would be materially higher than in the absence of the impugned practice. With respect to non-price dimensions of competition, such as quality, variety, service or innovation, the test applied is to determine whether the level of one or more of those dimensions of competition was, is or likely would be materially lower than in the absence of the impugned practice (*Tervita SCC* at para 80; *CCS* at paras 123-125, 376-377).

[643] Where it is alleged that future competition has been, is or is likely to be prevented by an impugned practice, this period will run from the time when that future competition would have likely materialized, in the absence of the impugned practice. If such future competition cannot be demonstrated to have been, or to be, likely to materialize in the absence of the impugned practice, the test contemplated by paragraph 79(1)(*c*) will not be met. To be likely to materialize, the future competition must be demonstrated to be more probable than not to occur in the absence of the impugned practice (*Tervita SCC* at para 66). To meet this test, the Commissioner is required to demonstrate that the future competition, whether in the form of entry by new competitors or expansion by existing competitors (including in the form of the introduction of new product offerings), likely would have materialized within a discernible time frame. This time frame need not be precisely calibrated. However, it must be based on evidence of when the entry or expansion in question realistically would have occurred, having regard to the typical lead time for new entry or expansion to occur in the relevant market in question.

[644] It bears emphasizing that the burden to demonstrate both the substantial nature of the alleged prevention or lessening of competition, and the basic facts of the "but for" scenario that are required to make that demonstration, lies with the Commissioner (*Tervita FCA* at paras 107-108).

(2) The parties' positions

(a) The Commissioner

[645] The Commissioner argues that VAA's conduct has had, is having and is likely to have the effect of substantially preventing or lessening competition in the Galley Handling Market. In

support of this position, the Commissioner asserts that, "but for" VAA's Exclusionary Conduct, the market for the supply of Galley Handling services at YVR would be substantially more competitive, including by way of materially lower prices, materially enhanced innovation and/or materially more efficient business models, and materially higher service quality.

[646] The Commissioner submits that in the absence of VAA's impugned conduct, significant new entry into the Galley Handling Market at YVR likely would have occurred, and likely would occur in the future. In this regard, he notes that potential new entrants have already sought authorization to access the airside to provide in-flight catering at the Airport, and would likely have begun operations at the Airport in the absence of VAA's Practices. The Commissioner therefore maintains that VAA's conduct insulates the incumbent in-flight catering firms at the Airport from these new sources of competition, enabling those incumbent firms to exercise a materially greater degree of market power, through materially higher prices and materially lower levels of service quality, than would otherwise prevail in the absence of VAA's practice.

[647] The Commissioner claims that the ability of airlines seeking Galley Handling services at YVR to contract with alternatives to the incumbent providers would allow them to realize at YVR the price and non-price benefits that they have enjoyed at other airports in Canada where new entry has been permitted to occur.

[648] The Commissioner further contends that new entry would also bring to YVR the introduction of innovative and/or more efficient Galley Handling business models. For example, airlines would gain the ability to procure Galley Handling services from a less than full-service in-flight catering firm, or from in-flight catering firms with a lower-cost off-Airport location, delivering efficiencies to service providers and savings to airlines.

[649] In support of his position, the Commissioner relies on the evidence of the market participants directly impacted by VAA's Exclusionary Conduct, namely several airlines and in-flight catering firms, as well as on the expert evidence of Dr. Niels. Dr. Niels' evidence includes: (i) the analysis of switching by airlines at Canadian airports; (ii) Jazz's gains from switching at airports other than YVR; (iii) the price effects for airlines that did not switch; and (iv) **[CONFIDENTIAL]**. The Commissioner claims that, on their own and certainly in the aggregate, these various sources of evidence demonstrate that VAA's anti-competitive conduct has caused, is causing and is likely to cause a substantial prevention and lessening of competition in the supply of Galley Handling at YVR. Specifically, the Commissioner maintains that, "but for" VAA's Exclusionary Conduct, there would likely have been in 2014-2015 and would likely be in the future: (i) entry by new competitors for the supply of Galley Handling at YVR; (ii) switching and threats of switching from airlines at YVR to new competitors for the supply of Galley Handling; (iii) lower prices for airlines for the supply of Galley Handling services at YVR; and (iv) a greater degree of dynamic competition for Galley Handling at YVR.

[650] Finally, the Commissioner argues that the alleged prevention or lessening of competition would be substantial in terms of magnitude, duration and scope: it adversely impacts competition to a degree that is material, the duration of the adverse effects is substantial and the adverse effects impact a substantial part of the Relevant Market.

[651] As stated before, the Commissioner's focus throughout the hearing of this Application was on one of VAA's two alleged impugned Practices, namely, the Exclusionary Conduct. Indeed, the other allegation regarding continued tying of access to the airside for the supply of Galley Handling services to the leasing of land at YVR from VAA was not addressed by the Commissioner during the hearing or in his closing written submissions.

(b) VAA

[652] VAA responds that its Practices do not, and are not likely to, prevent or lessen competition substantially in any market. More specifically, VAA submits that the Commissioner has failed to meet his burden to prove, on a balance of probabilities, that VAA's refusal to license Newrest and Strategic Aviation has had, is having or is likely to have the effect of substantially preventing or lessening competition in the Galley Handling Market.

[653] In its Amended Response, VAA submitted that its decision to limit the number of in-flight caterers at the Airport has not enabled the incumbent firms to exercise materially greater market power than they would have been able to exercise in the absence of the acts. VAA further claimed that there is vigorous competition between Gate Gourmet and CLS, that the presence of two full-service in-flight catering firms is consistent with the number of such competitors at other comparable North American airports, and that airlines can and do change firms in response to price and service competition.

[654] VAA further argued that the airlines (and their large international alliances) have considerable countervailing market power. Finally, VAA submitted that the licensing of dnata and the arrival of this third in-flight caterer at YVR will eliminate any prevention or lessening of competition that could have resulted from VAA's refusal to grant licences to Newrest and Strategic Aviation.

[655] In its closing submissions, VAA elaborated by stating that, on the unique facts of this case where it does not compete in the Relevant Market (i.e., the Galley Handling Market), the Commissioner must prove that its actions materially created, enhanced or maintained the market power of both Gate Gourmet and CLS, in the supply of Galley Handling at YVR. VAA argued that the evidence on the record does not establish that "the market at issue would be substantially more competitive" (*TREB FCA* at para 88), "but for" the Exclusionary Conduct.

[656] VAA reiterated that in evaluating whether its 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 licences to Newrest and Strategic Aviation and the countervailing market power exercised or exercisable by the airline customers of Gate Gourmet and CLS.

[657] VAA also maintains that the evidence provided by the Commissioner, whether from the market participants or from Dr. Niels, is not sufficient to meet the test under paragraph 79(1)(*c*). More specifically, VAA submits that the anecdotal evidence from Jazz and Air Transat is unreliable and open to serious question following the cross-examination of the Commissioner's witnesses. VAA further asserts that the Commissioner's evidence is limited to two small carriers. Furthermore, VAA claims that the economic evidence from Dr. Niels suffers from numerous

flaws. For example, it states that the alleged price effects only occur for "small" airlines, that they are largely associated with entry at airports going from a monopoly position to two in-flight caterers, and that these small airlines account only for about **[CONFIDENTIAL]**% of the flights at YVR, with no indication of the proportion they represent of the Galley Handling Market at YVR.

[658] VAA acknowledges that the Tribunal can assess both the quantitative and qualitative effects of the impugned conduct and that the qualitative effects are more relevant to an assessment of dynamic competition in innovation markets, in the sense that innovation or technology plays a key role in the competitive process. However, VAA submits that the Galley Handling Market is not such a market, and that there is no clear and convincing evidence of any adverse effect on innovation in this case.

[659] Finally, VAA adds that the factual circumstances relevant to the consideration of whether there has been or will likely be a substantial prevention or lessening of competition should be updated to the date of the hearing. In this instance, given the imminent entry of dnata, VAA maintains that the Commissioner has to prove that VAA's conduct is likely to have the effect of substantially preventing or lessening competition from a forward-looking perspective. VAA contends that, if any negative price effects have resulted from the impugned conduct, those effects will be remedied and cured with the entry of dnata at YVR.

(3) Assessment

[660] The Tribunal notes at the outset that most of the evidence adduced by the Commissioner was quantitative evidence relating to the alleged price effects of VAA's Exclusionary Conduct. As part of its assessment, the Tribunal has therefore focused significantly on whether prices likely would have been, or would likely be materially lower, "but for" VAA's Exclusionary Conduct. The Tribunal has also evaluated whether entry likely would have been, or would likely be materially greater in the absence of that conduct, whether switching between suppliers of Galley Handling services likely would have been, or would likely be materially more frequent, and whether innovation in terms of Galley Handling services offered likely would have been, or would likely be substantially greater.

[661] For the reasons discussed below, the Tribunal concludes that the Commissioner has not demonstrated that the incremental adverse effect of VAA's Exclusionary Conduct on competition in the Galley Handling Market has been, is or is likely to be material, relative to the "but for" world in which that conduct did not occur. Therefore, the Commissioner has not established that competition has been or is prevented or lessened substantially as a result of the Exclusionary Conduct, or that it is likely to be prevented or lessened substantially in the future.

(a) Alleged anti-competitive effects

(i) Entry

[662] In assessing whether competition has been, is or is likely to be substantially prevented or lessened by a practice of anti-competitive acts, one of the factors to consider is whether entry or expansion into the relevant market likely would have been, likely is or likely would be, substantially faster, more frequent or more significant "but for" that practice (*Canada Pipe FCA* at para 58; *TREB CT* at para 505).

[663] According to the Commissioner, VAA's Exclusionary Conduct constitutes a significant barrier to entry for new providers of Galley Handling services who otherwise would have entered into the Relevant Market.

[664] The Tribunal is satisfied that several of the Commissioner's witnesses provided credible and persuasive evidence regarding the exclusionary impact that VAA's conduct has had on them in terms of entry. Based on that evidence, the Tribunal accepts that this conduct has prevented the development of at least some new competition in the Galley Handling Market. Indeed, VAA does not dispute that Newrest, Strategic Aviation and Optimum would like to compete at YVR. Witnesses from each of these firms (Mr. Stent-Torriani for Newrest, Mr. Brown for Strategic Aviation and Mr. Lineham for Optimum) testified that, "but for" VAA's Exclusionary Conduct, their companies would have entered YVR in 2014-2015 and would have competed for airline business. The evidence shows that they participated in RFPs launched by Jazz and Air Transat in the 2014-2015 timeframe, and were unsuccessful at YVR because of their inability to obtain a licence from VAA to offer their Galley Handling services.

[665] Considering the foregoing, the Tribunal is satisfied that there would have been somewhat more new entry into the Relevant Market than there has in fact been, "but for" the impugned conduct (*Canada Pipe FCA* at para 58).

[666] The representatives of Newrest, Strategic Aviation and Optimum all testified that, despite the entry of dnata at YVR, they would still be interested in commencing operations at YVR and in competing for airline business in the Galley Handling Market. There is also evidence, notably from the witnesses who appeared on behalf Air Canada (Mr. Yiu) and WestJet (Mr. Soni), indicating that airlines are still generally looking for more competition in the in-flight catering business. However, apart from general statements from Newrest, Strategic Aviation and Optimum regarding their continued interest in operating at YVR, and similar statements from Air Canada and WestJet regarding the benefits of increased competition in Galley Handling services, the Commissioner has provided limited evidence regarding the incremental benefits that past, current or future new entry would have yielded in the Galley Handling Market. Normally, as part of an analysis of likely past, present or future entry, the Commissioner is expected to provide evidence regarding the proportion of the market that was, is or is likely to be available to new entrants. As part of this exercise, it is incumbent upon the Commissioner to identify concrete market opportunities that would likely have been, are or would likely be available to new entrants. In other words, the Commissioner has the burden to establish that new entrants would likely have entered or expanded in the relevant market, or would be likely to do so, "within a

reasonable period of time, and on a sufficient scale, to effect either a material reduction of prices or a material increase in one or more levels of non-price competition, in a material part of the market" (*Tervita FCA* at para 108). Such evidence has not been provided in this proceeding. Among other things, the Commissioner has not addressed the fact that the contracts between the incumbent in-flight caterers and the airlines are typically long-term contracts, varying between three to five years.

[667] As a result, the Tribunal is not satisfied that there is clear and convincing evidence to support the conclusion that there were, are or would likely be sufficient opportunities available to new entrants to support entry on a scale that would likely have been or would likely be sufficient to have a material impact on the price and non-price dimensions of competition in the Galley Handling Market.

[668] The Tribunal underscores that the situation is now different from the 2014-2015 and 2017 periods when there were RFPs for Galley Handling services initiated by airlines such as Air Transat, Jazz or Air Canada, and when Newrest, Strategic Aviation and/or Optimum offered their services and participated in the process. No evidence was adduced to demonstrate that new contracts for Galley Handling services are currently available or would soon be available for any airlines at YVR. When relying on an allegation that impugned conduct prevents or would likely prevent new entrants from having a material impact on the price or non-price dimensions of competition, the Commissioner must demonstrate more than the existence of firms that are interested in entering the relevant market. The Commissioner must go further and demonstrate that those firms are likely to be successful and that they are likely to achieve a scale of operations that permitted or would permit them to materially impact one or more important dimensions of competition. He has not done so for present or future entry. Likewise, as to the 2014-2015 and 2017 periods mentioned above, the Commissioner has not established that entry by Newrest, Strategic Aviation and/or Optimum likely would have been on a sufficient scale to result in materially lower prices or a materially higher level of innovation, quality, service or other non-price effects in a substantial part of the market.

[669] Based on the foregoing, the Tribunal finds that the Commissioner has not demonstrated, with clear and convincing evidence, that successful and sufficient entry at YVR has been or is prevented, or will likely be prevented in the foreseeable future, "but for" the Exclusionary Conduct.

(ii) Switching

[670] The Commissioner maintains that, had entry been permitted, switching from Gate Gourmet or CLS likely would have taken place to a materially higher degree than in the presence of VAA's Exclusionary Conduct. He adds that airlines would likely have resorted, and would likely turn in the future, to new providers of Galley Handling services at YVR. VAA replies that the evidence on switching does not demonstrate that VAA's Exclusionary Conduct has had, or is likely to have, the effect of limiting competition in the Galley Handling Market at YVR, let alone substantially.

