

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF certain conduct of Vancouver Airport Authority relating to the supply of in-flight catering at Vancouver International Airport;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*.

BETWEEN:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE		COMMISSIONER OF COMPETITION	
FILED / PRODUIT Date: October 2, 2017 CT-2016-015			Applicant
Andrée Bernier for / pour REGISTRAR / REGISTRAIRE		—and—	
OTTAWA, ONT.		VANCOUVER AIRPORT AUTHORITY	Respondent
# 122			

MOTION RECORD OF VANCOUVER AIRPORT AUTHORITY

(Respondent's Motion to Compel Answers to Questions Refused on Discovery of Kevin Rushton, returnable October 13, 2017))

September 29, 2017

GOODMANS LLP
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Michael Koch
Julie Rosenthal
Rebecca Olscher

Tel: 416.979.2211
Fax: 416.979.1234

Counsel for Vancouver Airport Authority

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CT-2016-015

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF certain conduct of Vancouver Airport Authority relating to the supply of in-flight catering at Vancouver International Airport;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

—and—

VANCOUVER AIRPORT AUTHORITY

Respondent

NOTICE OF MOTION

(Respondent's Motion to Compel Answers to Questions Refused on Discovery of Kevin Rushton, returnable October 13, 2017)

TAKE NOTICE that the Respondent, Vancouver Airport Authority ("VAA"), will make a motion to the Competition Tribunal, on October 13, 2017 at 9:30 a.m. The estimated duration of the motion is a half-day.

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THIS MOTION IS FOR:

1. an Order requiring the Applicant, the Commissioner of Competition (the “Commissioner”), to answer the refusals set out in Schedule “A” within fifteen (15) days;
2. the Respondent’s costs of this motion; and
3. such further and other relief as the Tribunal deems just.

THE GROUNDS FOR THE MOTION ARE:

1. On August 23 and 24, 2017, Kevin Rushton, on behalf of the Applicant, the Commissioner, attended at an examination for discovery (the “Examination”);
2. Mr. Rushton refused to answer certain proper questions asked during the Examination.
3. Mr. Rushton’s counsel took proper questions asked during the Examination under advisement, which are set out in Schedule “A”, and failed to answer those questions on or before September 22, 2017 (as was required by the Order Amending the Scheduling Order of Justice Gascon dated July 21, 2017);
4. VAA seeks answers to many unanswered questions asked during the Examination, which are set out in Schedule “A”;
5. Such further and other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) the pleadings and proceedings herein;

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- (b) the Reordered Third Party Summaries, dated June 6, 2017;
- (c) the transcript of the examination for discovery of Mr. Rushton, conducted on August 23 and 24, 2017; and
- (d) such further and other evidence as counsel may advise and the Tribunal may permit.

DATED at Toronto, Ontario this 29th day of September, 2017

GOODMANS LLP

Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Michael Koch

Tel: (416) 597-5156
Fax: (416) 979-1234

Julie Rosenthal

Tel: (416) 597-4259

Rebecca Olscher

Tel: (416) 849-6984

Counsel for Vancouver Airport Authority

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Schedule 'A'

ITEM	PG., Q.	DESCRIPTION
21	Pg. 68-71, Q. 120-125	Provide all facts that the Commissioner knows that relate to the market definition that does not include catering as alleged in paragraph 11 of the Commissioner's Application, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
24	Pg. 76-77, Q. 133	Provide all facts that the Commissioner knows that relate to the allegation in paragraph 14 of the Application, "The way in which In-flight Catering is provided in Canada has changed in recent years, as airlines have sought to reduce costs, including the cost of In-flight Catering", including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
25	Pg. 86-88, Q. 150	Provide all facts that the Commissioner knows that relate to geographic market definition, being characterized solely as Vancouver International Airport, as alleged in paragraph 11 of the Application, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
30	Pg. 101, Q. 177	Provide all facts that the Commissioner knows that relate to WestJet's decision to cease self-supply and contract with a supplier of in-flight catering at Vancouver International Airport, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
32	Pg. 107-108, Q. 190-191	Identify [REDACTED] referenced on page 74, fifth bullet from the bottom of the page, of Exhibit 4 to the examination of Mr. Rushton. Exhibit 4 is the Reordered Summary of Third Party Information, Confidential-Level B. The fifth bullet from the bottom of page 74 in Exhibit 4 states: [REDACTED] [REDACTED]

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ITEM	PG., Q.	DESCRIPTION
39	Pg. 144-147, Q. 256-264	<p>For the first five bullets listed on page 21 of Exhibit 4 to the examination of Mr. Rushton, indicate when the information was provided to the Bureau.</p> <p>Exhibit 4 is the Reordered Summary of Third Party Information, Confidential-Level B.</p>
43	Pg. 156-157, Q. 282-283	<p>Indicate whether the Commissioner requested or received any [REDACTED] as referenced in the last bullet on page 22 of Exhibit 4 to Mr. Rushton's examination.</p> <p>Exhibit 4 is the Reordered Summary of Third Party Information, Confidential-Level B. The last bullet on page 22 of Exhibit 4 states: [REDACTED]</p>
47	Pg. 186, Q. 332	<p>Provide all facts that the Commissioner knows that relate to (1) the factors airlines consider when deciding whether to double cater or purchase galley handling services provided by a third party; and (2) the growth or decline of double catering at airports. For each, include references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p>
48	Pg. 203, Q. 361	<p>Provide all facts that the Commissioner knows that relate to whether Vancouver International Airport competes with other airports to attract airlines or flights, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p>
49	Pg. 204-205, Q. 363-366	<p>Provide all facts that the Commissioner knows that relate to which factors are considered by airlines in deciding whether to operate at a particular airport, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p>

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ITEM	PG., Q.	DESCRIPTION
50	Pg. 225-229, Q. 411-417	Provide all facts that the Commissioner knows that relate to Vancouver Airport Authority's general ability to dictate the terms upon which it sells or supplies access to the airside at Vancouver International Airport for the supply of galley handling, as alleged at paragraph 32 of the Application, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
53	Pg. 242-243, Q. 447-448	Provide all facts that the Commissioner knows that relate to how the land rents charged to in-flight catering firms by Vancouver Airport Authority compare to the rents charged by other North American airports to on-airport in-flight catering firms, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
56	Pg. 255, Q. 464	Provide all facts that the Commissioner knows that relate to the Commissioner's allegation that Vancouver Airport Authority has considerable latitude to determine or influence price and non-price dimensions of competition in the market for the supply of galley handling at Vancouver International Airport, as alleged at paragraph 35 in the Application, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
57	Pg. 257-259, Q. 470-471	Provide all facts that the Commissioner knows that relate to whether Vancouver Airport Authority participates in the market for galley handling at Vancouver International Airport, other than sharing in the revenue as alleged at paragraph 47 of the Application, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.

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ITEM	PG., Q.	DESCRIPTION
58	Pg. 262-265, Q. 477-480	<p>Provide all facts that the Commissioner knows that support the allegation at paragraph 45 of the Application that Vancouver Airport Authority has a competitive interest in the market for the supply of galley handling at Vancouver International Airport, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p> <p>Furthermore, identify all of the records referred to by Mr. Rushton at page 262 of the examination transcript.</p>
60	Pg. 274-277, Q. 493-496	<p>Provide all facts that the Commissioner knows that relate to prices that airlines pay for in-flight catering to various competitors at airports across Canada, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p>
61	Pg. 280, Line 22 to Pg. 281, Line 22	<p>Identify the record (and references in the record) referred to by Mr. Rushton at page 279 of the examination transcript regarding an exchange between [REDACTED] and Vancouver Airport Authority whereby [REDACTED] indicated it would [REDACTED] if VAA allowed new entry of in-flight catering firms at Vancouver International Airport.</p> <p>If there are any further facts beyond those arising from the record referred to by Mr. Rushton at page 279 of the examination transcript, provide all facts that the Commissioner knows that relate to rent payments that support the contention that VAA has a competitive interest in the market for the supply of Galley Handling as stated in paragraph 46 of the Application, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p>
62	Pg. 278-281, Q. 501-507	<p>Provide all facts that the Commissioner knows that support the contention in paragraphs 45 to 47 of the Application that Vancouver Airport Authority has a competitive interest in the market for the supply of galley handling at Vancouver International Airport, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p>

ITEM	PG., Q.	DESCRIPTION
64	Pg. 287-289, Q. 515-519	Provide all facts that the Commissioner knows that relate to whether in-flight catering firms and galley handling firms operate on- or off-airport at North American airports, other than Vancouver International Airport, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
66	Pg. 291-296, Q. 523-527	Provide all facts that the Commissioner knows that relate to whether the concession fees charged by Vancouver Airport Authority are constrained by Vancouver Airport Authority's competition with other airports, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
67	Pg. 299-300, Q. 533-536	Provide all facts that the Commissioner knows that relate to the innovation, quality, service levels and more efficient business models that new entrants would have brought in this case that were prevented as a result of VAA excluding those new entrants, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
71	Pg. 337-339, Q. 606-610	Provide all facts that the Commissioner knows that relate to the allegation at paragraph 37 of the Application that "the businesses of Gate Gourmet and CLS at the Airport are profitable", including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
72-73	Pg. 349-351, Q. 629-632	Provide all facts that the Commissioner knows that relate to what transpired at any meeting between Newrest or Strategic Aviation and Vancouver Airport Authority, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.

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ITEM	PG., Q.	DESCRIPTION
74	Pg. 352-355, Q. 633-639	Provide all facts that the Commissioner knows that relate to the allegation at paragraph 40 of the Application that Vancouver Airport Authority has “consistently and purposely intended to exclude new-entrant firms from the market for the supply of Galley Handling at the Airport”, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
77	Pg. 359-362, Q. 649-653	Provide all facts that the Commissioner knows that relate to the allegation in paragraph 36 of the Application, “the purpose and effect of VAA’s Practice is an intended negative effect on competitors that is exclusionary”, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
78	Pg. 364-365, Q. 656-660	Provide all facts, excluding lease and licence agreements (with VAA and existing caterers at YVR) as well as excluding correspondence or discussions with potential new entrants, that the Commissioner knows that relate to the allegation in paragraph 42 of the Application that access (to airside for the supply of galley handling at YVR) is tied to leasing land or having a kitchen located on the airport, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
81	Pg. 370, Q. 669	Provide all facts that the Commissioner knows suggesting that the market power of VAA in relation to galley handling is affected or would change as a result of VAA’s tying of airside access to leasing land at the Airport as alleged at paragraph 29 to 33 of the Application, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.

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ITEM	PG., Q.	DESCRIPTION
82	Pg. 373-374, Q. 677-679	Provide all facts that the Commissioner knows that relate to the actual events of exclusion alleged by the Commissioner at paragraphs 1 and 38 of the Application (i.e. VAA's refusal of new entrant firms) and when in 2014 such events took place, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
83	Pg. 384-385, Q. 699-700	Provide all facts that the Commissioner knows that relate to Mr. Eccott's reasons for not granting a licence to Newrest prior to Mr. Richmond's involvement, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
84	Pg. 386-388, Q. 703-705	Provide all facts that the Commissioner knows that relate to whether the reasons expressed in Mr. Richmond's letter to Newrest on 12 May 2014 are or are not the actual reasons for which VAA declined to grant Newrest a licence, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
86	Pg. 388-395, Q. 707-719	Provide all facts that the Commissioner knows that relate to (1) whether █████ is the only airport, other than YVR, in Canada of which the Commissioner is aware that limits the number of galley handlers (2) whether there are other airports beyond Canada that limit the number of galley handlers in operation at those airports, and (3) the number of galley handlers at Canadian airports other than YVR, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
89	Pg. 409-410, Q. 751	Indicate if the Commissioner agrees or disagrees that food is of particular importance to Asian airlines. If the Commissioner disagrees, provide all facts that the Commissioner knows that relate to the importance of food to Asian airlines, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.

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ITEM	PG., Q.	DESCRIPTION
91	Pg. 424-426, Q. 761-763	<p>Provide the Commissioner's position regarding the importance of food to business class or first class passengers.</p> <p>Provide all facts that the Commissioner knows that relate to the importance of food to business class or first class passengers, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p>
93	Pg. 430-432, Q. 777-779	<p>Indicate if the Commissioner accepts that flight delays can affect an airline's willingness to launch or offer routes to that airport.</p> <p>Provide all facts that the Commissioner knows that relate to the effect of flight delays at an airport on the willingness of airlines to launch or offer routes to that airport, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p>
96	Pg. 438-440, Q. 795-797	<p>Provide all facts that the Commissioner knows that relate to the access issues raised by VAA as summarized in paragraph 13 of the Commissioner's Reply, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p>
100	Pg. 448-454, Q. 814-824	<p>Provide all facts that the Commissioner knows that relate to the impact at YVR of a reduction from two caterers to one, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p>
102	Pg. 456-458, Q. 831-834	<p>Provide all facts that the Commissioner knows that relate to the ability of the existing galley handlers at YVR to service the demand at YVR and the capacity of those providers at YVR, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p>

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ITEM	PG., Q.	DESCRIPTION
103	Pg. 460-461, Q. 839-842	Provide all facts that the Commissioner knows that relate to why LSG Sky Chefs left YVR in 2003, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
104	Pg. 465-467, Q. 853-856	Provide all facts that the Commissioner knows that relate to scale and scope economies in catering, scale and scope economies in galley handling and scale and scope economies that could cross over from catering to galley handling, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
105	Pg. 468-469, Q. 858-860	Provide all facts that the Commissioner knows that relate to competition between Gate Gourmet and CLS for galley handling and catering services at YVR, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
106	Pg. 474-475, Q. 866-867	Provide all facts that the Commissioner knows that relate to how prices for catering and galley handling at Vancouver International Airport compare to prices at airports where new entry is not limited, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.
110	Pg. 498-502, Q. 912-917	Provide a list of the customary requirements in each category – health, safety, security, and performance – that the Commissioner is asking the Tribunal to impose as part of its order.
114	Pg. 515-517, Q. 948-954	To confirm that the [REDACTED] produced to VAA reflect the entire universe of [REDACTED] that the Commissioner has collected.

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ITEM	PG., Q.	DESCRIPTION
117	Pg. 522-523, Q. 965	<p>With respect to each party that the Commissioner calls as a witness and thus submits a witness statement for, to provide references to each of the bullet points in Exhibits 3 and 4 that related to information obtained from each of those witnesses. For example, if the Commissioner files a witness statement from ██████████ to provide references to each of the bullet points in Exhibits 3 and 4 that related to information obtained from ██████████</p> <p>Exhibit 3 is the Reordered Summary of Third Party Information, Confidential-Level A. Exhibit 4 is the Reordered Summary of Third Party Information, Confidential-Level B.</p>
121	Pg. 530-531, Q. 982-983	<p>Identify which entries in section C, beginning on page 8 of Exhibit 3 to the examination of Mr. Rushton, refer to the same ██████████. (i.e. whether entries one and two are the same ██████████, whether three and four are the same ██████████, etc.).</p> <p>Exhibit 3 is the Reordered Summary of Third Party Information, Confidential-Level A.</p>
122	531:21	<p>Identify all the references, throughout the summaries, which refer to the same ██████████ that is referenced in the second full entry on page 15 of Exhibit 4 to the examination of Mr. Rushton.</p> <p>Exhibit 4 is the Reordered Summary of Third Party Information, Confidential-Level B.</p>
123	532:13	<p>Identify at which ██████████ the ██████████ referenced in Request 122 operates.</p>
124	534:6	<p>For each of the ██████████ identified in Request 123, indicate how many other ██████████ identified.</p>
125	Pg. 536, Q. 990	<p>For each ██████████ identified in Request 123 that the ██████████ identified in Request 122 services from ██████████, how far is that ██████████ from the ██████████ in kilometers and travel time.</p>
126	Pg. 539, Line 1	<p>Confirm if ██████████ are the ██████████ identified in Request 123.</p>
127	Pg. 537-540, Q. 991-999	<p>Identify which ██████████ are served by the ██████████ identified in Request 122 at each ██████████ identified in Request 123.</p>

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ITEM	PG., Q.	DESCRIPTION
128	Pg. 540-542, Q. 1000-1004	For each [REDACTED] identified in Request 127 at each [REDACTED] identified in Request 123 indicate what services are offered by the [REDACTED] identified in Request 122 (i.e. [REDACTED] etc.).
129	Pg. 544-545, Ln. 7-13, Q. 1007	<p>For each entry throughout Exhibits 3 and 4 to the examination of Mr. Rushton that references a [REDACTED] that provides [REDACTED] identify:</p> <p>(a) all other references to this [REDACTED] throughout the summaries</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>Furthermore, answers should draw on all facts known by the Commissioner, not just those contained within the summaries.</p> <p>Note, Exhibit 3 is the Reordered Summary of Third Party Information, Confidential-Level A. Exhibit 4 is the Reordered Summary of Third Party Information, Confidential-Level B.</p>

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ITEM	PG., Q.	DESCRIPTION
130	Pg. 545-547, Ln. 18-22	<p>For each entry throughout Exhibits 3 and 4 to the examination of Mr. Rushton that references an [REDACTED] identify:</p> <p>1. all other references to this [REDACTED] throughout the summaries</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>Furthermore, answers should draw on all facts known by the Commissioner, not just those contained within the summaries.</p> <p>Note, Exhibit 3 is the Reordered Summary of Third Party Information, Confidential-Level A. Exhibit 4 is the Reordered Summary of Third Party Information, Confidential-Level B.</p>

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The document at this Tab 2 is confidential and was removed from the Public Version of this Motion Record pursuant to the Confidentiality Order of Justice Gascon dated March 20, 2017.