- Switching by airlines

[671] On this issue, the Commissioner relied on Dr. Niels' analysis of the extent of switching at various Canadian airports. Dr. Niels' switching analysis consisted of counting the number of switches of in-flight catering providers made by the airlines at different airports over the period 2013-2017. In his analysis, Dr. Niels identified **[CONFIDENTIAL]** instances in which airlines switched in-flight caterers during that period. Of these, **[CONFIDENTIAL]** occurred at YVR, **[CONFIDENTIAL]**. Of the other **[CONFIDENTIAL]** which took place at other airports, **[CONFIDENTIAL]** involved switches to new entrants. A little more than half of these changes in in-flight caterers (i.e., **[CONFIDENTIAL]**) were made by **[CONFIDENTIAL]**.

[672] The evidence from Dr. Niels also showed an important change in the average yearly percentage of total airline purchases of in-flight catering services from in-flight caterers who were switched in the period from 2013 to 2017. That percentage was at **[CONFIDENTIAL]**% at YVR whereas it was much higher at every other airport in Canada, ranging from **[CONFIDENTIAL]**% to **[CONFIDENTIAL]**%, including YYZ at **[CONFIDENTIAL]**%. In other words, Dr. Niels found that the proportion of airline spending on in-flight catering that was switched during the period 2013-2017 was much lower at YVR than at other large Canadian airports. Dr. Niels added in reply to Dr. Reitman that **[CONFIDENTIAL]**, implying that VAA's refusal to permit entry has resulted in weaker competitive dynamics at YVR.

[673] According to the Commissioner, this analysis by Dr. Niels demonstrates that: (i) there was very little switching by airlines among the incumbent providers of in-flight catering services at YVR; (ii) comparatively, substantial switching occurred at airports other than YVR; and (iii) switching is often associated with the entry of new in-flight caterers.

[674] The Commissioner submits that this disparity in switching at YVR compared to other airports is relevant for two reasons. First, would-be entrants across Canada were ready to enter in 2014 and they remain ready to enter the Galley Handling Market. Therefore, "but for" VAA's Exclusionary Conduct, more switching would likely have occurred at YVR in the past and more would likely occur in the future. Second, the Commissioner suggests that Dr. Niels and Dr. Reitman agree that it is reasonable to presume that airlines benefit when they switch in-flight catering providers. Based on this, he maintains that there is a direct link between the fact of switching and benefits to airlines, and a direct link between a lack of switching and increased costs and/or reduced quality of service to airlines.

[675] The Tribunal acknowledges that there likely would have been at least some additional switching at YVR, "but for" the Exclusionary Conduct. However, the Tribunal considers that the switching analysis conducted by Dr. Niels has some important shortcomings. First, as pointed out by VAA, the switches counted by Dr. Niels in his analysis were for Catering and Galley Handling together. It is not possible to discern specific effects in the Galley Handling Market, *per se*, or to determine whether the switches observed related to that market or in respect of catering services. Second, Dr. Niels' analysis was incomplete. As Dr. Niels acknowledged, he did not factor into his analysis instances of partial switching made by airlines for their Galley Handling services. Third, apart from the fact that there has been more entry at some other airports than at YVR, it is not clear that there is any material difference between the intensity of

competition in the provision of Galley Handling services at YVR, relative to other airports. Dr. Niels essentially conceded this point.

[676] That said, further to its assessment of Dr. Niels' evidence on this point, and considering also the evidence provided by Air Transat and Jazz showing that they would have switched to a new in-flight caterer further to their respective 2014 and 2015 RFPs, the Tribunal agrees with the Commissioner that, on a balance of probabilities, switching would have been and would likely be greater and more frequent in the absence of VAA's Exclusionary Conduct. However, that is not the end of the analysis. As discussed above, the Commissioner must also address whether such switching likely would have been sufficient to result in materially lower prices, or materially higher levels of non-price benefits, in a substantial part of the market, "but for" the Exclusionary Conduct. For the reasons discussed in Section VII.E.3.b below, he has not satisfied his burden in this regard.

- Entry by dnata

[677] The Commissioner also submits that dnata's entry as a third provider of in-flight catering services at YVR in 2019 will have limited impact on the Galley Handling Market. The Commissioner argues that, unlike the situation for Newrest, Strategic Aviation and Optimum, there is limited evidence that dnata will likely be an effective competitor at YVR.

[678] The Commissioner claims that dnata has no presence in Canada and virtually none in North America (being only present in Orlando, Florida). He submits that dnata's limited presence in North America will be an obstacle to its success at YVR, as it will be unable to offer "network" pricing and satisfy airlines' preferences for a single caterer supplier across Canada.

[679] The Commissioner also contends that **[CONFIDENTIAL]** (Commissioner's Closing Argument, at para 78). The Commissioner further notes that, **[CONFIDENTIAL]**. Stated differently, despite the fact that domestic flights account for 67% of flights per week at YVR, **[CONFIDENTIAL]**. The Commissioner submits that since international flights account for a smaller proportion of flights per week at YVR, **[CONFIDENTIAL]**.

[680] The Commissioner further argues that VAA's process for selecting dnata – namely, the In-Flight Kitchen Report and the 2017 RFP itself – was fundamentally flawed in many respects, as were the results of the process.

[681] Finally, the Commissioner contends that dnata is a "**[CONFIDENTIAL]**" type of new competitor vis-à-vis the two incumbent caterers at YVR, in an in-flight catering environment where innovative business models exist and benefit airlines everywhere but YVR (Commissioner's Closing Argument, at para 77).

[682] The Tribunal disagrees with the Commissioner's position with respect to dnata. In brief, the evidence does not support the Commissioner's contention that dnata is unlikely to be an effective competitor.

[683] Regarding the scope of dnata's presence, the evidence does not support the Commissioner's suggestion that dnata's entry will be limited and targeted. In his cross-examination by counsel for VAA, **[CONFIDENTIAL]**.

[684] As to the RFP conducted by VAA in 2017, the Tribunal is not convinced by the Commissioner's arguments. The Tribunal agrees with VAA that, in light of the evidence regarding the In-Flight Kitchen Report and the RFP itself, the RFP was beyond reproach. The Tribunal does not find that the process was flawed or geared towards a given result. The Commissioner has not pointed to any persuasive evidence in that regard. Indeed, the RFP process was found to be fair by a third-party fairness advisor. It was expressly open to both full-service and non-full-service in-flight catering firms. It was also open to firms operating a kitchen on-Airport as well as those operating off-Airport. And the criteria for analyzing the bids were extremely detailed and objective. Contrary to the Commissioner's suggestion, the Tribunal finds no evidence showing that the RFP process was geared towards a "full-flight kitchen" operator or against providers like Strategic Aviation or Optimum.

[685] The Tribunal also disagrees with the Commissioner's comment that dnata is "**[CONFIDENTIAL]**" and will not be considering "innovative" new business models. On the contrary, the testimony of Mr. Padgett showed that dnata is ready and able to go after any type of in-flight catering work, whether that consists of catering or last-mile logistics or both. In other words, dnata has left the door open to the possibility of providing only Galley Handling services for airline customers who may not wish to source their catering services from dnata.

[686] The Tribunal considers that there is every indication that dnata will enter and compete fully with Gate Gourmet and CLS in the Galley Handling Market at YVR. In fact, Dr. Niels acknowledged that the entry of dnata will bring increased rivalry to the Galley Handling Market at YVR, as his evidence suggests that at least some switches occur upon the entry of new in-flight catering firms. Dr. Niels further accepted that, with the entry of dnata and the presence of three caterers at YVR going forward, there will be stronger competition than with two, though he qualified this increased competition as being a matter of degree. **[CONFIDENTIAL]**.

[687] In light of the foregoing, the Tribunal is not persuaded that dnata will not be an effective competitor. On the contrary, the Tribunal is inclined to accept Mr. Padgett's testimony that **[CONFIDENTIAL]**.

[688] That said, the Tribunal agrees with the Commissioner that as far as paragraph 79(1)(*c*) is concerned, the appropriate "but for" analysis is to compare outcomes with VAA's exclusionary practice in place to outcomes that would likely be realized absent that practice. It is not to compare outcomes with the presence of the two incumbent competitors to outcomes with those same two competitors plus dnata. However, the entry of dnata has made it more difficult for the Commissioner to demonstrate that, "but for" VAA's Exclusionary Conduct, prices likely would be materially lower, or non-price levels of competition likely would be materially greater, relative to the levels of prices and non-price competition that are in fact likely to prevail now that dnata has entered the Relevant Market.

(iii) Price effects

[689] The main focus of the Commissioner's arguments pertaining to alleged anti-competitive effects was on the price dimensions of VAA's Exclusionary Conduct and on how prices for Galley Handling services would likely have been and would likely be lower "but for" the impugned conduct. The Commissioner relied on evidence from a number of market participants, notably the various airlines called to testify, and on the expert evidence of Dr. Niels, to support his position that prices in the Galley Handling Market at YVR are materially higher than they would likely have been or would likely be, "but for" the Exclusionary Conduct. The Commissioner maintains that the aggregate savings resulting from reduced prices of Galley Handling services would likely have been and would likely be in the future, substantial.

[690] VAA responds that the Commissioner has not demonstrated that airlines would likely have benefitted from, or would likely be offered, materially lower prices in the Relevant Market in the absence of VAA's Exclusionary Conduct.

[691] The Tribunal agrees with VAA. Further to its review of the evidence, the Tribunal is not persuaded that VAA's Exclusionary Conduct has increased, is increasing or will likely increase the prices for Galley Handling services to a non-trivial degree in the Relevant Market, relative to the prices that likely would have existed "but for" the Exclusionary Conduct. Stated differently, the Commissioner has not demonstrated that, "but for" VAA's Exclusionary Conduct, the prices of the Galley Handling services at YVR would likely have been or would likely be lower, let alone "materially" lower.

[692] The Tribunal pauses to underscore, at the outset, that the Commissioner's evidence is essentially limited to **[CONFIDENTIAL]** of the total revenues generated by the in-flight catering firms operating at YVR, from 2013 to 2017. No evidence specifically addressed **[CONFIDENTIAL]** of in-flight catering revenues at YVR. This, says VAA, is a fatal flaw in the Commissioner's case, as he has not alleged any form of collusion between Gate Gourmet and CLS. The Tribunal agrees that this significantly weakens the Commissioner's case on paragraph 79(1)(*c*). In the circumstances of this case, the evidence does not allow the Tribunal to infer or imply anything with respect to **[CONFIDENTIAL]** in the absence of the Exclusionary Conduct.

[693] With respect to the alleged anti-competitive price effects of VAA's Exclusionary Conduct, the Commissioner relied on: (i) Dr. Niels' economic analyses of the price effects for airlines that did not switch providers, Jazz's gains from switching, and **[CONFIDENTIAL]**; and (ii) evidence provided directly by various airlines (i.e., Jazz, Air Transat, Air Canada and WestJet, and the eight airlines having provided letters of complaint).

- <u>Prices to the non-switchers</u>

[694] The main economic analysis relied upon by the Commissioner is a regression analysis conducted by Dr. Niels for airline customers that did not switch in-flight caterers. This is the only econometric evidence relied upon by the Commissioner.

[695] Dr. Niels used an event study methodology to analyze the effect of the entry of Strategic Aviation and/or Newrest on the average monthly price paid by a given airline customer **[CONFIDENTIAL]**, for a given Galley Handling product, at various airports other than YVR between 2014 and 2016. He compared the prices paid **[CONFIDENTIAL]** for Galley Handling services before and after entry by Strategic Aviation (**[CONFIDENTIAL]**) and Newrest (**[CONFIDENTIAL]**), for airlines that did not switch to the new entrants. Dr. Niels' analysis was essentially a comparison of prices paid **[CONFIDENTIAL]** over the two years prior to entry at the airport concerned with the average prices paid during the two years after entry. It yielded what Dr. Niels considered to be an estimate of the average effect of new entry on the prices paid by the airline customers who remained with **[CONFIDENTIAL]** and did not switch.

[696] This regression analysis **[CONFIDENTIAL]**. Dr. Niels also did not look at Catering prices, even though he recognized that he had the data to do so.

[697] Dr. Niels first found that the entry of new competitors did not have a statistically significant effect on the prices paid **[CONFIDENTIAL]** over the period 2013-2017. However, he found that **[CONFIDENTIAL]** "smaller airlines" customers by **[CONFIDENTIAL]**% if price observations are equally weighted, by **[CONFIDENTIAL]**% if they are revenue weighted and by **[CONFIDENTIAL]**% if they are quantity weighted. These results were statistically significant at the 5% level for unweighted and revenue-weighted results, and at the 1% level for quantity-weighted results. **[CONFIDENTIAL]**% if they are revenue-weighted but this result was statistically insignificant. Dr. Niels concluded that the analysis showed "robust evidence of a reduction **[CONFIDENTIAL]** galley handling prices for the smaller airlines in response to the entry of **[CONFIDENTIAL]**, despite these airlines not actually switching themselves" (Niels Report, at para 1.43).

[698] Dr. Niels indicated during his testimony that he had first performed the regression for all airline customers **[CONFIDENTIAL]** that did not switch, **[CONFIDENTIAL]**. He explained that he found no price effect for this "all airlines" sample and then proceeded to re-do the analysis, using a narrower sample for the "smaller airlines."

[699] Dr. Reitman criticized Dr. Niels' regression analysis at three levels.

[700] First, he stated that Dr. Niels' regression was based on a shorter time period than that for which Dr. Niels had the relevant data. Dr. Niels used data for a window of two years preceding and following entry, but had such data for periods of three years before and after entry.

[701] Second, Dr. Reitman criticized Dr. Niels' failure to distinguish between markets where **[CONFIDENTIAL]** a monopoly and markets where **[CONFIDENTIAL]** competition. In other words, Dr. Niels' regression did not differentiate between entry events that reflect the competitive situation at YVR (i.e., two competing in-flight caterers) and those that do not (i.e., monopoly situations). Instead, Dr. Niels' analysis gave the same weight to the impact on **[CONFIDENTIAL]** a monopoly prior to **[CONFIDENTIAL]** entry, as to the impact at other airports which already had pre-existing competition. Of the **[CONFIDENTIAL]** instances in which entry occurred over the period 2014-2016, **[CONFIDENTIAL]** involved the entry of a **[CONFIDENTIAL]**. These all related to airports where **[CONFIDENTIAL]** entered. A number

of other instances (e.g., **[CONFIDENTIAL]**) involved situations where a caterer entered into an airport where two or more incumbents were already present.