3

The document at this Tab 3 is confidential and was removed from the Public Version of this Motion Record pursuant to the Confidentiality Order of Justice Gascon dated March 20, 2017.

4

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CT-2016-015

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF certain conduct of Vancouver Airport Authority relating to the supply of in-flight catering at Vancouver International Airport;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*.

BETWEEN:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT CT-2016-015 September 29, 2016	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 1

COMMISSIONER OF COMPETITION

Applicant

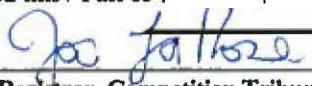
– and –

VANCOUVER AIRPORT AUTHORITY

Respondent

**I hereby certify this to be a true copy of the original document/
Je certifie par la présente que ceci est une copie conforme au document original**

Dated this / Fait ce 29th of September 2016


**For Registrar, Competition Tribunal /
Pour Registraire, Tribunal de la concurrence**

NOTICE OF APPLICATION

TAKE NOTICE that the Applicant, the Commissioner of Competition (the “Commissioner”), will make an application to the Competition Tribunal (the “Tribunal”), on a day and place to be determined by the Tribunal, pursuant to section 79 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “Act”), for:

- (a) an order pursuant to subsections 79(1) and 79(2) of the Act:
 - (i) prohibiting the Respondent, Vancouver Airport Authority (“**VAA**”), from directly or indirectly engaging in the practice of anti-competitive acts set out in the Statement of Grounds and Material Facts (“**SGMF**”), below;
 - (ii) requiring VAA to issue authorization, on non-discriminatory terms, to any firm that meets customary health, safety, security and performance requirements, so as to entitle that firm to access the airside at Vancouver International Airport (the “**Airport**”), from one or more facilities used by the firm whether located on Airport property or off Airport property, for the purposes of supplying Galley Handling (defined in paragraph 12 of the SGMF); and
 - (iii) otherwise requiring 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;
- (b) an order directing VAA to pay costs;
- (c) an order directing VAA to establish, and thereafter maintain, a corporate compliance program consistent with the Commissioner’s bulletin entitled “Corporate Compliance Programs”, as such bulletin may be revised from time-to-time; and
- (d) such further and other relief as the Commissioner may request and this Tribunal may consider appropriate.

AND TAKE NOTICE that if you do not file a response with the Registrar of the Tribunal within 45 days of the date upon which this Application is served upon you, the Tribunal may, upon application by the Commissioner and without further

notice, make such order or orders as it may consider just, including the orders sought in this Application.

AND TAKE FURTHER NOTICE that the Commissioner will rely on the SGMF in support of this Application and on such further or other material as counsel may advise and the Tribunal may permit.

AND TAKE FURTHER NOTICE that a concise statement of the economic theory of the case is attached as Schedule "A" to the SGMF.

THE ADDRESSES FOR SERVICE ARE:

For Vancouver Airport Authority:

Goodmans LLP
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7
Tel: 416.979.2211
Fax: 416.979.1234

Attention: Calvin S. Goldman, Q.C.
Michael Koch
Richard Annan

For Commissioner of Competition:

Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Tel.: 819.994.7714
Fax: 819.953.9267

Attention: Antonio Di Domenico
Jonathan Hood
Katherine Rydel
Ryan Caron

The Applicant proposes that the hearing of this matter be held in the City of Ottawa, Ontario and be heard in English. The Applicant proposes that documents be filed electronically.

STATEMENT OF GROUNDS AND MATERIAL FACTS

I. OVERVIEW AND GROUNDS

1. The Vancouver Airport Authority has abused its dominant market position by excluding and denying the benefits of competition to the In-flight Catering marketplace at Vancouver International Airport. It has no legitimate explanation to justify the substantial prevention or lessening of competition that has resulted in higher prices, dampened innovation and lower service quality.
2. New-entrant firms have sought, and continue to seek, to provide In-flight Catering, comprising Catering and Galley Handling (each as defined in paragraph 12, below), at the Airport. Airlines operating commercial passenger air transportation services wish to procure In-flight Catering at the Airport from these new-entrant firms, to realize substantial cost savings and other benefits. Standing as a wall between these buyers and sellers of In-flight Catering is VAA.
3. VAA substantially or completely controls the market for access to the airside at the Airport for the supply of Galley Handling. Without VAA's authorization to access the airside, firms cannot supply Galley Handling at the Airport. VAA thus also substantially or completely controls the market for the supply of Galley Handling at the Airport.
4. Despite repeated requests from new-entrant firms seeking to provide In-flight Catering at the Airport, and unlike other airport authorities in Canada, VAA unjustifiably refuses to authorize their access to the airside. VAA also requires firms providing In-flight Catering at the Airport to lease land from VAA for the operation of Catering kitchen facilities, as a condition of

authorizing access to the airside. VAA's conduct is a practice of anti-competitive acts, the purpose and effect of which is to exclude new-entrant firms from providing In-flight Catering or Galley Handling at the Airport.

5. VAA's practice with respect to airside access for the supply of Galley Handling has had, is having and is likely to have the effect of preventing or lessening competition substantially in the market for the supply of Galley Handling at the Airport. But for VAA's practice, the market for the supply of Galley Handling at the Airport would be substantially more competitive, including by way of lower prices, enhanced innovation and/or more efficient business models, and higher service quality.
6. Ultimately, what the Commissioner seeks in this case is to maintain and encourage competition, by allowing airlines and In-flight Catering firms that wish to do business with each other to do so, such that all In-flight Catering firms – both incumbents and new-entrants – are afforded an opportunity to succeed or fail on the basis of their respective ability to compete. In these circumstances, an order of the Tribunal is necessary and appropriate.

II. THE PARTIES

A. THE COMMISSIONER

7. The Applicant, the Commissioner, is an officer appointed by the Governor in Council pursuant to section 7 of the Act and is responsible for the administration and enforcement of the Act.

B. VAA

8. The Respondent, VAA, is a not-for-profit corporation continued under the *Canada Not-for-profit Corporations Act*. VAA operates the Airport pursuant to a Ground Lease entered into in 1992 with the Government of

Canada, as represented by the Minister of Transport (the “**Ground Lease**”).

9. In the fiscal year ended 31 December 2014, VAA generated consolidated revenue of \$465.6 million, and had an excess of revenue over expenses for the year of \$105.6 million. In the fiscal year ended 31 December 2015, VAA generated consolidated revenue of \$485.5 million, and had an excess of revenue over expenses of \$131.5 million.

III. **VAA HAS ABUSED A DOMINANT MARKET POSITION, IN CONTRAVENTION OF SECTION 79 OF THE ACT**

10. VAA has engaged in and continues to engage in an abuse of a dominant market position relating to the supply of In-flight Catering at the Airport.

A. **VAA SUBSTANTIALLY OR COMPLETELY CONTROLS THE MARKET FOR AIRPORT AIRSIDE ACCESS FOR THE SUPPLY OF GALLEY HANDLING, AS WELL AS THE MARKET FOR GALLEY HANDLING AT THE AIRPORT**

(i) Relevant Markets

11. Two markets are relevant for purposes of the Commissioner’s Application – the market for the supply of Galley Handling at the Airport, and the market for Airport airside access for the supply of Galley Handling.

Market for the Supply of Galley Handling at the Airport

12. **In-flight Catering** comprises two principal bundles of products and services purchased by airlines operating commercial passenger air transportation services – Catering and Galley Handling. **Catering** consists primarily of the preparation of meals for distribution, consumption or use on-board a commercial aircraft by passengers and crew, and includes buy-on-board offerings and snacks. **Galley Handling** consists primarily of the loading and unloading of Catering, commissary products (typically non-food items and non-perishable food items) and ancillary products

(such as duty-free products, linen and newspapers) on a commercial aircraft, including in relation thereto: 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.