[702] Third, Dr. Niels did not define his entry event windows in a manner that ensured that the price changes at airports experiencing entry are compared with the price changes at airports at which no entry occurred. According to Dr. Reitman, 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" (Reitman Report, at para 196).

[703] Dr. Reitman adapted the regression model used by Dr. Niels to estimate the respective price effects of entry into previously monopolized markets and entry into markets with pre-existing competition. Dr. Reitman compared the pre- and post-entry differences in Galley Handling prices between airports in which entry occurred and a control group of airports in which no entry occurred for three different entry events. In this manner, Dr. Reitman estimated the respective price impacts of **[CONFIDENTIAL]** entry into monopoly airports **[CONFIDENTIAL]**, and **[CONFIDENTIAL]** into airports where there was pre-existing competition. Dr. Reitman did this for an "all airlines" sample and for a "small airlines" sample.

[704] For the all airlines sample, the results for entry that occurred at airports where there were already at least two incumbent caterers provided no statistically significant evidence that prices fell following entry. Dr. Reitman concluded that "there is no evidence that entry at airports that already had at least two providers had any substantial downward effect on pricing" (Reitman Report, at para 210). Dr. Reitman also found that **[CONFIDENTIAL]** with revenue-weights and **[CONFIDENTIAL]** with equal weights, although these estimates were statistically significant only at the **[CONFIDENTIAL]** level.

[705] With his sample confined to "small airlines" customers, Dr. Reitman found that, in the case of entry into a monopoly situation, **[CONFIDENTIAL]** was not statistically significant, except in the case of quantity-weighted prices where there was a statistically significant **[CONFIDENTIAL]**. By comparison, Dr. Reitman found a revenue-weighted **[CONFIDENTIAL]** and an equally-weighted **[CONFIDENTIAL]**, neither of which is statistically significant, **[CONFIDENTIAL]**. Notwithstanding **[CONFIDENTIAL]** of two of his estimates of the **[CONFIDENTIAL]** and **[CONFIDENTIAL]** quantity-weighted estimate, Dr. Reitman averaged the three and stated that**[CONFIDENTIAL]** (Reitman Report, at para 211).

[706] In one case of entry **[CONFIDENTIAL]**, Dr. Reitman found that **[CONFIDENTIAL]**.

[707] The Tribunal is persuaded that Dr. Reitman's critique of Dr. Niels' analysis seriously undermines the conclusions Dr. Niels derived from that analysis. In brief, in view of Dr. Reitman's critique, the Tribunal is of the view that Dr. Niels' analysis does not provide clear and convincing evidence that, "but for" VAA's Exclusionary Conduct, prices for Galley Handling services would likely have been lower at YVR. The Tribunal considers that, for the following reasons, it cannot give much weight to Dr. Niels' regression analysis in assessing the likely adverse price effects of VAA's Exclusionary Conduct.

[708] First, regarding the time frame used for his regression analysis, Dr. Niels was unable to provide, further to questions from the panel, a justification for his curtailment of the study window to a period of two years before and after entry. Dr. Niels conceded that his estimate of the price reduction following new entry becomes statistically insignificant if a longer six-year window (i.e., three years before entry and three after) is chosen.

[709] Second, regarding the statistical results, Dr. Reitman persuasively testified that revenue-weighted figures ranked higher than equally-weighted or quantity-weighted figures when it comes to estimating what happened to prices paid by airlines for in-flight catering. Dr. Reitman also mentioned that both he and Dr. Niels prefer revenue weights to quantity weights (Reitman Report, at para 212). The Tribunal agrees and considers that the revenue-weighted figures of the various regression analyses are the most relevant for its analysis. Dr. Niels' "blended estimate" of the price effects **[CONFIDENTIAL]** but when revenue weights are considered, **[CONFIDENTIAL]**. For his part, when revenue-weighted figures are considered, Dr. Reitman finds **[CONFIDENTIAL]**.

[710] Third, and most importantly, the Tribunal considers that the results relating to entry into markets where there were competing incumbents (as opposed to monopoly situations) are the relevant ones for its analysis, as they better reflect the situation that prevails at YVR. The Tribunal agrees with VAA that observed price effects of entry into previously monopolized markets is not particularly relevant for an assessment of price effects at YVR, which had two competing incumbents in the 2014-2016 timeframe. Likewise, the Tribunal agrees that any effects **[CONFIDENTIAL]** cannot be extrapolated to YVR. Generally speaking, one would expect that the price effect of introducing competition into a monopoly situation may well be different from the price effect of adding a third competitor to a duopoly situation. Indeed, Dr. Reitman's analysis suggests that this is in fact the case. Dr. Niels accepted that, as a matter of theory, the price-reducing effect of entry should decline as the number of incumbent competitors in the market concerned increases. However, he maintained that this decline is "a matter of degree" (Transcript, Conf. B, October 15, 2018, at pp 491-492). Dr. Niels further conceded, upon questioning from the panel, that he could have measured the effects separately for airports that went from one to two providers from those that went from two to three providers, but did not.

[711] Given that dnata has now entered the Galley Handling Market at YVR, it is even more difficult to see how the impact of entry into a monopoly situation can be extrapolated to the Relevant Market at YVR. The effect of the entry of a third competitor (prior to dnata's recent entry) is what is relevant to the case at hand. Moreover, the Tribunal must concern itself with the effect of entry on the prices paid by all airlines, or at least by those accounting for a substantial part of the relevant market, rather than a small and arbitrary subset of them. Only two revenue-weighted parameter estimates qualify to meet those two requirements. The first is Dr. Reitman's parameter for **[CONFIDENTIAL]**. The second is Dr. Reitman's parameter for **[CONFIDENTIAL]**.

[712] The Tribunal notes that on this issue, Dr. Niels responded that there were other factors in addition to the number of competitors that affected the intensity of competition. He cited evidence to the effect that **[CONFIDENTIAL]**. The Tribunal does not accept such statement because the evidence on the record does not establish, on a balance of probabilities, that **[CONFIDENTIAL]**.

[713] For all the above reasons, the Tribunal accepts Dr. Reitman's finding that the effect of the entry of a third competitor on the Galley Handling prices paid by all airlines is not statistically significant. For greater certainty, Dr. Niels's econometric analysis of the prices to non-switchers therefore does not constitute clear and reliable evidence supporting a conclusion that, "but for" VAA's Exclusionary Conduct, the prices of Galley Handling services at YVR would likely have been or would likely be lower, let alone "materially" lower.

- Jazz's gains from switching

[714] The Commissioner also relies on another economic analysis conducted by Dr. Niels, with respect to Jazz's gains from switching subsequent to its 2014 RFP ("**Jazz Analysis**"). This analysis **[CONFIDENTIAL]** Jazz's own estimated gains from switching done by Ms. Bishop, which is discussed later in this section.

[715] Dr. Niels used in-flight caterer data to determine Jazz's savings from switching in-flight caterers in 2015 (from Gate Gourmet to Strategic Aviation and Newrest at eight different airports other than YVR). Dr. Niels' analysis identified specific cost benefits enjoyed by Jazz when entry was not excluded. Dr. Niels found that Jazz saved approximately **[CONFIDENTIAL]** the year following the switch, **[CONFIDENTIAL]** resulted from savings in Galley Handling. Dr. Niels' conclusion was that the savings earned by Jazz resulted from the competition that was introduced by the new entrants.

[716] The Commissioner maintains that the lower prices Jazz paid after switching reflect a change in the competitive position of entrant in-flight caterers and the benefits of competition. The Commissioner submits that **[CONFIDENTIAL]** represent substantial savings with respect to the market for in-flight catering in 2015 at those airports.

[717] VAA responded that the Jazz Analysis is limited to Gate Gourmet, and therefore completely ignores CLS.

[718] Dr. Reitman added that Dr. Niels overstated the savings realized by Jazz. Dr. Reitman submitted that Dr. Niels ignored the savings that Jazz would have realized had it renewed its contract with Gate Gourmet. According to Dr. Reitman, Gate Gourmet initially offered Jazz **[CONFIDENTIAL]** on its new contract, which represented a saving of **[CONFIDENTIAL]**, and **[CONFIDENTIAL]**. Therefore, had Jazz stayed with Gate Gourmet, it would have **[CONFIDENTIAL]**. Dr. Niels responded that **[CONFIDENTIAL]**.

[719] Dr. Reitman also maintained that in any event, the savings realized at other airports do not apply to YVR as prices at YVR may not have been **[CONFIDENTIAL]** as they were at other airports (Reitman Report, at paras 188-190). Stated differently, the other airports where the savings were achieved may not be entirely comparable to YVR. Dr. Reitman testified that the **[CONFIDENTIAL]**. By contrast, he noted that the evidence from Jazz **[CONFIDENTIAL]**. He therefore concluded that the savings in those **[CONFIDENTIAL]** do not reflect the market conditions at YVR.

[720] Furthermore, VAA submitted that the Jazz Analysis is not confined to Galley Handling prices, and so does not control for the possibility that any savings in Galley Handling costs were

partially or entirely offset through higher costs for catering. Therefore, VAA says that these results are not reliable as evidence of lower overall costs from switching. The Tribunal observes that Dr. Niels also performed a similar analysis for Galley Handling prices alone, and cautioned that the "galley handling only result should be interpreted with care" (Niels Report, at para 4.55).

[721] VAA further stated that the Jazz Analysis employed the incorrect "but for" scenario and is therefore 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 Aviation or Newrest in 2015. However, the contract renewal terms offered by Gate Gourmet for 2015 **[CONFIDENTIAL]**. 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 the other caterers.

[722] VAA added that the evidence showed that **[CONFIDENTIAL]**.

[723] Further to its assessment of the evidence, the Tribunal agrees with the Commissioner and accepts Dr. Niels' evidence on the **[CONFIDENTIAL]** savings identified in this Jazz Analysis. The fact that Jazz **[CONFIDENTIAL]**. Furthermore, while it is true that the savings are not all confined to Galley Handling, Dr. Niels acknowledged that **[CONFIDENTIAL]** related to Galley Handling. In addition, regarding his statement that **[CONFIDENTIAL]**.

[724] For all the above reasons, the Tribunal concludes that Dr. Niels' Jazz Analysis on the savings obtained by Jazz at airports other than YVR constitutes reliable evidence supporting a conclusion that, "but for" the Exclusionary Conduct, the prices of Jazz's Galley Handling services would likely have been or would likely be somewhat lower. However, that alone is not sufficient to discharge the Commissioner's burden under paragraph 79(1)(*c*), particularly considering that **[CONFIDENTIAL]**.

- **[CONFIDENTIAL]**

[725] A third piece of economic evidence prepared by Dr. Niels and relied upon by the Commissioner at the hearing is evidence relating to the renegotiation of a contract between **[CONFIDENTIAL]** in 2014.

[726] **[CONFIDENTIAL]**.

[727] In his Reply Report, Dr. Niels analyzed **[CONFIDENTIAL]**.

[728] Dr. Reitman provided two critiques of Dr. Niels' analysis: (i) **[CONFIDENTIAL]**; and (ii) with no change in the number of competitors at YVR, the price increase could not have resulted from an increase in market power.

[729] The Tribunal accepts the Commissioner's submission that even though **[CONFIDENTIAL]**.

[730] However, the Tribunal remains unpersuaded that **[CONFIDENTIAL]** resulted from the exercise of market power that **[CONFIDENTIAL]** would not likely have been able to exercise,

"but for" VAA's Exclusionary Conduct. **[CONFIDENTIAL]** was competing against **[CONFIDENTIAL]** both before and after the change, and the Commissioner has not demonstrated that the presence of Newrest, Strategic Aviation and/or Optimum likely would have prevented **[CONFIDENTIAL]** from being able to impose the price increase in question. Moreover, insofar as **[CONFIDENTIAL]** is concerned, the Tribunal reiterates that Dr. Niels' claim that **[CONFIDENTIAL]** was shown to be unsupported by the available evidence, including the **[CONFIDENTIAL]** at YVR. It was also contradicted by the **[CONFIDENTIAL]** at YVR.

[731] The Tribunal therefore concludes that the Commissioner has not demonstrated with clear and convincing evidence that, "but for" VAA's Exclusionary Conduct, **[CONFIDENTIAL]** for Galley Handling services at YVR likely would have been or would likely be lower, let alone "materially" lower.

- Jazz

[732] In support of its argument regarding the anti-competitive price effects of VAA's conduct, the Commissioner also relied on evidence provided directly by certain airlines. One of these airlines was Jazz, which provided evidence in relation to the RFP it launched in 2014. In that 2014 RFP, **[CONFIDENTIAL]**.

[733] Ms. Bishop from Jazz testified that further to the RFP, Jazz switched from Gate Gourmet to Newrest at YYZ, YUL and YYC, and from Gate Gourmet to Strategic Aviation at five other airports. In her witness statement and in her examination in chief, Ms. Bishop provided evidence regarding the increased expenses that Jazz allegedly incurred as a result of being constrained to contract with Gate Gourmet, as opposed to **[CONFIDENTIAL]**, at YVR. She also provided evidence regarding savings allegedly realized by Jazz as a result of contracting with Newrest and Sky Café at the eight other airports across the country. She testified that the switching at those eight airports generated savings of $2.9 million (or 16%) for Jazz, in 2015 alone. As it was unable to switch at YVR, Jazz had to accept a bid from Gate Gourmet that was approximately **[CONFIDENTIAL]** greater than what Jazz would have paid at that airport had its preferred provider, **[CONFIDENTIAL]**, been allowed airside access at YVR. Accounting for material changes to Jazz's fleet since 2015, Jazz estimated that it was forced to pay approximately **[CONFIDENTIAL]** over a period of 2 years and three months, or **[CONFIDENTIAL]**, for in-flight catering at YVR than it would have had to pay had it been able to use its preferred provider.

[734] All of the evidence given by Ms. Bishop in that regard was based on Exhibits 10 and 13 to her witness statement.

[735] Ms. Bishop further testified that, when it became aware that Jazz intended to switch to other in-flight caterers at other airports in Canada, Gate Gourmet submitted a bid for YVR that ultimately reflected an **[CONFIDENTIAL]** increase over its 2014 prices to Jazz at YVR. Despite this increase and **[CONFIDENTIAL]**, Ms. Bishop stated that Jazz had no choice but to award the **[CONFIDENTIAL]** contract to Gate Gourmet.