13. Historically, both Catering and Galley Handling have been provided in Canada by full-service In-flight Catering firms, namely Gate Gourmet Canada Inc. ("**Gate Gourmet**"), at most airports nationally, and CLS Catering Services Ltd. ("**CLS**"), in Toronto and Vancouver. In 2009, another full-service In-flight Catering firm, Newrest Servair Holding Canada Inc., began operating in Canada, and is now present in Calgary, Montreal and Toronto.
14. The way in which In-flight Catering is provided in Canada has changed in recent years, as airlines have sought to reduce costs, including the cost of In-flight Catering. Freshly-prepared meals, once served to all passengers, are now largely reserved for those travelling in business or first class. In their place, economy class passengers are increasingly served lower-cost frozen meals, sourced in many cases on a national basis from foodservice firms.
15. With airline demand driving change in In-flight Catering service requirements, Catering and Galley Handling can be, and are, provided by separate firms. Today, a variety of firms specialize in Catering, such as by manufacturing large volumes of frozen meals, or by sourcing freshly-prepared meals from local restaurants proximate to airports. Other firms specialize in Galley Handling, such as by leveraging their existing airport infrastructure or expertise. Catering products are delivered to Galley

- Handling firms or full-service In-flight Catering firms, which, as part of their suite of Galley Handling services, load the meals onto aircraft. The separate supply of Catering and Galley Handling can deliver efficiencies to service providers and savings to airline customers.
16. Airlines periodically select a provider of In-flight Catering (or Catering or Galley Handling), principally based on price and service. Airlines can, and do, obtain In-flight Catering from different service providers at different airports. At some airports, the value proposition to an airline can be enhanced by the generally lower-cost “off-airport” location of the In-flight Catering firm, on land not leased from the airport authority. Airlines may select an In-flight Catering firm not presently serving a particular airport, conditional on that firm obtaining authorization from the airport authority to provide service at the airport.
 17. Airlines have the option of self-supplying all or a portion of their In-flight Catering needs. This includes so-called “double catering”, or transporting extra meals and ancillary supplies from one airport for service during a flight departing a second airport. Self-supply, including double catering, is not a feasible or preferable substitute for In-flight Catering for most airlines in Canada, including for logistical and financial reasons.
 18. Galley Handling constitutes a relevant product market. The relevant sellers or suppliers in this market are Galley Handling or In-flight Catering firms, while the relevant purchasers are airlines operating commercial passenger air transportation services.
 19. A sole profit-maximizing seller (*i.e.*, a hypothetical monopolist) would profitably impose and sustain a small but significant and non-transitory increase in price in the sale or supply of Galley Handling. For the vast

majority of airlines, there are no acceptable substitutes to the purchase of Galley Handling.

20. The Airport is the relevant geographic market for the sale or supply of Galley Handling. For the vast majority of airlines, there are no acceptable substitutes to the purchase of Galley Handling at the Airport.
21. One relevant market is therefore the supply of Galley Handling at the Airport.

Market for Airport Airside Access for the Supply of Galley Handling

22. Access to the airside is required to provide Galley Handling at an airport. The airside generally 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.
23. Airport authorities are the only entities in Canada from which a Galley Handling or In-flight Catering firm may obtain authorization to access the airside. Typically, airport authorities grant access to the airside by way of agreements or arrangements. Under the terms of these agreements or arrangements, firms generally pay a fee to the airport authority in exchange for authorization to access the airside to provide Galley Handling. The fee is commonly set as a percentage of the gross revenue generated by a firm from supplying Catering or Galley Handling at or from the airport. In-flight Catering firms usually pass on all or a part of this airport charge as a "port fee" to their airline customers.
24. Access to the airside for the supply of Galley Handling also constitutes a relevant product market. The relevant sellers or suppliers in this market

are airport authorities, while the relevant purchasers are Galley Handling or In-flight Catering firms.

25. A sole profit-maximizing seller (*i.e.*, a hypothetical monopolist) would profitably impose and sustain a small but significant and non-transitory increase in price in the sale or supply of access to the airside for the supply of Galley Handling. There are no acceptable substitutes to access to the airside for the supply of Galley Handling.
26. The Airport is the relevant geographic market for the sale or supply of access to the airside for the supply of Galley Handling. There are no acceptable substitutes to access to the airside at the Airport for the supply of Galley Handling.
27. A second relevant market is therefore access to the Airport airside for the supply of Galley Handling.

(ii) *VAA Substantially or Completely Controls the Relevant Markets*

28. VAA substantially or completely controls the market for access to the Airport airside for the supply of Galley Handling, as well as the market for the supply of Galley Handling at the Airport.

Market for Airport Airside Access for the Supply of Galley Handling

29. VAA has a substantial degree of market power in the market for access to the Airport airside for the supply of Galley Handling.
30. VAA is a monopolist in the market for access to the Airport airside for the supply of Galley Handling. VAA is the only entity from which a Galley Handling or In-flight Catering firm may obtain access to the Airport airside; there are no other sellers or suppliers of access to the Airport airside.

31. Barriers to entry and expansion in the market for access to the Airport airside for the supply of Galley Handling are absolute. No entity other than VAA may sell or supply access to the Airport airside. Entry of an alternative source of supply of access to the Airport airside simply is not possible.
32. VAA is generally able to dictate the terms upon which it sells or supplies access to the Airport airside for the supply of Galley Handling. For example, in 2010-2011, VAA was able to impose and sustain a more than 40% increase in the fee it charges firms under Airport airside access agreements to provide In-flight Catering at the Airport. Similarly, VAA is able to require firms providing In-flight Catering Services at the Airport to lease land from VAA for the operation of Catering kitchen facilities, as a condition of authorizing access to the Airport airside (as explained in greater detail at paragraph 42, below).
33. VAA's substantial degree of market power in the market for access to the Airport airside for the supply of Galley Handling is not constrained by Galley Handling or In-flight Catering firms or otherwise.

Market for the Supply of Galley Handling at the Airport

34. By virtue of its control over access to the Airport airside – a necessary input to the supply of Galley Handling – VAA also has a substantial degree of market power in the market for the supply of Galley Handling at the Airport.
35. VAA has considerable latitude to determine or influence price and non-price dimensions of competition in the market for the supply of Galley Handling at the Airport, including the terms upon which Galley Handling and In-flight Catering firms carry on business in this market. For example, VAA has the power to exclude, and has excluded, new-entrant Galley

Handling and In-flight Catering firms from supplying services at the Airport, by refusing to grant those firms access to the Airport airside.

B. VAA’S REFUSAL TO GRANT AIRSIDE ACCESS TO ADDITIONAL IN-FLIGHT CATERERS AND ITS TYING OF AIRSIDE ACCESS TO LAND LEASING IS A PRACTICE OF ANTI-COMPETITIVE ACTS

36. VAA has engaged in and is engaging in a practice of anti-competitive acts (the “**Practice**”) through: (i) its ongoing refusal to grant access to the Airport airside to new-entrant firms for the supply of Galley Handling at the Airport; and (ii) its continued tying of access to the Airport airside for the supply of Galley Handling to the leasing of Airport land from VAA for the operation of Catering kitchen facilities. The purpose and effect of VAA’s Practice is an intended negative effect on competitors that is exclusionary.

(i) VAA’s Refusal to Grant Airside Access to Additional In-flight Caterers

37. Gate Gourmet and CLS are currently the only firms authorized by VAA to provide In-flight Catering at the Airport. They (or their predecessors) have operated at the Airport since at least 1992, when VAA entered into the Ground Lease with the Government of Canada. VAA has never conducted a request for proposals or similar competitive process to select one or more firms to supply Galley Handling and/or Catering at the Airport, and has no immediate plans to do so. As such, no new entry in the In-flight Catering marketplace at the Airport has occurred in more than 20 years. The businesses of Gate Gourmet and CLS at the Airport are profitable.

38. In 2014, VAA refused requests from two new-entrant firms for authorization to access the airside to provide In-flight Catering at the Airport. While these firms would be new entrants to the In-flight Catering marketplace in Vancouver, they are both well-established businesses that

provide In-flight Catering at other airports in Canada. In this regard, airport authorities in Edmonton, Calgary, Regina, Winnipeg, Ottawa, Toronto, Montreal and Halifax have granted one or more of these firms access to the airside at airports in those cities.

39. Today, VAA continues to refuse to permit anyone other than Gate Gourmet and CLS to provide In-flight Catering at the Airport. VAA does so over the objections of several airlines, which have expressed to VAA their desire to see greater In-flight Catering competition at the Airport.
40. VAA has consistently and purposely intended to exclude new-entrant firms from the market for the supply of Galley Handling at the Airport, by refusing to grant such firms access to the Airport airside. Since access to the Airport airside is required to supply Galley Handling at the Airport, it was and is reasonably foreseeable or expected that the effect of VAA's refusal to grant access to the airside to new-entrant firms for the supply of Galley Handling would be an exclusionary effect on those firms. In fact, VAA's ongoing refusal to grant airside access to new-entrant In-flight Catering firms has resulted in the total and complete exclusion of such firms from the Airport.
41. VAA's refusal to grant access to the Airport airside to new-entrant firms for the supply of Galley Handling at the Airport has negatively impacted the businesses of excluded firms, including by way of lost contracts with airlines, reduced revenues, higher costs and delayed entry and expansion in Canada.

(ii) VAA's Tying of Airside Access to Land Leasing

42. In addition to its outright refusal to authorize new-entrant firms to access the airside to provide Galley Handling or In-flight Catering at the Airport, VAA's practice with respect to incumbent providers of In-flight Catering at

the Airport has been to tie their authorization to access the Airport airside for the supply of Galley Handling to their leasing of Airport land from VAA for the operation of Catering kitchen facilities. In other words, VAA does not permit a firm to access the Airport airside for the supply of Galley Handling if that firm does not operate a Catering kitchen located on Airport property (i.e., if the firm's kitchen were to be located on land not managed by VAA). VAA's airside access agreements with Gate Gourmet and CLS terminate if and when Gate Gourmet or CLS ceases to rent land from VAA for the operation of Catering kitchens on Airport property.

43. VAA has consistently and purposely intended to exclude new-entrant firms from the market for the supply of Galley Handling at the Airport by requiring that any firms accessing the airside to supply Galley Handling also lease Airport land for the operation of Catering kitchen facilities. It was and is reasonably foreseeable or expected that the effect of VAA's tying, of access to the Airport airside for the supply of Galley Handling to the leasing of Airport land from VAA for the operation of Catering kitchen facilities, would be an exclusionary effect on competitors. In-flight Catering firms are not permitted to locate their Catering kitchens on less expensive off-Airport land, and firms that may wish to provide only Galley Handling are excluded from operating at the Airport altogether.
44. VAA's tying of Airport airside access to the leasing of Airport land for the operation of Catering kitchens has negatively impacted the businesses of excluded firms, including by way of lost contracts with airlines, reduced revenues, higher costs and delayed entry and expansion in Canada.

(iii) VAA's Competitive Interest in Excluding Competition

45. VAA has a competitive interest in the market for the supply of Galley Handling at the Airport, and in insulating the incumbent In-flight Catering firms at the Airport from new sources of competition.
46. Each of Gate Gourmet and CLS rents land from VAA, pursuant to lease agreements, for the operation of Catering kitchens located on Airport property. Gate Gourmet and CLS pay VAA several million dollars per year, representing rent payments under these lease agreements, as well as fees under airside access agreements. In recent years, VAA has increased both the land lease rates and the amount of the percentage-based airside access fee it charges to Gate Gourmet and CLS.
47. VAA thus shares in the revenue generated from the supply of Galley Handling and In-flight Catering at or from the Airport, and benefits financially, through the lease and access fees, from the protection from competition it confers on the incumbent In-flight Catering firms at the Airport.

(iv) Absence of a Legitimate Business Justification

48. After deciding to exclude new-entrant firms from supplying Galley Handling at the Airport, VAA put forth a variety of factors that, it claims, justify its anti-competitive conduct. None of VAA's explanations constitute a legitimate business justification; they are not credible efficiency or pro-competitive rationales for VAA's Practice that are independent of the anti-competitive effects of its conduct, and in any event, they do not outweigh VAA's subjective intent to exclude or the reasonably foreseeable or expected exclusionary effects of the Practice.

49. Moreover, VAA's conduct with respect to airside access for the supply of In-flight Catering is opposite to its policy concerning airside access for the supply of ground handling (such as baggage handling) at the Airport. VAA places no restriction on the number of firms it permits to access the airside to supply ground handling to airlines at the Airport.
50. Firms seeking authorization from VAA to access the airside to supply In-flight Catering at the Airport are well-established businesses that provide In-flight Catering at other airports in Canada, where they have been permitted to operate by the relevant airport authority.
51. The overall character or purpose of VAA's Practice is anti-competitive.

C. VAA'S CONDUCT HAS HAD, IS HAVING AND IS LIKELY TO HAVE THE EFFECT OF PREVENTING AND/OR LESSENING COMPETITION SUBSTANTIALLY IN THE MARKET FOR GALLEY HANDLING AT THE AIRPORT

52. VAA's ongoing refusal to grant access to the Airport airside to new-entrant firms for the supply of Galley Handling at the Airport, and its continued tying of access to the Airport airside for the supply of Galley Handling to the leasing of Airport land from VAA for the operation of Catering kitchen facilities, has had, is having and is likely to have the effect of preventing or lessening competition substantially in the market for the supply of Galley Handling at the Airport. But for this ongoing practice of anti-competitive acts, the market for the supply of Galley Handling at the Airport would be substantially more competitive.
53. In the absence of VAA's Practice, significant new entry into the market for the supply of Galley Handling at the Airport would likely occur. New entrants have already sought authorization to access the airside to provide In-flight Catering at the Airport, and would be likely to begin operations at the Airport in the absence of VAA's Practice.

54. VAA's conduct insulates the incumbent In-flight Catering firms at the Airport from these new sources of competition, enabling those 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.
55. Enhanced rivalry from new entry would result in a substantially more competitive market for the supply of Galley Handling at the Airport. The ability of airlines seeking Galley Handling or In-flight Catering at the Airport to contract with alternatives to the incumbent providers would result in materially lower prices for the supply of Galley Handling at the Airport and materially greater service and product quality. Airlines have already realized these benefits at airports in Canada where new entry has been permitted to occur.
56. New entry would also bring to the Airport the introduction of innovative and/or more efficient Galley Handling business models. For example, airlines would gain the ability to choose to procure Galley Handling at the Airport from other than a full-service In-flight Catering firm, or from an In-flight Catering firm with a lower-cost off-Airport location, delivering efficiencies to service providers and savings to airlines.
57. In sum, but for VAA's practice of anti-competitive acts, the market for the supply of Galley Handling at the Airport 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.

IV. A TRIBUNAL ORDER IS NECESSARY

58. An order of the Tribunal is necessary and appropriate in the circumstances, including for the following reasons:

- a. VAA's ongoing refusal to grant access to the Airport airside to new-entrant firms for the supply of Galley Handling at the Airport, and its continued tying of access to the Airport airside for the supply of Galley Handling to the leasing of Airport land from VAA for the operation of Catering kitchen facilities, has had, is having and is likely to have the effect of preventing or lessening competition substantially in the market for the supply of Galley Handling at the Airport;
- b. an order, and more particularly, the relief sought by the Commissioner herein, is reasonable and necessary to overcome the anti-competitive effects of VAA's practice in the market for the supply of Galley Handling at the Airport and to restore or stimulate competition in the market;
- c. an order ensures an enforceable mechanism is in place to prevent VAA from engaging in the same or similar conduct likely to have the effect of preventing or lessening competition substantially in the market for the supply of Galley Handling at the Airport; and
- d. an order will indicate to the Canadian marketplace more broadly that the practices described by the Commissioner herein are anti-competitive.

V. RELIEF SOUGHT

59. The Commissioner therefore seeks an order of the Tribunal:

- a. pursuant to subsections 79(1) and 79(2) of the Act:
 - i. prohibiting VAA from directly or indirectly engaging in the practice of anti-competitive acts set out in this Application, namely: (i) VAA's ongoing refusal to grant access to the

Airport airside to new-entrant firms for the supply of Galley Handling at the Airport; and (ii) VAA's continued tying of access to the Airport airside for the supply of Galley Handling to the leasing of Airport land from VAA for the operation of Catering kitchen facilities;

- ii. requiring VAA to issue authorization, on non-discriminatory terms, to any firm that meets customary health, safety, security and performance requirements, so as to entitle that firm to access the airside at the Airport, from one or more facilities used by the firm whether located on Airport property or off Airport property, for the purposes of supplying Galley Handling; and
 - iii. otherwise requiring 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;
- b. directing VAA to pay costs;
 - c. directing VAA to establish, and thereafter maintain, a corporate compliance program consistent with the Commissioner's bulletin entitled "Corporate Compliance Programs", as such bulletin may be revised from time-to-time; and
 - d. containing such further and other relief as the Commissioner may request and this Tribunal may consider appropriate.

DATED AT Gatineau, Quebec, this 29th day of September, 2016



John Pecman
Commissioner of Competition

SCHEDULE “A”

CONCISE STATEMENT OF ECONOMIC THEORY

1. Despite requests from both airlines and In-flight Catering firms, VAA refuses to grant authorization to new-entrant firms to access the Airport airside to supply Galley Handling at the Airport. VAA also ties access to the Airport airside for the supply of Galley Handling to the leasing of Airport land from VAA for the operation of Catering kitchen facilities, by requiring firms providing In-flight Catering at the Airport to lease land from VAA for the operation of Catering kitchen facilities as a condition of authorizing access to the airside.
2. VAA's conduct is anti-competitive, having the purpose and effect of an intended negative effect on competitors that is exclusionary. VAA's exclusionary conduct has negatively impacted, and is likely to negatively impact, the businesses of firms that provide Galley Handling or In-flight Catering, leading to, among other things, lost contracts with airlines, reduced revenues, higher costs and delayed entry and expansion in Canada.
3. VAA's anti-competitive conduct has had, is having and is likely to have the effect of preventing or lessening competition substantially in the market for the supply of Galley Handling at the Airport.