[736] However, on cross-examination, Ms. Bishop testified that she had no role in performing the calculations that underlay the figures set out in Exhibits 10 and 13. Nor did she have any detailed understanding as to how the figures were calculated. Ms. Bishop was unable to reconcile inconsistencies between the figures in Exhibit 10 and those appearing in an email sent by her colleague, Mr. Umlah. 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 explanation provided by Jazz's counsel and adopted by Ms. Bishop. Ms. Bishop was invited by counsel for VAA to reconcile several other inconsistencies and, on each occasion, she stated that she could not do so. The Tribunal observes that there were significant discrepancies in the figures resulting from those calculations, compared to what was reported in Exhibit 10. Ms. Bishop was similarly unable to offer complete information as to how the figures in Exhibit 13 were calculated.

[737] Further to the cross-examination of Ms. Bishop, and having listened to how Ms. Bishop gave her evidence and responded to cross-examination at the hearing, and having observed her demeanour, the Tribunal is not satisfied that either the numbers used in her statement or her testimony regarding those numbers can be considered as reliable. While Ms. Bishop could explain how some arithmetic calculations were made, she could not clarify the apparent discrepancies with other documentation that emanated from Jazz. The Tribunal thus concludes that the evidence in Ms. Bishop's witness statement with respect to Exhibits 10 and 13 and the alleged missed savings or increased expenses at YVR does not constitute reliable, credible and probative evidence, and can only be given little weight. The figures she put forward cannot be verified, and are contradicted by the evidence.

[738] For all of the foregoing reasons, the evidence regarding Jazz's 2014 RFP does not assist the Commissioner to demonstrate anti-competitive price effects linked to VAA's Exclusionary Conduct.

- Air Transat

[739] The Commissioner referred to similar evidence from Air Transat, in relation to a 2015 RFP for in-flight catering at a total of 11 airports serviced by Air Transat. As part of the RFP, Air Transat received proposals from **[CONFIDENTIAL]**.

[740] Similarly to Ms. Bishop, Air Transat's witness, Ms. Stewart, testified as to the alleged increased expenses that Air Transat expected to incur at YVR as a result of contracting with Gate Gourmet, as opposed to Optimum. She also testified regarding the alleged savings by Air Transat as a result of contracting with Optimum, as opposed to Gate Gourmet, at other airports across the country.

[741] Ms. Stewart stated that the actual prices of Optimum represented cost savings of approximately **[CONFIDENTIAL]**, or **[CONFIDENTIAL]**, over **[CONFIDENTIAL]** years for stations across the country, compared to the actual costs being paid by Air Transat to **[CONFIDENTIAL]**. Ms. Stewart further stated that at YVR, the fact that it contracted with Gate Gourmet at only that airport caused Air Transat to pay approximately **[CONFIDENTIAL]**

% more at YVR than it expected to pay Optimum, its preferred in-flight caterer for service at YVR.

[742] Furthermore, Ms. Stewart indicated that **[CONFIDENTIAL]**. Nevertheless, **[CONFIDENTIAL]** were not quantified by Ms. Stewart in her witness statement.

[743] With respect to the alleged increased expenses at YVR, Ms. Stewart affirmed in her witness statement that "Air Transat determined that Optimum's bid for YVR was superior to that of Gate Gourmet from both a price and service perspective" (Stewart Statement, at para 33). However, on cross-examination, Ms. Stewart agreed that **[CONFIDENTIAL]**.

[744] On cross-examination, Ms. Stewart also acknowledged an important error in her witness statement, relating to her affirmation that as a result of contracting with Gate Gourmet at YVR, Air Transat paid "approximately **[CONFIDENTIAL]** than what it would have paid to Optimum for service at YVR" (Stewart Statement, at para 35). Ms. Stewart clarified that Air Transat paid approximately **[CONFIDENTIAL]**, not **[CONFIDENTIAL]** than what it would have paid to Optimum.

[745] The Tribunal agrees with VAA that, even as corrected, Ms. Stewart's statement is not particularly persuasive evidence of likely increased prices relating to Galley Handling at YVR. First, Ms. Stewart's claim of a **[CONFIDENTIAL]**% increase in costs paid to Gate Gourmet encompasses both food and Galley Handling together. Second, in her testimony, Ms. Stewart acknowledged that she was not able to identify whether the cost savings offered by Optimum were coming from the Galley Handling services or from the Catering services. Third, even if it is assumed that **[CONFIDENTIAL]**'s bid for Galley Handling services **[CONFIDENTIAL]**, that price **[CONFIDENTIAL]** for Galley Handling services **[CONFIDENTIAL]**. Finally, comparing the prices **[CONFIDENTIAL]** would have charged at YVR **[CONFIDENTIAL]** with the prices it charged **[CONFIDENTIAL]** does not provide persuasive evidence of any market power **[CONFIDENTIAL]** at YVR. In both cases, **[CONFIDENTIAL]**.

[746] There were similar problems with respect to Ms. Stewart's evidence relating to Air Transat's alleged savings as a result of contracting with Optimum, as opposed to Gate Gourmet, at airports other than YVR. Ms. Stewart admitted on cross-examination that, when only the prices for Galley Handling services are considered, **[CONFIDENTIAL]**. Air Transat's costing analysis further revealed that **[CONFIDENTIAL]**.

[747] The Tribunal pauses to observe that even Dr. Niels, the Commissioner's expert, acknowledged that **[CONFIDENTIAL]**, it was not possible to accurately determine the amounts of any gains resulting from that airline's switch from Gate Gourmet to Optimum.

[748] In summary, for the reasons set forth above, and having heard Ms. Stewart during her testimony and having observed her demeanour, the Tribunal does not consider that her evidence on Air Transat's alleged increased expenses and expected savings constitutes clear, compelling and reliable evidence in this regard. The Tribunal concludes that this evidence does not merit much weight in terms of the alleged anti-competitive price effects of VAA's Exclusionary Conduct, compared to the "but for" world.

- Testimony from Air Canada and WestJet

[749] The Commissioner also referred to the testimonies of witnesses from Air Canada (Mr. Yiu) and WestJet (Mr. Soni), regarding the price effects of VAA's Exclusionary Conduct. The Commissioner submits that this evidence demonstrates that, "but for" that conduct, those airlines would have likely had, and in the future would have, access to more competitively priced in-flight catering options at YVR.

[750] However, the Tribunal notes that the evidence relied on by the Commissioner consists of general and generic statements contained in the witness statements about the lack of competition and the benefits of increased competition in Galley Handling services, with no specific concerns or examples given by these two major airlines, which accounted for nearly 70% of all flights at YVR in 2016 and 2017. In the same vein, and as further discussed in the next section below, the Air Canada **[CONFIDENTIAL]**, expressing concerns about the refusals to grant licences to Newrest and Strategic Aviation, do not provide any specific examples or concerns with respect to Galley Handling services at YVR, despite the fact that Air Canada is, by far, the major airline operating at YVR, and **[CONFIDENTIAL]** across Canada and **[CONFIDENTIAL]** at YVR.

[751] The Tribunal considers that this generic evidence from Air Canada and WestJet does not provide clear, convincing and non-speculative evidence, with a sufficient degree of particularity, with respect to adverse price effects of VAA's Exclusionary Conduct.

[752] The Tribunal appreciates that airlines would prefer more, rather than less, in-flight catering options. But, to constitute evidence that is sufficiently clear and convincing to meet the standard of balance of probabilities, and to support a finding of a likely prevention or lessening of competition in the Galley Handling Market attributable to VAA's Exclusionary Conduct, the evidence from these two major airlines would have needed to be more precise and particularized.

- Airlines' letters

[753] During the hearing, the Commissioner put much emphasis on letters from eight airlines that expressed their support for more competition in Galley Handling services at YVR. These consist of four letters sent in April 2014 by each of Air Canada, Jazz, Air France / KLM and British Airways, and five letters sent in November and December 2016 by **[CONFIDENTIAL]**, Korean Air, Delta Airlines and Air France.

[754] For the following reasons, the Tribunal does not find these letters from the airlines to be particularly convincing and considers that it can only give them limited weight in terms of evidence of likely anti-competitive effects in the Galley Handling Market due to VAA's Exclusionary Conduct.

[755] With respect to the first four letters written in April 2014, the Tribunal notes that they were sent by the airlines at the request of Newrest, in the context of Newrest's application to be granted a licence for in-flight catering services at YVR. Only two of those letters (i.e., those from Air Canada and Jazz) were addressed to VAA. (The other two were addressed to Newrest.) The letters were short, expressed the airlines' support for Newrest's (and Strategic Aviation's)

requests for catering licences at YVR, and stated that competition was not optimized at YVR, where there were only two major in-flight caterers. Apart from their general support for new entry, none of the letters mentioned particular concerns with respect to the Galley Handling services at YVR.

[756] In their witness statements and in their testimonies before the Tribunal, Mr. Richmond and Mr. Gugliotta underlined that the letters were limited to a few sentences expressing each airline's general support for Newrest's request. They noted that none contained particular information or complaints specific to in-flight catering at YVR that VAA had not considered. Likewise, the letters did not provide any reasons to reconsider VAA's decision.

[757] During the month of May 2014, Mr. Richmond wrote response letters to the President and CEO of Air Canada and to Jazz (the only two airlines which had written directly to VAA), providing VAA's explanation for its decision not to authorize a third in-flight caterer to access the airside at YVR. With one exception, there is no evidence that, following Mr. Richmond's response and explanation for VAA's decision not to grant a licence to Newrest and Strategic Aviation, Air Canada or Jazz replied to VAA regarding the situation of in-flight catering at YVR. The Tribunal notes that, in her witness statement prepared for this Application, Ms. Bishop stated that Jazz disagreed with VAA's assessment of the in-flight catering marketplace at YVR, as expressed by Mr. Richmond at the time. However, the evidence from 2014-2015 does not show that those two airlines voiced particular concerns to VAA further to the May 2014 response. The exception is a telephone conversation with Jazz's CEO mentioned by Mr. Richmond in his witness statement, about which Mr. Richmond had no clear recollection and which did not change VAA's views.

[758] There is also no evidence on the record of specific concerns or complaints expressed to VAA by Air France / KLM or British Airways (i.e., the two airlines that wrote the other 2014 letters) regarding the Galley Handling services at YVR.

[759] As to the five letters from late November and early December 2016, the Tribunal observes that they were sent in the context of the Commissioner's Application, shortly after the Commissioner had filed the Application in late September 2016. The Tribunal further notes that the letters are all fairly succinct, they again contain only general statements about the benefits of competitive markets, and they do not refer to any particular issues or problems regarding in-flight catering services at YVR. In addition, they are very similarly worded (with some sentences being virtually identical), even though they come from airlines spread all across the globe (i.e., **[CONFIDENTIAL]**, Air France, Delta Airlines and Korean Airlines).

[760] Each letter starts with a paragraph stating that the letter is sent in the context of the Application made by the Commissioner. It then indicates that competition is always "most welcome" at airports where the airline operates and that competition is insufficient or not optimized at YVR, as there are only two in-flight catering firms. Finally, it affirms the airline's support for Newrest's request for a catering licence at YVR. Turning more specifically to **[CONFIDENTIAL]** save for an added introductory reference to the Commissioner's Application.

[761] These general letters (and the evidence provided by witnesses who appeared on behalf of these airlines, namely, Air Canada and Jazz) have to be balanced against the evidence from Mr. Richmond and Mr. Gugliotta which demonstrates that VAA had regular and continuous interactions with all airlines operating at YVR and that, during these interactions in the relevant time frame, airline executives with whom Mr. Richmond and Mr. Gugliotta dealt did not raise concerns with VAA relating to in-flight catering services or competition at YVR (except for the telephone conversation with Jazz mentioned above). More specifically, there is no evidence to indicate that, **[CONFIDENTIAL]** voiced any concerns with VAA about the price or quality of Galley Handling services at YVR.

[762] Mr. Richmond further noted that in his experience, when airlines have a serious problem about airport operations, they do not hesitate to raise it immediately with airport management. Mr. Richmond also testified that in April 2014, no airlines had raised operational or financial concerns about catering, and that "no airline either before or since has called [him] about catering at the airport" (Transcript, Conf. B, October 30, 2018, at p 818). Mr. Gugliotta added that there is a formal mechanism at YVR, the Airline Consultative Committee, where VAA and the airlines meet on a frequent basis. However, no airlines have raised any issues there, or in the other regular interactions between VAA and the airlines, with respect to the service quality or the pricing of in-flight catering services.

[763] Mr. Gugliotta also referred to the regular meetings that VAA has with the senior management of Air Canada and WestJet, the two biggest airlines operating at YVR. He stated that "this flight kitchen issue in terms of either service or pricing was never raised" by either of these airlines during those regular meetings (Transcript, Conf. B, November 1, 2018, at p 1036). This specific evidence provided by VAA was not contradicted by the witnesses who appeared on behalf of Air Canada and WestJet, namely, Mr. Yiu and Mr. Soni, respectively.

[764] The Tribunal found the testimony of Mr. Richmond and Mr. Gugliotta on this point to be credible and reliable. The Tribunal attributes more weight to their specific evidence regarding their interactions with airline customers than to the general statements made by the eight airlines in the 2014 and 2016 letters sent at the request of Newrest or in the context of these proceedings, which simply expressed a general preference for more competition in catering services at YVR.

[765] To support a finding of likely adverse price or non-price effects, relative to the required "but for" scenario, the Commissioner must adduce sufficient clear, convincing and cogent evidence to satisfy the balance of probabilities test. Letters and documents from customers affected by the impugned conduct can of course be highly relevant and probative in that context. However, where sophisticated customers are involved, it is not unreasonable to expect the letters in question to provide a minimum level of detail regarding the actual or anticipated effects of the impugned conduct on their respective business or on the market in general. The Tribunal finds that the particular letters discussed above do not materially assist in meeting that test. When the Commissioner relies on letters from sophisticated industry participants such as the airlines in this case, the Tribunal needs more than boiler-plate statements supporting increased competition.

[766] In the circumstances, the Tribunal is of the view that the letters produced by the Commissioner from the airlines do not amount to clear and convincing evidence supporting a

conclusion that, "but for" VAA's Exclusionary Conduct, the prices of Galley Handling services at YVR would likely have been or would likely be lower.