MARKET POWER

4. The relevant product markets are: (i) access to the airside for the supply of Galley Handling; and (ii) Galley Handling. The Airport is the relevant geographic market for both product markets.

5. VAA substantially or completely controls the market for access to the Airport airside for the supply of Galley Handling, as well as the market for the supply of Galley Handling at the Airport.
6. VAA has a substantial degree of market power in the market for access to the Airport airside for the supply of Galley Handling. In fact, VAA is a monopolist in this market, being the only entity from which a Galley Handling or In-flight Catering firm may obtain access to the Airport airside. As a monopolist, VAA is generally able to dictate the terms upon which it sells or supplies access to the Airport airside for the supply of Galley Handling. Barriers to entry and expansion in the market for access to the Airport airside for the supply of Galley Handling are absolute. Entry of an alternative source of supply of access to the Airport airside simply is not possible. VAA's substantial degree of market power in the market for access to the Airport airside for the supply of Galley Handling is not constrained by Galley Handling or In-flight Catering firms or otherwise.
7. By virtue of its control over access to the Airport airside – a necessary input to the supply of Galley Handling – VAA also has a substantial degree of market power in the market for the supply of Galley Handling at the Airport. VAA has considerable latitude to determine or influence price and non-price dimensions of competition in the market for the supply of Galley Handling at the Airport, including the terms upon which Galley Handling and In-flight Catering firms carry on business in this market.

ANTI-COMPETITIVE CONDUCT

8. VAA has engaged in and is engaging in a practice of anti-competitive acts through: (i) its ongoing refusal to grant access to the Airport airside to new-entrant firms for the supply of Galley Handling at the Airport; and (ii) its continued tying of access to the Airport airside for the supply of Galley

Handling to the leasing of Airport land from VAA for the operation of Catering kitchen facilities. The purpose and effect of VAA's conduct is an intended negative effect on competitors that is exclusionary.

9. VAA has a competitive interest in the market for the supply of Galley Handling at the Airport, and in insulating the incumbent In-flight Catering firms at the Airport from new sources of competition. VAA shares in the revenue generated from the supply of Galley Handling and In-flight Catering at or from the Airport, and benefits, through lease and access fees, from the protection from competition it confers on the incumbent In-flight Catering firms at the Airport.

Substantial Lessening and/or Prevention of Competition

10. VAA's ongoing refusal to grant access to the Airport airside to new-entrant firms for the supply of Galley Handling at the Airport, and its continued tying of access to the Airport airside for the supply of Galley Handling to the leasing of Airport land from VAA for the operation of Catering kitchen facilities, has had, is having and is likely to have the effect of preventing or lessening competition substantially in the market for the supply of Galley Handling at the Airport.
11. In the absence of VAA's anti-competitive conduct, the market for the supply of Galley Handling at the Airport would be substantially more competitive. Significant new entry would likely occur, enhancing rivalry with incumbent suppliers of In-flight Catering and resulting in materially lower prices for the supply of Galley Handling at the Airport, materially enhanced innovation and/or materially more efficient business models, and materially higher service quality.

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CT-2016-015

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF certain conduct of Vancouver Airport Authority relating to the supply of in-flight catering at Vancouver International Airport;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

—and—

VANCOUVER AIRPORT AUTHORITY

Respondent

RESPONSE OF VANCOUVER AIRPORT AUTHORITY

PART I - OVERVIEW

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

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

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

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

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

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

PART II – ADMISSIONS AND DENIALS

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

PART III – MATERIAL FACTS UPON WHICH THE AUTHORITY RELIES

(a) The Authority and its Public Interest Mandate

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

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

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

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

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

(b) Catering and Galley Handling at YVR

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

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

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

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

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

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

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

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

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

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

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

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

(d) Requests by Potential New Entrants

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

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

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

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

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

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

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

61. Section 79 of the Act does not apply to a regulator acting pursuant to a validly enacted legislative or regulatory mandate. Accordingly, section 79 does not apply as a matter of fact and law to the Authority when exercising its public interest mandate pursuant to legislative enactment, including the applicable Order in Council.

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

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

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

63. The Authority denies that it substantially or completely controls either the market for access to the YVR airside for the supply of Galley Handling, or the market for the supply of Galley Handling.

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64. The Authority denies that it substantially or completely controls the market for access to the Airport airside for the supply of Galley Handling. The Authority is not generally able to dictate the terms upon which it sells or supplies access to the Airport airside for the supply of Galley Handling, among other reasons, because airlines are free to meet their Galley Handling needs through self-supply or double catering and, accordingly, do not need to obtain access to the Airport airside for that purpose.
65. As well, the Authority, which competes with other airports to attract airlines, including through offering an efficient mix of services to those airlines, is constrained in its ability to dictate the terms upon which it sells or supplies access to the Airport airside for the supply of Galley Handling. The fact that the Authority chose not to raise the rates of the concession fees it charges to Gate Gourmet and CLS for more than a 10-year period demonstrates that it was, and continues to be, constrained in its ability to dictate terms upon which it sells or supplies access to the airside for the supply of Galley Handling.
66. The Authority further denies that it substantially or completely controls the market for Galley Handling. Because airlines can meet their Galley Handling needs through self-supply or double catering, the relevant geographic market for Galley Handling is broader than the Airport.
67. The Authority does not provide Galley Handling and does not own any interest in, or represent, any provider of Galley Handling.
68. The Authority does not have any market power in the market for Galley Handling. Contrary to the Commissioner's allegation, the Authority does not have "considerable latitude" to determine or influence price and non-price dimensions of competition in the market for Galley Handling. In the alternative, if the Authority did have such latitude (which is denied), that would not amount to market power in the relevant product market.
69. In the further alternative, if a provider of an input into a downstream market can be viewed as having market power in that downstream market, then the Authority

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does not have market power in that market, for the same reasons cited above at paragraphs 64 and 65 – it does not completely or substantially control the market for access airside at the Airport for providing Galley Handling.

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

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

The Authority's Purpose

72. The Authority did not at any time have any anti-competitive purpose. On the contrary, it had (and continues to have) a valid, efficiency-enhancing, pro-competitive business justification for not permitting new entry at this time.
73. In the exercise of its business judgement, informed by its expertise and experience, the Authority was (and remains) concerned that there is insufficient demand to justify the entry of additional firms providing Galley Handling services at the Airport.
74. The Authority carefully considered the complex set of factors affecting its decision in the unique context of YVR's competition with other airports – including major U.S. airports such as San Francisco and Seattle – to attract flights and grow as a gateway to the Pacific Rim and other destinations of major international long-haul carriers.
75. In view of the importance of Catering services to these carriers, the Authority acted to ensure that the existing companies providing Catering and Galley Handling services are able to operate efficiently at the Airport by, among other things, each sharing its costs over both the Catering and the Galley Handling services it provides. Having experienced the exit of one firm providing Catering

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and Galley Handling services at the Airport, the Authority is concerned that, if one or more new firms were permitted to provide Galley Handling services at the Airport, one or both of the two existing firms – who provide both Catering and Galley Handling – would no longer be viable. Such an eventuality would eliminate the existing choice of, and competition between, at least two Catering providers at the Airport. Moreover, if one or both of these Catering firms were to exit the market, the Authority believes that it would be difficult to attract another on-Airport provider to provide Catering services at YVR, thereby affecting quality and service levels.

76. The decision made by the Authority was therefore directed at fulfillment of its public interest mandate, including ensuring to the greatest extent possible, the competitiveness of the Airport.
77. Thus, the Authority's purpose was at all times to ensure that it is able to retain and attract additional airline business to the Airport, by providing these airlines – in particular, long-haul carriers – with a competitive choice of at least two Catering companies at YVR.
78. Further, there is no factual or legal foundation for, and the Authority specifically denies, the Commissioner's allegations of "tying" set out at paragraphs 42 through 44 of the SMFG regarding the Authority's requirement for firms providing Catering services to be located on-site at YVR.
79. At all material times, the Authority had a valid business justification for requiring Catering firms to be located on-site at the Airport. The Authority reasonably believes that the presence of Catering firms on-site at the Airport is important to ensure optimal levels of quality and service, which, in turn, are important to ensuring the efficient operation of the Airport as a whole, including achieving its public interest mandate, mission and vision.
80. Any exclusionary negative effect on Newrest and/or Strategic, which is not admitted but denied, was never the goal of the Authority. Moreover, any such effect (which is denied) is outweighed by the Authority's legitimate business

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justification for refusing entry to an additional Galley Handling operation, at this time.

No Plausible Competitive Interest in Adversely Impacting Competition

81. As described above, unlike the respondent in prior cases decided by the Tribunal under section 79 of the Act, the Authority is not involved in the business in question, and does not have any similar commercial interest in the relevant markets as has been reflected in prior section 79 cases.
82. In any event, for the reasons discussed below, the Authority specifically denies that it has any plausible competitive interest in adversely impacting competition in the market for Galley Handling such as would be necessary to a finding that the Authority had committed anti-competitive acts within the meaning of paragraph 79(1)(b) of the Act.
83. The Authority specifically denies that a landlord and tenant relationship, such as that between the Authority on the one hand, and Gate Gourmet and CLS on the other hand, is of such a nature as to give rise to a plausible competitive interest in adversely impacting competition in the market in which the tenant competes.
84. In the alternative, as explained in further detail in the Authority's Concise Statement of Economic Theory set out in Schedule "A" to this Response, even if one assumes that the Authority was acting as a sole profit-maximizing monopolist with respect to control over airside access at the Airport, in order to maximize the revenues it earns from complementary service providers, such as from Galley Handling firms at the Airport, as alleged by the Commissioner, a monopoly supplier of access to the Airport airside for the purpose of supplying Galley Handling would have an interest in ensuring the most efficient market structure for the provision of Galley Handling at the Airport. Therefore, it follows that, even on the Commissioner's theory, the Authority would have no plausible interest in adversely affecting competition in Galley Handling.

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85. In any event, as outlined above, the Authority had a number of efficiency-enhancing and pro-competitive reasons for refusing further entry at this time.

(iii) No Substantial Lessening or Prevention of Competition

86. The Authority denies that its refusal to permit any additional companies to offer Galley Handling services at the Airport at this time has lessened or prevented, or is likely to lessen or prevent, competition for Galley Handling substantially.

87. First, because there is insufficient demand at the Airport to sustain additional entry at this time, if the Authority had permitted additional entrants to provide Galley Handling services at the airport, the likely result would have been less competition at the Airport for the provision of Catering services.

88. Second, the Authority's impugned acts in this case have not enabled, and are unlikely to enable, Gate Gourmet and CLS to exercise materially greater market power than they would have exercised in the absence of the acts.

89. There is vigorous competition between Gate Gourmet and CLS at the Airport as evidenced by significant shifts in the share of Galley Handling business and Catering business between them. Airlines can and do change Galley Handling and Catering firms at any given airport in response to price and service competition. The presence of only two Galley Handling and Catering firms at YVR is consistent with the number of such competitors located at other comparable North American airports.

90. In addition, the airlines, which are increasingly joining together in large international alliances, have considerable negotiating power with Galley Handling firms and exercise countervailing market power to play one Galley Handling provider off against the other in order to drive down prices and increase service levels.

91. The airlines' negotiating power is increased (and the Galley Handling firms' market power is correspondingly decreased) by the fact that they have the option

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of self-supplying or double catering all or a portion of their Galley Handling needs.

92. In any event, the Authority's judgment that providers of Catering and Galley Handling should be located on-site at the Airport cannot have had any "but for" effect on competition since the Authority determined that, in any event, no additional entry was warranted at this time.
93. Finally, the Authority's impugned acts have not had, and are unlikely to have, an impact on the existing providers' market power that extends through a material part of the market for Galley Handling, as to the best of the Authority's understanding, only Jazz and, possibly, Air Transat have sought to contract with a new entrant supplier of Galley Handling at the Airport.

PART V – STATEMENT OF ECONOMIC THEORY

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

PART VI – RELIEF SOUGHT

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

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PART VII – PROCEDURAL MATTERS

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

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



GOODMANS LLP

Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Calvin S. Goldman, QC

Tel: (416) 597-5914

Fax: (416) 979-1234

Michael Koch

Tel: (416) 597-5156

Julie Rosenthal

Tel: (416) 597-4259

Ryan Cookson

Tel: (416) 597-6012

Counsel for Vancouver Airport Authority

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Schedule A - Concise Statement of Economic Theory

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

Market Power

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

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

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

The Authority's Conduct is Pro-Competitive

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

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

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

No Substantial Lessening of Competition

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

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CT-2016-015

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF certain conduct of Vancouver Airport Authority relating to the supply of in-flight catering at Vancouver International Airport;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

VANCOUVER AIRPORT AUTHORITY

Respondent

REPLY OF THE COMMISSIONER OF COMPETITION

I. OVERVIEW

1. To justify its abuse of dominance – dominance that has substantially harmed competition for Galley Handling at Vancouver International Airport – VAA attempts to cloak itself as acting in the “public interest”. In seeking to do so, VAA ignores its obligation to comply with the *Competition Act*, a law of general application that has as its purpose to maintain and encourage competition in Canada, to the benefit of all Canadians.
2. VAA also makes the illogical argument it needs to *restrict* competition in the market for Galley Handling at the Airport to *preserve* competition. To try and support this argument, VAA makes allegations that have no evidentiary basis and also misapprehends the applicable legal test to evaluate VAA’s abusive conduct.
3. The fact is that VAA has abused its dominant market position by excluding and denying the benefits of competition to the Galley Handling market at the Airport. It has no legitimate explanation to justify the substantial prevention or lessening of competition that has resulted in higher prices, dampened innovation and lower service quality. In these circumstances, an order of the Tribunal to grant the relief sought by the Commissioner is necessary and appropriate.
4. The Commissioner repeats and relies upon the allegations in the Notice of Application, Statement of Grounds and Material Facts and Concise Statement of Economic Theory (the “**Application**”) and, except as hereinafter expressly admitted, denies each of the allegations in the Response of the Vancouver Airport Authority (the “**Response**”). Capitalized terms used herein are as defined in the Application.

II. THE *COMPETITION ACT* APPLIES TO VAA

5. Contrary to the allegations in the Response, section 79 of the Act applies to VAA's conduct. No "regulated conduct exemption" is available to VAA.
6. First, VAA is not a regulator. It is a corporation under the *Canada Not-for-profit Corporations Act* that has entered into a Ground Lease with the Minister of Transport to operate the Airport. The federal statute – *Airport Transfers (Miscellaneous Matters) Act* – that permits the Minister of Transport to enter into the Ground Lease does not confer a regulatory function on VAA.
7. Second, no provision in any Act of Parliament or any statutory instrument specifies that the *Competition Act* shall not apply, in whole or in part, to the activities of VAA. To the contrary, section 8.06.01 of the Ground Lease specifically requires VAA to observe and comply with any applicable law. VAA is a "person" within the meaning of section 79 of the Act, such that the Act's abuse of dominance provisions apply to VAA.
8. Third, there is no operational conflict or inconsistency between the application of the Act and VAA's operation of the Airport pursuant to the Ground Lease. VAA has the ability to carry out the operation of the Airport pursuant to the Ground Lease while simultaneously complying with the Act, and VAA's compliance with the Act would in no way frustrate the fulfillment of any Parliamentary intent.
9. VAA, by its conduct, acknowledges that its licensing of firms to access the Airport's airside is subject to the Act. Section 8.12 of VAA's standard-form "Ground Handling Licence" agreement specifically provides that nothing in that agreement applies or is enforceable to the extent it would be contrary to the Act.

III. NO LEGITIMATE BUSINESS JUSTIFICATIONS

10. To justify its abusive conduct, VAA relies on several alleged business justifications. As described below, VAA's explanations for its conduct in this case do not constitute legitimate business justifications for the purposes of section 79 of the Act. None of VAA's explanations are credible efficiency or pro-competitive rationales for VAA's Practice that are *independent* of the anti-competitive effects of its conduct. Even if credible justifications exist, which is denied, VAA's justifications are insufficient to outweigh VAA's clear subjective intent to exclude or the reasonably foreseeable or expected exclusionary effects of the Practice.
11. **First**, VAA's argument that new entry is not supported because of alleged shrinking demand is countered by the fact that airlines operating at the Airport wish to procure In-Flight Catering from new-entrant firms. At least three international airlines have written letters advocating for additional In-flight Catering competition at the Airport. These letters have been in VAA's possession while new-entrant firms were requesting (and continue to request) authorization to access the airside to provide In-flight Catering at the Airport.
12. Regardless of the size of the market, open competition should determine the number and identity of firms serving the In-Flight Catering marketplace at the Airport, not VAA. Markets are most efficient and consumers are best served when competing firms are free to decide how to compete.
13. **Second**, VAA claims that it is not desirable for In-flight Catering facilities to be located off-Airport, due to ground access issues arising from the Airport's location on an island, and because firms that make investments in facilities off-Airport are less committed to continuing to serve the Airport in the event of a business downturn.