[767] The Tribunal pauses to observe that VAA argued that the countervailing power of airlines has to be taken into account as a constraining factor on any exercise of market power by the in-flight catering firms. However, in the absence of specific evidence to that effect, the Tribunal is not prepared to give much weight to this argument.

- VAA's Pricing Analyses

[768] The Tribunal makes one additional comment regarding the pricing analyses submitted by VAA. In response to Dr. Niels' switching analysis, Dr. Reitman conducted regression analyses to compare Galley Handling prices at YVR with prices for those services at other Canadian airports.

[769] Dr. Reitman tendered two econometric models of his own (using data from Gate Gourmet prepared by Dr. Niels). In them, he compared the prices paid for all in-flight catering products by all airlines at YVR with the corresponding prices paid at other Canadian airports. He also compared prices across airports for all in-flight catering and Galley Handling products, as well as for just Galley Handling, for all airline customers from 2013-2017. In addition, he estimated the effect of entry on the difference between the prices charged **[CONFIDENTIAL]** at airports where entry occurred and the prices at airports where no entry occurred.

[770] In his analyses, Dr. Reitman found that the prices charged to airlines at YVR **[CONFIDENTIAL]**, than at the other airports. In other words, he found **[CONFIDENTIAL]** at YVR relative to prices at other airports. Dr. Reitman's conclusion was robust to numerous sensitivity tests including confining the sample to Galley Handling products and smaller airline customers. He reached the same conclusion when he confined his analysis to comparing the period before there was any entry at the airports concerned to the period after all entry had taken place. With respect to all in-flight catering and Galley Handling products, he concluded that "[t]he regression results **[CONFIDENTIAL]** coefficients on the variables for other airports" (Reitman Report, at para 163). With respect to just Galley Handling, he observed that **[CONFIDENTIAL]** (Reitman Report, at para 171). Dr. Reitman also ran different variations of the model to test whether there were price differences between YVR and other airports for in-flight catering products and services in the period before those other airports experienced additional entry by flight caterers **[CONFIDENTIAL]**, as well as in the period after the last entry of **[CONFIDENTIAL]**. Dr. Reitman concluded that **[CONFIDENTIAL]**.

[771] In response to this evidence, the Commissioner submitted that Dr. Reitman's opinion reflects a fundamental misunderstanding of the relevant economic assessment to be made.

[772] Dr. Niels argued that Dr. Reitman did not properly control for inter-airport differences in wages, prices of relevant inputs and taxes. For example, **[CONFIDENTIAL]** used by Dr. Reitman does not reflect inter-city differences in prices. As a result, the effect of VAA's entry restrictions on **[CONFIDENTIAL]** at YVR relative to other airports may be obscured by other influences for which he has not controlled. To control for that, Dr. Niels compared

[CONFIDENTIAL] EBITDA margins across airports instead of its prices across airports. Dr. Niels found that these margins **[CONFIDENTIAL]** at YVR. Dr. Reitman agreed that margins were a better measuring tool than prices. However, he criticized Dr. Niels for using EBITDA margins instead of variable cost margins to assess competition. When variable cost margins are used, Dr. Reitman found that the differences in variable cost margins being earned **[CONFIDENTIAL]** across Canadian airports **[CONFIDENTIAL]**.

[773] More fundamentally, the Commissioner submitted that Dr. Reitman's methodology does not address the anti-competitive effects of VAA's Exclusionary Conduct, because the appropriate "but for" question is not to ask whether prices or margins at YVR are low relative to other airports, but whether they would likely have been lower absent VAA's conduct.

[774] The Tribunal agrees with the Commissioner on this point and finds that Dr. Reitman's pricing analyses are not of much assistance with respect to the assessment of the actual and likely effects of VAA's Exclusionary Conduct that is contemplated by paragraph 79(1)(*c*). Dr. Reitman did not assess price changes in his analysis. He looked at price levels overall, as well as during the before and after periods, and concluded that prices at YVR **[CONFIDENTIAL]** than at other airports, either before or after entry had occurred at them. However, his analysis did not properly hold constant other sources of differences in price levels across airports. Nor does it test to see whether the difference in prices between YVR and the other airports changed between the pre- and post-entry periods. Accordingly, this aspect of his analysis failed to persuasively address the effect of entry on prices. As a result, this evidence merits little, if any, weight.

- Conclusion on price effects

[775] In light of the foregoing, the Tribunal is left with unpersuasive and insufficient evidence regarding the alleged price effects of VAA's Exclusionary Conduct in the Galley Handling Market. The Tribunal therefore concludes that the Commissioner has not demonstrated that VAA's Exclusionary Conduct has had, is having or is likely to have the effect of adversely impacting the prices charged for Galley Handling services in the Relevant Market.

(iv) Innovation and dynamic competition

[776] Turning to the non-price effects of VAA's Exclusionary Conduct, the Commissioner submits that VAA's conduct has stifled innovation or shielded the airlines from innovative forms of competition, by excluding new in-flight catering business models from the Relevant Market and by preventing in-flight caterers from offering innovative hybrid or mixed-model services to the airlines. The Commissioner argues that market participants have confirmed that innovation in in-flight catering is an important dimension of competition, which has created (and is creating) substantial price and non-price benefits to customers through new business models and processes. The Commissioner states that, "but for" VAA's Exclusionary Conduct, airlines would have the option to choose to procure Galley Handling at YVR from firms other than the full-service incumbent in-flight caterers and that as a result, innovation and dynamic competition would be substantially greater at YVR.

[777] Relying on an article from the economist Carl Shapiro (Carl Shapiro, "Competition and innovation: Did Arrow Hit the Bull's Eye?" in Josh Lerner and Scott Stern, eds, *The Rate and Direction of Inventive Activity Revisited*, (Chicago: University of Chicago Press, 2012) at pp 376-377), the Commissioner emphasizes that innovation encompasses a wide range of improvements and efficiencies, not just the development of novel processes and products. He claims that there is overwhelming evidence of improvements in efficiency and business models for existing products and services, and that these are just as important for dynamic competition and innovation as the products and service offerings themselves.

[778] The Commissioner relies on four sources of evidence on this issue, namely, the testimonies of in-flight catering firms Strategic Aviation, Optimum and Newrest, as well as the evidence provided by the representative of Air Transat, Ms. Stewart.

[779] According to the Commissioner, Strategic Aviation has introduced a differentiated and cost-efficient business model, namely, a "one-stop-shop" for both Catering and Galley Handling. Unlike traditional firms, Strategic Aviation provides Galley Handling using its own personnel but partners with specialized third parties to source Catering for those airlines that require it. This model allows airlines to procure the specific mix of Galley Handling and Catering that they require, without being forced to absorb their share of fixed overhead costs for in-flight catering services that they do not want. This new business approach was itself spurred by the emergence of a new airline business model, namely, the low-cost carrier model and its focus on BOB. Mr. Brown from Strategic Aviation testified that there was an opportunity to take advantage of the emerging airline model of providing improved food to passengers. He further stated that these more flexible business models not only allow for airlines to source a particular type of food more easily, they also result in important increases in economic efficiency and lower prices to airlines by, essentially, offering them the possibility to use outside kitchens having excess capacity.

[780] Another example relied on by the Commissioner is Optimum. Optimum does not operate Catering facilities nor does it provide Galley Handling. It subcontracts all these services to independent third-party providers. In essence, it acts as an intermediary to find the best providers for each airline's needs at each airport. Mr. Lineham from Optimum testified that its business model allows airlines to "find the right kitchens that can make food that's appropriate" (Transcript, Public, October 3, 2018, at p 180).

[781] Turning to Newrest, Mr. Stent-Torriani testified that innovation falls into two categories: (i) the "front end customer side" and (ii) the production side. With respect to the "front end customer side," Mr. Stent-Torriani testified that there is "a great deal that can be done with respect to point of sales, i.e., digital, pre order, et cetera" (Transcript, Public, October 4, 2018, at p 239). With respect to the production side, he added that there are also technological improvements that can be pursued in terms of robotics, giving customers a higher level of traceability and quality.

[782] The representative of Air Transat also testified that Air Transat values fresh approaches to doing business spurred by entry and competition. Ms. Stewart testified that **[CONFIDENTIAL]** (Transcript, Conf. B, October 9, 2018, at p 356).

[783] VAA responds that the Galley Handling Market is not a "dynamic market" in the sense of featuring significant technological change or innovation, the two hallmarks of a market in which it states that qualitative effects are of particular relevance. VAA submits that Galley Handling is an activity into which the major inputs are labour, physical facilities such as warehouses, and equipment such as trucks. According to VAA, Strategic Aviation was not proposing to "innovate;" rather, it was proposing to follow a business model of providing only the Galley Handling component of in-flight catering services, while partnering with Optimum or others for the provision of food. During cross-examination, **[CONFIDENTIAL]**.

[784] As it affirmed in *TREB CT*, the Tribunal considers that dynamic competition, including innovation, is the most important dimension of competition (*TREB CT* at para 712). To echo the words of the economist Joseph Schumpeter, competition is, at its core, a dynamic process "wherein firms strive to survive under an evolving set of rules that constantly produce winners and losers" (*TREB CT* at para 618). The Tribunal also does not dispute that innovation can take multiple incarnations and that it encompasses more than the development of new products or novel processes or the introduction of cutting-edge new technology. It can indeed extend to competing firms coming up with different or improved business models.

[785] However, in the present case, the evidence pertaining on innovation falls short of the mark. The Tribunal is not persuaded that the evidence on the record demonstrates that, "but for" the Exclusionary Conduct, there would likely have been, or would likely be, a realistic prospect of material changes in innovation linked to the arrival of new entrants in the Galley Handling Market.

[786] First, apart from one reference made by **[CONFIDENTIAL]**, there is no clear and convincing evidence of qualitative benefits, distinct and separate from a reduction of input costs, that would likely be brought by Strategic Aviation, Optimum or Newrest. The evidence from these three in-flight caterers did not provide persuasive examples of materially more innovative products or approaches to be offered to airlines.

[787] Second, Strategic Aviation's and Optimum's business models of offering Catering and Galley Handling separately are not new. The evidence shows that Gate Gourmet and other full-service in-flight caterers have also evolved in that direction and can and do provide Galley Handling services separately. In other words, the allegedly innovative Galley Handling services that Strategic Aviation is proposing to provide (i.e., to provide only the Galley Handling portion of in-flight catering) are currently being provided by Gate Gourmet at YVR and may well be provided by dnata once it commenced operations.

[788] There is evidence that Gate Gourmet is prepared to offer the Galley Handling subset of its full-line services to airlines that do not wish to take advantage of Gate Gourmet's ability to prepare the food. Notably, since 2017, Gate Gourmet has provided WestJet solely with Galley Handling services at YVR. Similarly, Gate Gourmet provides services to Air Canada that involve loading and unloading pre-packaged frozen food prepared by Air Canada's **[CONFIDENTIAL]** and Optimum. As evidenced by the success of **[CONFIDENTIAL]** and the trend of airlines moving more Catering operations off-airport, these options already exist and the in-flight catering incumbents already offer evolving business models and processes, adaptable to the

needs of airline customers. Incumbent in-flight catering firms are also using their kitchens to supply non-airline customers.

[789] [CONFIDENTIAL].

[790] [CONFIDENTIAL].

[791] The Tribunal recognizes that the business models of Gate Gourmet, CLS and dnata are not identical to those of Strategic Aviation and Optimum, as the latter focus on sourcing from different restaurants with excess capacity. But, as far as Galley Handling services are concerned, the Commissioner has not demonstrated that, "but for" the Exclusionary Conduct, new entrants likely would have brought, or would likely bring, materially new models or particularly significant incremental innovations to the Relevant Market. Put differently, with respect to this non-price dimension of competition, the Tribunal does not find that innovation or the range of services offered in the Galley Handling Market was, is or likely would be significantly lower than it would have been in the absence of VAA's Exclusionary Conduct.

[792] Indeed, Mr. Brown from Strategic Aviation and Ms. Bishop from Jazz confirmed that the Galley Handling services provided by Strategic Aviation were no different from Gate Gourmet or other full-service in-flight catering firms.

[793] The evidence reveals that the only firm that explicitly stated that it would hesitate to provide Galley Handling services on a stand-alone basis to airline customers at YVR was one of the new entrants, namely Newrest. In his testimony, Mr. Stent-Torriani indicated that Newrest might offer catering services without Galley Handling, but that this was not its preference, and that it would "almost certainly" not provide such Galley Handling services separately (Transcript, Public, October 4, 2018, at pp 236-237).

[794] There is also no clear and convincing evidence of lower service quality in the Galley Handling Market at YVR, relative to the "but for" scenario in which VAA did not engage in the Exclusionary Conduct. Apart from one example from the witness from Air Transat in the context of the 2015 RFP (referred to above), no evidence was adduced to demonstrate that there were material service or product quality improvements as a result of airlines switching to the "innovative" catering providers at other airports.

[795] For the above reasons, the Tribunal finds no clear and convincing evidence that VAA's decision not to license Newrest or Strategic Aviation resulted in less innovation or a lower quality of services, than would likely have existed in the absence of the Exclusionary Conduct. Moreover, the evidence demonstrates that dnata intends to provide the full range of in-flight catering services from its flexible, modern kitchen located off-airport, in proximity to YVR in Richmond. Therefore, particularly when one considers dnata's entry as part of the existing factual circumstances, there is no persuasive evidence of reduced choice, service or innovation at YVR as a result of the Exclusionary Conduct. In other words, it has not been established that the levels of such non-price dimensions of competition would not likely have been, and would not likely be ascertainably greater "but for" VAA's Exclusionary Conduct.

[796] The Tribunal underscores that the incumbent in-flight catering firms have developed new types of offerings and other innovations that provide new and valuable offerings to airlines, as

food served on airplanes has moved away from fresh meals and more towards frozen meals and pre-packaged food. This has had an important impact on the Tribunal's assessment of whether innovation would likely be, or would likely have been, materially greater in the absence of VAA's Exclusionary Conduct, and whether the elimination of the Exclusionary Conduct likely would permit innovative in-flight catering firms with new business models to advance the Galley Handling Market substantially further on the innovation ladder. The Tribunal is not persuaded that this is more likely than not to be the case in this Application.

(v) Conclusion

[797] Having regard to all of the foregoing, the Tribunal therefore concludes that, "but for" the Exclusionary Conduct, there may have been some fairly limited and positive price and/or non-price effects on competition in the Galley Handling Market at YVR. In this regard, there likely would have been some new entry into the Galley Handling Market; there likely would have been some additional switching; and Jazz may have paid somewhat lower prices to Gate Gourmet, including at airports other than YVR. However, those effects are far less than what the Commissioner alleged. Moreover, the conclusion stated above does not represent the end of the required analysis.

(b) Magnitude, duration and scope

[798] The Tribunal will now address whether the limited anti-competitive effects identified above, taken together, rise to the level of "substantiality," as required by paragraph 79(1)(*c*) of the Act. The Tribunal finds that this is not the case. In brief, the aggregate impact of the limited anti-competitive effects that have been demonstrated to result from VAA's Exclusionary Conduct does not constitute an actual or likely substantial prevention or lessening of competition in the Relevant Market. In other words, the Tribunal is not satisfied, on a balance of probabilities, that "but for" VAA's Exclusionary Conduct, the prices for Galley Handling services would likely have been, or would likely be, materially lower in the Galley Handling Market, or that there would likely have been, or would likely be, materially greater non-price competition in that market, for example in respect of service levels or innovation.

[799] The Tribunal is not persuaded that the evidence regarding the likelihood of additional entry and regarding the likelihood of additional switching in the Relevant Market is sufficient to enable the Commissioner to discharge his burden under paragraph 79(1)(*c*). Without a link between, on the one hand, such additional entry and switching and, on the other hand, some material impact on the price or non-price dimensions of competition in a material part of the Galley Handling Market (*Tervita FCA* at para 108), the Commissioner's evidence falls short of the mark. In this regard, the Tribunal agrees with VAA that the Commissioner's evidence does not provide clear and compelling evidence that there would likely have been, or would likely be, materially greater price or non-price competition at YVR "but for" VAA's Exclusionary Conduct.

[800] In his closing submissions, the Commissioner made a general statement that the anti-competitive effects attributable to VAA's Exclusionary Conduct rise to the level of substantiality "because VAA has, and continues to, foreclose rivalry in the market for the supply of Galley

Handling at YVR" and because "Gate Gourmet, CLS and, soon, dnata service airlines at YVR without threat of entry" (Commissioner's Closing Argument, at para 112). The Commissioner further referred to the Tribunal's statement in *TREB CT* to the effect that "[i]n the absence of rivalry, competition does not exist and cannot constrain the exercise of market power, unless the threat of potential competition is particularly strong" (*TREB CT* at para 462).

[801] However, the anti-competitive effects attributable to VAA's Exclusionary Conduct cannot necessarily be said to rise to the level of substantiality simply because VAA has foreclosed entry in the market for the supply of Galley Handling services at YVR.

[802] As the SCC stated in *Tervita*, it is not enough that a potential competitor must be likely to enter the market. "[T]his entry must be likely to have a substantial effect on the market. […] [A]ssessing substantiality requires assessing a variety of dimensions of competition including price and output. It also involves assessing the degree and duration of any effect it would have on the market" (*Tervita* at para 78). Accordingly, the Commissioner must demonstrate that entry likely would have decreased the market power of the incumbent firms, or that it would be likely to have this effect in the future. In the absence of such evidence, the impugned conduct cannot be said to prevent competition substantially (*Tervita* at para 64). In this case, the Commissioner has not demonstrated the extent to which either of the two incumbents had market power, and how VAA's Exclusionary Conduct has permitted those market participants to maintain their market power, or is likely to have this effect in the future.

[803] There has to be evidence that the prevention of entry or of increased switching translates into likely and material price or non-price effects in the Relevant Market. This evidence has not been provided in this case. This is a fatal shortcoming in the Commissioner's case.

[804] With respect to Jazz's gains from switching, the fact that there is evidence of savings in the order of **[CONFIDENTIAL]** is of limited use to the Tribunal's analysis under paragraph 79(1)(*c*), because it relates to one airline's savings at airports other than YVR. Moreover, no evidence was provided by the Commissioner with respect to the size of the Galley Handling markets at those other airports, or of Jazz's total expenditures on Galley Handling services at those airports. Therefore, even though the **[CONFIDENTIAL]** figure estimated by Dr. Niels **[CONFIDENTIAL]**, the Tribunal does not have the necessary evidence to determine the relative significance and magnitude of these savings made by Jazz from its switching of in-flight caterers at other airports, and to determine the materiality of these savings. The measure has to be a relative one, compared to the size of the market as a whole and to Jazz's overall expenditures for Galley Handling services at those airports other than YVR. That evidence has not been provided, and the Tribunal cannot therefore determine the relative materiality of this alleged price effect and how much of it ought to be attributed to the Exclusionary Conduct at YVR.

[805] Even if the Tribunal was to consider that some of the other evidence adduced by the Commissioner regarding the price effects of VAA's conduct could be interpreted as having established an actual or likely prevention or lessening of competition in the Relevant Market, the Tribunal would not conclude, on the evidence before it, that the Galley Handling Market would likely have been, or would likely be, substantially more competitive, "but for" VAA's Exclusionary Conduct. For example, the Commissioner's evidence regarding

[CONFIDENTIAL] and the **[CONFIDENTIAL]**% price decrease for non-switching "smaller" airlines do not significantly assist the Commissioner to demonstrate a prevention or lessening of competition that rises to the level of "substantial," either in terms of magnitude or scope.

[806] With respect to **[CONFIDENTIAL]**, this evidence related to one very small airline at YVR and a **[CONFIDENTIAL]**, for a specific product. The only evidence provided by Dr. Niels of an increase to the Galley Handling prices charged to **[CONFIDENTIAL]** was an increase to the price of "**[CONFIDENTIAL]**", which represented **[CONFIDENTIAL]**. And this airline is a **[CONFIDENTIAL]** operating at YVR.

[807] Similarly, regarding the evidence of price decreases at other airports for smaller airlines, the Tribunal considers the revenue-weighted **[CONFIDENTIAL]** found by Dr. Niels to be fairly modest and hardly material, in the context of this particular Relevant Market. Even Dr. Niels qualified this as "evidence of **[CONFIDENTIAL]** of entry for the smaller airlines" (Exhibits A-085, CA-086 and CA-087, Reply Report of Dr. Gunnar Niels, at para 5.89). Furthermore, it relates solely to "smaller airlines" which, in the aggregate, represent approximately **[CONFIDENTIAL]** of the traffic (in terms of flights) at YVR. Even in his "blended" analysis which included entries into monopoly situations, Dr. Niels did not find significant price effects for an "all airlines" sample comprising the **[CONFIDENTIAL]** airline customers of **[CONFIDENTIAL]**. Moreover, no evidence was provided on the proportion that these "smaller airlines" account for in the Galley Handling Market, as opposed to the number of flights at YVR. The above-mentioned "**[CONFIDENTIAL]**" figure does not reflect a share of passengers, nor does it necessarily reflect a share of Galley Handling expenditures at YVR. As mentioned by Dr. Reitman, the appropriate metric for the assessment of an alleged substantial prevention or lessening of competition is the fraction of the Galley Handling expenditures at YVR represented by those airlines, not the fraction of flights at YVR that they represent. As Dr. Niels himself reported, the **[CONFIDENTIAL]** airlines **[CONFIDENTIAL]** that were excluded from his smaller sample represent a significant proportion of **[CONFIDENTIAL]**.

[808] It bears emphasizing that there is no evidence indicating that the percentage of flights accounted for by an airline is a good proxy of the percentage of the Galley Handling services it purchases. Indeed, the evidence instead suggests that airlines having a larger proportion of international flights likely account for a larger share of the Galley Handling services than their actual proportion of flights. This further undermines the significance of Dr. Niels' evidence with respect to "smaller airlines".

[809] The Tribunal pauses to observe that one problem with the Commissioner's argument regarding the alleged substantial prevention or lessening in the Galley Handling Market is that the Commissioner has not provided clear, convincing and reliable evidence regarding the relative significance of the various airlines in the Galley Handling Market.

[810] In addition, as stated above, the Commissioner's evidence regarding the price effects of VAA's Exclusionary Conduct is limited to **[CONFIDENTIAL]** of the total revenues generated by the in-flight catering firms operating at YVR, from 2013 to 2017. No evidence specifically addressed **[CONFIDENTIAL]** of in-flight catering revenues.

[811] In light of all of the foregoing, the Tribunal is not satisfied that the above-mentioned anti-competitive price or non-price effects which could be attributable to VAA's Exclusionary Conduct are, individually or in the aggregate, "substantial" as required by paragraph 79(1)(*c*) of the Act. The evidence does not allow the Tribunal to conclude that VAA's Exclusionary Conduct has adversely affected or is adversely affecting, price or non-price competition in the Relevant Market, to a degree that is material, or that it is likely to do so in the future.

(4) Conclusion

[812] For the reasons set forth above, the Tribunal concludes that the Commissioner has not demonstrated, on a balance of probabilities, that the requirements of paragraph 79(1)(*c*) are met. In brief, the Tribunal is not satisfied that there is clear and convincing evidence demonstrating, on a balance of probabilities, that "but for" VAA's Exclusionary Conduct, prices for Galley Handling services would likely be materially lower in the Relevant Market, that there would likely be a materially broader range of services in the Relevant Market, or that there would likely be materially more innovation in the Relevant Market.

VIII. CONCLUSION

[813] For all the above reasons, the Commissioner's Application is dismissed. In light of this conclusion, no remedial action will be ordered.

IX. COSTS

[814] At the end of the hearing, the Tribunal encouraged the parties to reach an agreement as to the quantum of costs without knowing the outcome of the case. The Tribunal explained that if no agreement could be reached, the parties could make submissions on costs in due course. The Tribunal reaffirms that it is increasingly favouring this approach. This is because asking the parties to agree on the issue of costs before they know the outcome is more likely to result in a reasonable and expeditious resolution of the question of costs. The Tribunal further reiterates that it will typically favor lump sum awards of costs over formal taxation of bills of costs.

[815] By way of letter dated December 14, 2018, counsel for the Commissioner and for VAA notified the Tribunal that they had reached an agreement with respect to counsel fees as well as a partial agreement with respect to disbursements. According to that agreement, if the Tribunal awarded costs payable by VAA to the Commissioner, VAA would pay $101,000 to the Commissioner for counsel fees, whereas the Commissioner would pay $103,000 to VAA, if costs were payable to VAA. However, the parties were unable to reach an agreement on disbursements, except for travel costs and transcript costs, which they both agreed should be $73,314 and $35,258, respectively. The parties were unable to agree on the balance of the disbursements, and notably on their respective expert fees. They each submitted detailed bills of costs.

[816] As VAA is the successful party in this matter, it is entitled to recover at least some of its costs.

[817] Section 8.1 of the CT Act gives jurisdiction to the Tribunal to award costs of proceedings before it in accordance with the provisions governing costs in the *Federal Courts Rules*, SOR/98-106 ("**FC Rules**"). Accordingly, pursuant to FC Rule 400(1), the Tribunal has "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid." A non-exhaustive list of factors that the Tribunal may consider when exercising its discretion is set out in FC Rule 400(3). It is a fundamental principle that an award of costs represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party (*Apotex Inc v Wellcome Foundation Ltd* (1998), 159 FTR 233 (FCTD), 84 CPR (3d) 303, aff'd (2001), 199 FTR 320 (FCA)).

[818] In *Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc*, 2002 FCA 417 ("***Maple Leaf Meats***"), the FCA described the approximation of costs as a matter of judgment rather than an accounting exercise. An award of costs is not an exercise in exact science. It is only "an estimate of the amount the Court considers appropriate" (*Maple Leaf Meats* at para 8). The costs ordered should not be excessive or punitive, but rather reflect a fair relationship to the actual costs of litigation. The question for the Tribunal is therefore to determine what, in the circumstances, are necessary and reasonable legal costs and disbursements (*Nadeau Ferme Avicole Ltée v Groupe Westco Inc*, 2010 Comp Trib 1 at para 49).

[819] With respect to legal costs, there is agreement between the parties on the amount to be paid to the successful party. However, in this case, the success on the issues in dispute has been divided; the Commissioner has prevailed on the product and geographic market definitions, on paragraph 79(1)(*a*) and on the PCI. A fair amount of time was spent by VAA disputing those issues. In the circumstances, the Tribunal is of the view that the legal costs to be paid to VAA should be reduced, by about a third. This is particularly so given that VAA persisted in spending time on market definition, paragraph 79(1)(*a*) and PCI, notwithstanding the Tribunal's encouragement to move along to the issues in respect of which VAA ultimately proved to be the successful party. The Tribunal thus fixes the Tariff B legal costs to be paid to VAA by the Commissioner at $70,000.

[820] Turning to disbursements, in addition to the travel and transcript costs agreed upon, VAA claims expert fees of $1,834,848 for Dr. Reitman and of $379,228 for Dr. Tretheway, as well as electronic discovery and document management fees of $291,290, for a total exceeding $2.6 million. The Commissioner submits that these disbursement amounts are excessive and should be substantially reduced.

[821] The Tribunal is satisfied that both parties have provided, in their respective bills of costs, detailed information and sufficient support to explain the disbursements incurred and the basis of their various claims. The bills of costs were prepared in accordance with Column III of Tariff B of the FC Rules, and evidence has been provided regarding the billing, payment and justifications of the services provided and expenses incurred. With respect to experts, details regarding the tasks performed by each expert (and their teams), as well as the amount of time spent per task, have been provided. The question is not whether the disbursements at issue were incurred but whether they are reasonable, necessary and justified.

[822] The Tribunal notes that the expert fees claimed by VAA are substantially higher than the fees of the Commissioner's sole expert witness, Dr. Niels, which totalled $1,333,209 for his two

reports. Since Dr. Reitman did not have to construct his own data set to perform his analyses and was essentially responding to Dr. Niels' analysis, the Tribunal agrees with the Commissioner that his total fees should be reduced. Expert-related costs are not automatically recoverable in their entirety, and can be adjusted by the Tribunal when they do not appear reasonable. With respect to the expert fees of Dr. Tretheway, the Tribunal is also of the view that they should be reduced as they include expenses incurred prior to the Application and the Tribunal struck a portion of his report (i.e., question 4) on the ground that it was inadmissible expert evidence.

[823] Turning to the disbursements claimed by VAA for electronic discovery and document management, they essentially relate to the fees charged by a third-party provider. The Tribunal agrees with VAA that it would be unfair to expect a party to comply with the requirements of electronic discovery and document management for an electronic hearing, without allowing for a recovery of the fees incurred for that purpose. The use of an effective document management system is essential to the seamless functioning of electronic hearings before the Tribunal, and it has a fundamental impact at each step of the proceedings (whether it is oral discoveries, motions, preparation of witness statements and expert reports, document production, or the hearing itself). Fees incurred in that respect are disbursements which, in principle, should be recoverable by the successful party.

[824] However, there are nonetheless limits to such disbursements. Only the amounts incurred after the filing of the Application can be properly claimed. In this regard, the e-discovery charges incurred by a party to comply with compulsory production orders under section 11 of the Act as part of the Bureau's prior, underlying investigation should not form part of claimed disbursements, even though many documents produced in that context may end up being directly related to subsequent filings before the Tribunal. In *Commissioner of Competition v Canada Pipe*, 2005 Comp Trib 17 ("***Canada Pipe 2005***"), the Tribunal held that it would be against public policy to order costs against the Commissioner for "the expense of complying with an order mandated by the Act and ratified by a Court of competent jurisdiction" (*Canada Pipe 2005* at para 12). Accordingly, the amount of disbursements claimed by VAA for electronic discovery and document management will need to be reduced to exclude such amounts.

[825] As stated above, the Tribunal favors lump sum awards as it simplifies the assessment process. In fact, there is now "a judicial trend to grant costs on a lump sum basis whenever possible" (*Philip Morris Products SA v Marlboro Canada Ltd*, 2015 FCA 9 at para 4). A lump sum award saves time and trouble for the parties by avoiding precise and unnecessarily complicated calculations. Lump sum awards also align with the objective of promoting the "just, most expeditious and least expensive determination" of proceedings, as provided by FC Rule 3, which echoes the direction found in subsection 9(2) of the CT Act to deal with matters as informally and expeditiously as the circumstances and considerations of fairness permit.

[826] In his submissions on costs, the Commissioner argued that the Tribunal should consider FC Rule 400(3)(h) in making its assessment, and the broad public interest in having proceedings litigated before the Tribunal. Relying on *Commissioner of Competition v Visa Canada Corporation*, 2013 Comp Trib 10 ("***Visa Canada***"), where the Tribunal made no award on costs as there was a broad public interest in bringing the case, the Commissioner submits that there was a similarly broad public interest in bringing the present case as it would clarify the interpretation of section 79 of the Act, its defenses, and its application to entities such as VAA.

The Tribunal disagrees. The Tribunal does not find the "public interest" argument in this case to be as "compelling" as it was in *Visa Canada*, where the matter before it was more novel (*Visa Canada* at paras 405, 407). All cases brought forward by the Commissioner have a public interest dimension and contribute to clarify contentious competition law matters, but that does not mean that the Commissioner can escape costs awards in all cases.

[827] In light of the foregoing, and taking into consideration the conditions of reasonableness and necessity, the Tribunal concludes that $1,850,000 would be an acceptable amount for VAA's disbursements, instead of the total exceeding $2.6 million claimed by VAA. However, as with the legal costs, success on the issues in dispute in this case should be taken into account. The Tribunal is of the view that the disbursements to be paid to VAA should also be reduced by about a third. The Tribunal thus fixes the disbursements to be paid to VAA by the Commissioner at $1,250,000.

[828] The Commissioner will therefore be required to pay to VAA a total lump sum amount of $70,000 in respect of Tariff B legal costs, and of $1,250,000 in respect of disbursements.

X. ORDER

[829] The Application brought by the Commissioner is dismissed.

[830] Within 30 days from the date of this Order, the Commissioner shall pay to VAA an amount of $70,000 in respect of legal costs, and of $1,250,000 in respect of disbursements.

[831] These reasons are confidential. In order to enable the Tribunal to issue a public version of this decision, the Tribunal directs the parties to attempt to reach an agreement regarding the redactions to be made to these reasons in order to protect confidential evidence and information. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on October 31, 2019, setting out their agreement and any areas of disagreement concerning the redaction of the confidential version of the decision. If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from these confidential reasons. Such submissions are to be served and filed by the close of the Registry on October 31, 2019.

DATED at Ottawa, this 17th day of October, 2019.

SIGNED on behalf of the Tribunal by the Panel Members.

(s) Denis Gascon J. (Chairperson)
(s) Paul Crampton C.J.
(s) Dr. Donald McFetridge

Schedule "A" – Relevant provisions of the Act

Abuse of Dominant Position	Abus de position dominante
Definition of *anti-competitive act*	**Définition de *agissement anti-concurrentiel***
78 (1) For the purposes of section 79, ***anti-competitive act***, without restricting the generality of the term, includes any of the following acts:	**78 (1)** Pour l'application de l'article 79, ***agissement anti-concurrentiel*** s'entend notamment des agissements suivants :
(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;	**a)** la compression, par un fournisseur intégré verticalement, de la marge bénéficiaire accessible à un client non intégré qui est en concurrence avec ce fournisseur, dans les cas où cette compression a pour but d'empêcher l'entrée ou la participation accrue du client dans un marché ou encore de faire obstacle à cette entrée ou à cette participation accrue;
(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;	**b)** l'acquisition par un fournisseur d'un client qui serait par ailleurs accessible à un concurrent du fournisseur, ou l'acquisition par un client d'un fournisseur qui serait par ailleurs accessible à un concurrent du client, dans le but d'empêcher ce concurrent d'entrer dans un marché, dans le but de faire obstacle à cette entrée ou encore dans le but de l'éliminer d'un marché;
(c) freight equalization on the plant of a competitor for the purpose of impeding or	**c)** la péréquation du fret en utilisant comme base l'établissement d'un

preventing the competitor's entry into, or eliminating the competitor from, a market;

concurrent dans le but d'empêcher son entrée dans un marché ou d'y faire obstacle ou encore de l'éliminer d'un marché;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

d) l'utilisation sélective et temporaire de marques de combat destinées à mettre au pas ou à éliminer un concurrent;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

e) la préemption d'installations ou de ressources rares nécessaires à un concurrent pour l'exploitation d'une entreprise, dans le but de retenir ces installations ou ces ressources hors d'un marché;

(f) buying up of products to prevent the erosion of existing price levels;

f) l'achat de produits dans le but d'empêcher l'érosion des structures de prix existantes;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

g) l'adoption, pour des produits, de normes incompatibles avec les produits fabriqués par une autre personne et destinées à empêcher l'entrée de cette dernière dans un marché ou à l'éliminer d'un marché;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and

h) le fait d'inciter un fournisseur à ne vendre uniquement ou principalement qu'à certains clients, ou à ne pas vendre à un concurrent ou encore le fait d'exiger l'une ou l'autre de ces attitudes de la part de ce fournisseur, afin d'empêcher l'entrée ou la participation accrue d'un concurrent dans un marché;

(i) selling articles at a price

i) le fait de vendre des articles

lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

à un prix inférieur au coût d'acquisition de ces articles dans le but de discipliner ou d'éliminer un concurrent.

(j) and (k) [Repealed, 2009, c. 2, s. 427]

j) et k) [Abrogés, 2009, ch. 2, art. 427]

[…]

[…]

Prohibition where abuse of dominant position

Ordonnance d'interdiction dans les cas d'abus de position dominante

79 (1) Where, on application by the Commissioner, the Tribunal finds that

79 (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

a) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

b) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels;

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

c) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

Additional or alternative order

Ordonnance supplémentaire ou substitutive

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

(2) Dans les cas où à la suite de la demande visée au paragraphe (1) il conclut qu'une pratique d'agissements anti-concurrentiels a eu ou a pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché et qu'une ordonnance rendue aux termes du paragraphe (1) n'aura vraisemblablement pas pour effet de rétablir la concurrence dans ce marché, le Tribunal peut, en sus ou au lieu de rendre l'ordonnance prévue au paragraphe (1), rendre une ordonnance enjoignant à l'une ou l'autre ou à l'ensemble des personnes visées par la demande d'ordonnance de prendre des mesures raisonnables et nécessaires dans le but d'enrayer les effets de la pratique sur le marché en question et, notamment, de se départir d'éléments d'actif ou d'actions.

Limitation

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

Restriction

(3) Lorsque le Tribunal rend une ordonnance en application du paragraphe (2), il le fait aux conditions qui, à son avis, ne porteront atteinte aux droits de la personne visée par cette ordonnance ou à ceux des autres personnes touchées par cette ordonnance que dans la mesure de ce qui est nécessaire à la réalisation de l'objet de l'ordonnance.

Administrative monetary penalty

Sanction administrative pécuniaire

(3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000.

(3.1) S'il rend une ordonnance en vertu des paragraphes (1) ou (2), le Tribunal peut aussi ordonner à la personne visée de payer, selon les modalités qu'il peut préciser, une sanction administrative pécuniaire maximale de 10 000 000 $ et, pour toute ordonnance subséquente rendue en vertu de l'un de ces paragraphes, de 15 000 000 $.

Aggravating or mitigating factors

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account any evidence of the following:

(a) the effect on competition in the relevant market;

(b) the gross revenue from sales affected by the practice;

(c) any actual or anticipated profits affected by the practice;

(d) the financial position of the person against whom the order is made;

(e) the history of compliance with this Act by the person against whom the order is made; and

(f) any other relevant factor.

Facteurs à prendre en compte

(3.2) Pour la détermination du montant de la sanction administrative pécuniaire, il est tenu compte des éléments suivants :

a) l'effet sur la concurrence dans le marché pertinent;

b) le revenu brut provenant des ventes sur lesquelles la pratique a eu une incidence;

c) les bénéfices réels ou prévus sur lesquels la pratique a eu une incidence;

d) la situation financière de la personne visée par l'ordonnance;

e) le comportement antérieur de la personne visée par l'ordonnance en ce qui a trait au respect de la présente loi;

f) tout autre élément pertinent.

Purpose of order

(3.3) The purpose of an order made against a person under

But de la sanction

(3.3) La sanction prévue au paragraphe (3.1) vise à

subsection (3.1) is to promote practices by that person that are in conformity with the purposes of this section and not to punish that person.

encourager la personne visée par l'ordonnance à adopter des pratiques compatibles avec les objectifs du présent article et non pas à la punir.

Superior competitive performance

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

Efficience économique supérieure

(4) Pour l'application du paragraphe (1), lorsque le Tribunal décide de la question de savoir si une pratique a eu, a ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, il doit évaluer si la pratique résulte du rendement concurrentiel supérieur.

Exception

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

Exception

(5) Pour l'application du présent article, un agissement résultant du seul fait de l'exercice de quelque droit ou de la jouissance de quelque intérêt découlant de la *Loi sur les brevets*, de la *Loi sur les dessins industriels*, de la *Loi sur le droit d'auteur,* de la *Loi sur les marques de commerce*, de la *Loi sur les topographies de circuits intégrés* ou de toute autre loi fédérale relative à la propriété intellectuelle ou industrielle ne constitue pas un agissement anti-concurrentiel.

Limitation period

(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice

Prescription

(6) Une demande ne peut pas être présentée en application du présent article à l'égard d'une pratique d'agissements anti-concurrentiels si la

has ceased.

pratique en question a cessé depuis plus de trois ans.

Where proceedings commenced under section 45, 49, 76, 90.1 or 92

Procédures en vertu des articles 45, 49, 76, 90.1 ou 92

(7) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(7) Aucune demande à l'endroit d'une personne ne peut être présentée au titre du présent article si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux qui ont été allégués au soutien :

(a) proceedings have been commenced against that person under section 45 or 49; or

a) d'une procédure engagée à l'endroit de cette personne en vertu des articles 45 ou 49;

(b) an order against that person is sought by the Commissioner under section 76, 90.1 or 92.

b) d'une ordonnance demandée par le commissaire à l'endroit de cette personne en vertu des articles 76, 90.1 ou 92.

Schedule "B" – List of Exhibits

A-001	Witness Statement of Robin Padgett (dnata Catering Services Ltd.)
CA-002	Witness Statement of Robin Padgett (dnata Catering Services Ltd.) (Confidential - Level A)
CA-003	Witness Statement of Robin Padgett (dnata Catering Services Ltd.) (Confidential - Level B)
A-004	Witness Statement of Rhonda Bishop (Jazz Aviation LP)
CA-005	Witness Statement of Rhonda Bishop (Jazz Aviation LP) (Confidential - Level B)
CR-006	Email from **[CONFIDENTIAL]** dated March 31, 2014 (Confidential - Level B)
CR-007	Email from **[CONFIDENTIAL]** dated May 29, 2014 (Confidential - Level A)
A-008	Witness Statement of Geoffrey Lineham (Optimum Stratégies Inc.)
CA-009	Witness Statement of Geoffrey Lineham (Optimum Stratégies Inc.) (Confidential - Level B)
A-010	Witness Statement of Andrew Yiu (Air Canada)
CA-011	Witness Statement of Andrew Yiu (Air Canada) (Confidential - Level B)
R-012	News release dated August 31, 2017 – Air Canada to Launch New International 787 Dreamliner Routes from Vancouver
R-013	Calin's Column dated October 2017 – Our Love for Vancouver
CR-014	**[CONFIDENTIAL]** (Confidential - Level A)
CA-015	**[CONFIDENTIAL]** (Confidential - Level A)
A-016	Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.)
CA-017	Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.) (Confidential - Level A)
CA-018	Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.) (Confidential - Level B)
A-019	Supplemental Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.)

CA-020	Supplementary Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.) (Confidential - Level A)
CA-021	Supplementary Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.) (Confidential - Level B)
CR-022	Email from Jonathan Stent-Torriani dated March 7, 2015 (Confidential - Level B)
CR-023	Email from Trevor Umlah dated July 9, 2014 **[CONFIDENTIAL]** (Confidential - Level B)
A-024	Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.)
CA-025	Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.) (Confidential - Level A)
CA-026	Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.) (Confidential - Level B)
A-027	Supplemental Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.)
CA-028	Supplementary Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.) (Confidential - Level A)
CA-029	Supplementary Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.) (Confidential - Level B)
CR-030	Letter from Sky Café dated September 5, 2014 (Confidential - Level B)
CR-031	Email from **[CONFIDENTIAL]** dated June 27, 2014 (Confidential - Level B)
CR-032	Letter from **[CONFIDENTIAL]** dated July 14, 2016 (Confidential - Level B)
CR-033	Letter from **[CONFIDENTIAL]** dated April 30, 2015 (Confidential - Level B)
CR-034	Letter from **[CONFIDENTIAL]** dated September 29, 2015 (Confidential - Level B)
A-035	Witness Statement of Barbara Stewart (Air Transat A.T. Inc.)
CA-036	Witness Statement of Barbara Stewart (Air Transat A.T. Inc.) (Confidential - Level B)
A-037	Supplemental Witness Statement of Barbara Stewart (Air Transat A.T. Inc.)
CR-038	Final Canadian RFP Catering Cost Analysis dated July 28 2016 (Confidential - Level A)

A-039	Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.)
CA-040	Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.) (Confidential - Level A)
CA-041	Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.) (Confidential - Level B)
A-042	Supplemental Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.)
CA-043	Supplemental Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.) (Confidential - Level A)
CA-044	Supplemental Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.) (Confidential - Level B)
CA-045	**[CONFIDENTIAL]** dated February 22, 2012 (Confidential - Level A)
CA-046	**[CONFIDENTIAL]** dated February 22, 2012 (Confidential - Level B)
A-047	GG Canada document dated February 22, 2012
CA-048	**[CONFIDENTIAL]** dated January 21, 2014 (Confidential - Level A)
CA-049	**[CONFIDENTIAL]** dated January 21, 2014 (Confidential - Level B)
A-050	GG Strategy Review dated January 21, 2014
CA-051	**[CONFIDENTIAL]** dated July 3, 2014 (Confidential - Level A)
CA-052	**[CONFIDENTIAL]** dated July 3, 2014 (Confidential - Level B)
A-053	GG Executive Review dated July 3, 2014
CA-054	Canada In-Flight Catering Market Size & Share (Confidential - Level A)
CA-055	Canada In-Flight Catering Market Size & Share (Confidential - Level B)
A-056	Canada In-Flight Catering Market Size & Share
CA-057	**[CONFIDENTIAL]** (Confidential - Level A)
CA-058	**[CONFIDENTIAL]** (Confidential - Level B)
A-059	**[CONFIDENTIAL]**
CA-060	**[CONFIDENTIAL]** dated November 21, 2013 (Confidential - Level A)
CA-061	**[CONFIDENTIAL]** dated November 21, 2013 (Confidential - Level B)

A-062	GG document dated November 21, 2013
CA-063	**[CONFIDENTIAL]** dated March 24, 2014 (Confidential - Level A)
CA-064	**[CONFIDENTIAL]** dated March 24, 2014 (Confidential - Level B)
A-065	GG document dated March 24, 2014
CA-066	**[CONFIDENTIAL]** (Confidential - Level A)
CA-067	**[CONFIDENTIAL]** (Confidential - Level B)
A-068	**[CONFIDENTIAL]**
CA-069	**[CONFIDENTIAL]** (Confidential - Level A)
CA-070	**[CONFIDENTIAL]** (Confidential - Level B)
A-071	**[CONFIDENTIAL]**
CA-072	**[CONFIDENTIAL]** dated May 2015 (Confidential - Level A)
CA-073	**[CONFIDENTIAL]** dated May 2015 (Confidential - Level B)
A-074	GG document dated May 2015
CR-075	Email from Ken Colangelo dated August 8, 2014 (Confidential - Level B)
A-076	Witness Statement of Maria Wall (CLS Catering Services Ltd.)
A-077	Amended and Supplemental Witness Statement of Steven Mood (WestJet)
CA-078	Amended and Supplemental Witness Statement of Steven Mood (WestJet) (Confidential - Level B)
CR-079	**[CONFIDENTIAL]** dated April 4, 2017 (Confidential - Level B)
A-080	Amended and Supplemental Witness Statement of Simon Soni (WestJet)
CA-081	Amended and Supplemental Witness Statement of Simon Soni (WestJet) (Confidential - Level B)
A-082	Expert Report of Dr. Gunnar Niels
CA-083	Expert Report of Dr. Gunnar Niels (Confidential - Level A)
CA-084	Expert Report of Dr. Gunnar Niels (Confidential - Level B)
A-085	Reply Report of Dr. Gunnar Niels

CA-086	Reply Report of Dr. Gunnar Niels (Confidential - Level A)
CA-087	Reply Report of Dr. Gunnar Niels (Confidential - Level B)
A-088	Expert Datapack – July 2018
A-089	Expert Datapack – August 2018
A-090	Dr. Gunnar Niels – Presentation Deck
CA-091	Dr. Gunnar Niels – Presentation Deck (Confidential – Level A)
CA-092	Dr. Gunnar Niels – Presentation Deck (Confidential – Level B)
R-093	Enforcement Guidelines - The Abuse of Dominance Provisions - Sections 78 and 79 of the *Competition Act*
R-094	Ground rules on airport access: the Arriva v Luton case
CA-095	YUL-1402-2017-FILE 3 (Confidential - Level A)
CA-096	Read-in Brief of the Commissioner Volume I (Confidential - Level B)
CA-097	Read-in Brief of the Commissioner Volume II (Confidential - Level B)
R-098	Supplementary Expert Report of Dr. David Reitman
CR-099	Supplementary Expert Report of Dr. David Reitman (Confidential - Level A)
CR-100	Supplementary Expert Report of Dr. David Reitman (Confidential - Level B)
R-101	Dr. Reitman Slide Deck
CR-102	Dr. Reitman Slide Deck (Confidential - Level A)
CR-103	Dr. Reitman Slide Deck (Confidential - Level B)
CA-104	**[CONFIDENTIAL]** (Confidential - Level B)
CA-105	**[CONFIDENTIAL]** (Confidential - Level B)
A-106	Letter to Young-Don Lim, Korean Air, from Craig Richmond, Vancouver Airport Authority, dated December 7, 2016
A-107	Statistics Canada webpage - CPI
R-108	Witness Statement of Craig Richmond
CR-109	Witness Statement of Craig Richmond (Confidential - Level B)

R-110	Supplementary Witness Statement of Craig Richmond
CR-111	Supplementary Witness Statement of Craig Richmond (Confidential - Level B)
CA-112	Tribunal Document No. 58072 (Confidential - Level B)
A-113	Letter to Craig Richmond, Vancouver Airport Authority, from Young-Don Lim, Korean Air, dated November 25, 2016
CA-114	Ground Handling License (Confidential - Level B)
A-115	Delta Airlines - In-flight Catering Letter 28 Nov 2016 (PDF) - 1/10/2017
A-116	Letter from Françoise Renon, Air France, to Craig Richmond, Vancouver Airport Authority, dated December 5, 2016
A-117	YVR Connects 2015 Sustainability Report
A-118	Vancouver Airport Authority 2014 Annual Report (PDF) - 00/00/2014
A-119	Vancouver Airport Authority 2013 Annual and Sustainability Report
A-120	Vancouver Airport Authority, 2012 Annual and Sustainability Report
A-121	VIAA Lobbyist Registration for Mike Tretheway, Consultant, Version 1 of 2 (2000-05-26 to 2005-06-10)
A-122	VIAA Lobbyist Registration for Mike Tretheway, Consultant, Version 2 of 2 (2005-08-16 to 2006-04-11)
A-123	VAA Lobbyist Registration for Gerry Bruno, Consultant
A-124	VAA Lobbyist Registration for Paul Ouimet, Consultant
A-125	VAA Lobbyist Registration for Sam Barone, Consultant
A-126	VAA Lobbyist Registration for Solomon Wong, Consultant
A-127	VAA Lobbyist Registration for Fred Gaspar, Consultant
A-128	VAA Lobbyist Registration for Robert Andriulaitis, Consultant
A-129	ADM (Aéroports de Montréal) Lobbyist Registration for Mike Tretheway, Consultant
A-130	Greater Toronto Airports Authority Lobbyist Registration for Mike Tretheway, Consultant
A-131	Canadian Airports Council Lobbyist Registration for Mike Tretheway, Consultant

A-132	Affidavit of Dr. Michael W. Tretheway
R-133	Supplementary Expert Report of Dr. Michael W. Tretheway
CR-134	Supplementary Expert Report of Dr. Michael W. Tretheway (Confidential - Level B)
R-135	Hearing Presentation
CR-136	Hearing Presentation (Confidential - Level B)
CA-137	Catering Firms vs Passengers at Canadian and Select U.S. Airports (Confidential - Level B)
CA-138	Reconciliation is that Mplan only counts caterers on-site, 2 are authorized access but off site (Confidential - Level B)
A-139	"Delta Dailyfood and Fleury Michon become Fleury Michon Airline Catering", PAX International article dated April 3, 2018
A-140	Meal Received, Business Class
A-141	Meal Served, Business Class
A-142	Special Meals
A-143	Asian Meals
A-144	Chefs
CA-145	Attachment to email from Michelle Wilson to Geoff Eccott, dated May 9, 2014 at 3:10pm. Subject: Flight Kitchens (Confidential - Level B)
CA-146	Email from Michelle Wilson to Geoff Eccott, dated May 9, 2014 at 3:10pm. Subject: Flight Kitchens. Attachment: Flight Kitchens v2.xlsx (Confidential - Level B)
CA-147	Email from Michelle Wilson to Geoff Eccott, dated May 9, 2014 at 10:33am. Subject: Flight Kitchens. Attachment: Flight Kitchens.xlsx (Confidential - Level B)
CA-148	Affidavit of Documents – Vancouver Airport Authority (March 3, 2017) (Confidential - Level B)
CA-149	Attachment to email from Michelle Wilson to Geoff Eccott, dated May 9, 2014 at 10:33am. Subject: Flight Kitchens (Confidential - Level B)
A-150	Re: Letter to Newrest - 5/9/2014

A-151	IATA Economics Briefing No. 4: Value Chain Profitability
A-152	Profitability and the Air Transportation Value Chain, June 2013
A-153	Gategroup Annual Results 2013 Investors and Analysts Presentation (13 March 2014)
A-154	Gategroup Annual Report 2013 (colour version)
CA-155	Data Definitions (Confidential - Level A)
CA-156	2011 to 2016 Actuals IS (Confidential - Level A)
A-157	LSG Sky Chefs 2013 Annual Review
A-158	Tretheway, M. and Andriulaitis, R., *"Airport Policy in Canada: Limitations of the Not-for-Profit Governance Model"*
A-159	Witness Statement of Tony Gugliotta
CR-160	Witness Statement of Tony Gugliotta (Confidential - Level B)
CA-161	Witness Statement of Tony Gugliotta (version provided to Commissioner of Competition on January 12, 2018) (Confidential - Level B)
CA-162	Vancouver Airport Authority 2015 Operating and Capital Budget (DRAFT), by the Finance and Audit Committee, dated November 6, 2014 (Confidential - Level B)
CA-163	Summary memo 3-05.doc - 4/4/2005 (Confidential - Level B)
CR-164	CX Invoice No. 4771516 (Confidential - Level B)
CR-165	Projection 2016 (Confidential - Level A)
CR-166	Projection 2015 (Confidential - Level A)
CR-167	180323 - 2017 Actuals IS (Confidential - Level A)
CR-168	Income Statement - 2011 to 2014 Actuals (Confidential - Level A)
CR-169	Projection 2014 (Confidential - Level A)
CR-170	Spreadsheet for YVR Airline Catering and Retail in 2017 (Confidential - Level A)
R-171	Witness Statement of Scott Norris
CR-172	Witness Statement of Scott Norris (Confidential - Level B)

R-173	Supplementary Witness Statement of Scott Norris
CR-174	Supplementary Witness Statement of Scott Norris (Confidential - Level B)
CA-175	Vancouver Airport Authority Supplemental Affidavit of Documents, sworn October 13, 2017 (Confidential - Level B)
CA-176	In-flight catering RFP - Tiger team!!!.msg - 8/31/2017 (Confidential - Level B)
CA-177	Chart of Undertakings, Questions Taken Under Advisement and Refusals Provided at the Follow-up Examination for Discovery of Craig Richmond held November 1, 2017 (Responses delivered on December 21, 2017) - Requests 3, 5 and 26 (Confidential - Level B)
R-178	Witness Statement of John Miles
CR-179	Witness Statement of John Miles (Confidential - Level B)
CA-180	Gate Gourmet Canada Inc. Statement of Concession Fees, dated January 8, 2014 (Confidential - Level B)
CA-181	CLS Catering Services Ltd. Airport Concession Fee for the month ended July 31, 2017 (Confidential - Level B)
CA-182	Flight Kitchen Valuation Spreadsheet dated June 16, 2017 (Confidential - Level B)
A-183	Lufthansa Group Annual Report 2016
A-184	Lufthansa Group Annual Report 2013
CA-185	Modified version of Tribunal reference 13228 (Confidential - Level B)
A-186	Updated Read-in Brief of the Commissioner of Competition as of 19 October 2018, Volume I
A-187	Updated Read-in Brief of the Commissioner of Competition as of 19 October 2018, Volume II
CR-188	Brief of Read-Ins from the Examinations for Discover and Answers to Undertakings of Kevin Rushton (Volume 1 of 3) (Confidential - Level A)
CR-189	Brief of Read-Ins from the Examinations for Discovery and Answers to Undertakings of Kevin Rushton (Volume 1 of 3) (Confidential - Level B)
R-190	Brief of Read-Ins from the Examinations for Discovery and Answers to Undertakings of Kevin Rushton (Volume 1 of 3)

CR-191	Brief of Read-Ins from the Examinations for Discovery and Answers to Undertakings of Kevin Rushton (Volume 2 of 3) (Confidential - Level B)
CR-192	Brief of Read-Ins from the Examinations for Discovery and Answers to Undertakings of Kevin Rushton (Volume 3 of 3) (Confidential - Level A)
R-193	Brief of Read-Ins from the Examinations for Discovery and Answers to Undertakings of Kevin Rushton (Volume 2 of 3)
R-194	Brief of Read-Ins from the Examinations for Discovery and Answers to Undertakings of Kevin Rushton (Volume 3 of 3)
CR-195	Brief of Read-Ins from the Examinations for Discovery and Answers to Undertakings of Kevin Rushton (Volume 3 of 3) (Confidential - Level B)

COUNSEL OF RECORD:

For the applicant:

The Commissioner of Competition

Jonathan Hood
Antonio Di Domenico
Katherine Rydel
Ryan Caron

For the respondent:

Vancouver Airport Authority

Calvin S. Goldman, QC
Michael Koch
Richard Annan
Julie Rosenthal
Ryan Cookson
Sarah Stothart