14. Even if access issues exist, which is denied, In-flight Catering firms already operate in Canada from off-airport locations. Their level of service, including on-time performance, meets airline requirements, and is backstopped by level-of-service commitments, and penalties, in contracts with airlines. Whether located on- or off-airport, In-flight Catering firms make significant investments in establishing and maintaining their facilities, and firms located off-airport do not take lightly the commitments and investments they have made.
15. **Third**, VAA claims that after being contacted by new-entrant firms seeking authorization to access the airside to provide In-flight Catering at the Airport it conducted a careful review of the marketplace prior to making any decision. In fact, it was only after VAA had already rejected new entry did VAA conduct any kind of detailed analysis, and the analysis that VAA did conduct cannot, as a matter of fact, support the conclusions that VAA seeks to draw in this case.

IV. VAA'S ILLOGICAL ARGUMENT THAT A LESS COMPETITIVE MARKET IS IN FACT A MORE COMPETITIVE MARKET

16. VAA asserts that there can be no lessening or prevention of competition owing to "vigorous competition" between the incumbent providers of In-flight Catering at the Airport – Gate Gourmet and CLS. The test for a substantial prevention or lessening of competition for the purposes of section 79 of the Act is a relative rather than an absolute one; that there may be competition between Gate Gourmet and CLS is irrelevant to the assessment of whether the relevant market would be substantially more competitive but for VAA's ongoing practice of anti-competitive acts, which it would be in this case.
17. The Commissioner also rejects VAA's proposition that the absolute number of In-flight Catering firms operating at the Airport is indicative of

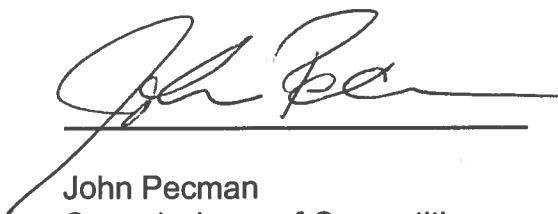
the competitiveness of the relevant market. That new entry may cause an incumbent firm to exit the market does not mean that the result is a less competitive market. To the contrary, vigorous competition in a market, participation in which is not blocked by a gatekeeper's refusal to permit access to a critical input, will deliver quality products and services to customers at competitive prices, including in this case.

18. Finally, airlines cannot exercise material countervailing buyer power at the Airport as VAA asserts. Countervailing buyer power only works if there is a free and contestable market that provides options to airlines for In-flight Catering. VAA's conduct in this case ensures that airlines are captive to the incumbents at the Airport and cannot exercise material countervailing buyer power.

V. CONCLUSION

19. VAA has engaged in and continues to engage in an abuse of a dominant market position relating to the supply of In-flight Catering at the Airport. As described in the Application, VAA has a competitive interest in the market for the supply of Galley Handling at the Airport, and in insulating the incumbent In-flight Catering firms at the Airport from new sources of competition. VAA's practice of anti-competitive acts has, and continues, to harm competition. Accordingly, the Commissioner respectfully requests the Tribunal to grant the relief sought in paragraph 59 of the Application.

DATED AT Gatineau, Quebec, this 28th day of November, 2016.



John Pecman
Commissioner of Competition

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Fax: 819.953.9267

Jonathan Hood
Tel: 416.954.5925
jonathan.hood@canada.ca

Katherine Rydel
Tel: 819.994.4045
katherine.rydel@canada.ca

Ryan Caron
Tel: 819.953.3889
ryan.caron@canada.ca

Counsel to the Applicant, the Commissioner

TO: **Calvin S. Goldman, Q.C.**
Michael Koch
Julie Rosenthal
Ryan Cookson
Goodmans LLP
Bay Adelaide Centre

333 Bay Street, Suite 3400
Toronto, ON M5H 2S7
Tel: 416.979.2211
Fax: 416.979.1234

Counsel to the Respondent, Vancouver Airport Authority

AND TO: **The Registrar**
Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, ON K1P 5B4

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CT-2016-015

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF certain practices of Vancouver Airport Authority relating to the supply of in-flight catering services at Vancouver International Airport;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

VANCOUVER AIRPORT AUTHORITY

Respondent

**MEMORANDUM OF FACT AND LAW OF THE
COMMISSIONER OF COMPETITION TO THE RESPONDENT'S MOTION
CHALLENGING ADEQUACY AND ACCURACY OF SUMMARIES**

PART I: OVERVIEW

1. The Commissioner of Competition (the “**Commissioner**”), acting in the public interest, has provided a 206 page third party summary (“**TPS**”) to Vancouver Airport Authority (“**VAA**”), summarizing information the Commissioner has obtained from third parties during his investigation that is contained in records that are subject to a class-based public interest privilege.
2. This privilege exists to protect and facilitate the Commissioner’s ability to enforce and administer the *Competition Act*. As such, in providing the facts to VAA in the TPS, the Commissioner has done so in a manner that preserves the public interest privilege in the underlying records upon which the TPS is based, so as to protect the identities of the third parties who provided the information and the integrity of the investigation while maximizing the amount of disclosure to VAA.
3. There are no indicia in the TPS to indicate that facts have been improperly shielded and no evidence filed by VAA to support its bald allegation that the TPS is inadequate or inaccurate. The evidentiary threshold that a respondent must meet to challenge the adequacy and accuracy of summaries prior to discovery of the Commissioner’s representative is high. VAA has failed to meet this threshold.
4. Because the TPS has no indicia of inadequacy or inaccuracy, no other evidence has been filed, and discovery of the Commissioner’s representative has not yet occurred, the Tribunal should dismiss VAA’s motion. To do otherwise invites inefficient uses of Tribunal process and resources, and would encourage future respondents to automatically challenge the TPS, even where, as in this case, there is no basis on which to do so.

PART II: SUMMARY OF FACTS

A. VAA's Abuse of Dominance

5. On September 29, 2016, the Commissioner applied to the Tribunal seeking to remedy the abuse of a dominant market position by VAA in excluding and denying the benefits of competition to the in-flight catering marketplace at Vancouver International Airport ("**Commissioner's Application**").¹
6. New-entrant firms have sought, and continue to seek, to provide In-flight Catering², comprising Catering and Galley Handling, at the Airport. Airlines operating commercial passenger air transportation services wish to procure In-flight Catering at the Airport from these new-entrant firms, to realize substantial cost savings and other benefits. Standing as a wall between these buyers and sellers of In-flight Catering is VAA.
7. VAA substantially or completely controls the market for access to the airside at the Airport for the supply of Galley Handling. Without VAA's authorization to access the airside, firms cannot supply Galley Handling at the Airport. VAA thus also substantially or completely controls the market for the supply of Galley Handling at the Airport.
8. Despite repeated requests from new-entrant firms seeking to provide In-flight Catering at the Airport, and unlike other airport authorities in Canada, VAA unjustifiably refuses to authorize their access to the airside. VAA also requires firms providing In-flight Catering at the Airport to lease land from VAA for the operation of Catering kitchen facilities, as

¹ The paragraphs that follow provide a high-level summary for context. For full particulars, see the pleadings in the Motion Record of the Respondent, Volume II, Tab 7 and Tab 9.

² Where capitalized terms are not defined in this Memorandum of Fact and Law, the Commissioner relies on those terms as they are defined in the Commissioner's Application.

a condition of authorizing access to the airside. VAA's conduct is a practice of anti-competitive acts, the purpose and effect of which is to exclude new-entrant firms from providing In-flight Catering or Galley Handling at the Airport.

9. VAA's practice with respect to airside access for the supply of Galley Handling has had, is having and is likely to have the effect of preventing or lessening competition substantially in the market for the supply of Galley Handling at the Airport. But for VAA's practice, the market for the supply of Galley Handling at the Airport would be substantially more competitive, including by way of lower prices, enhanced innovation and/or more efficient business models, and higher service quality.

B. Disclosure to VAA

10. Pursuant to the scheduling order of Justice Gascon dated December 20, 2016, as amended by further orders dated February 13, 2017, and February 16, 2017 ("**Scheduling Order**"), the Commissioner served VAA with the Commissioner's Affidavit of Documents on February 15, 2017.
11. On March 20, 2017, Justice Gascon issued a confidentiality order regarding the treatment of certain classes of protected information ("**Confidentiality Order**").
12. On March 21, 2017, the Commissioner served VAA with an amended Affidavit of Documents, which does not list any new documents. Rather, the Commissioner waived privilege over 8,513 documents. Of the remaining 1,393 documents listed in Schedule C, the Commissioner claims public interest privilege, and no other type of privilege, over 1,183 documents. The Commissioner also asserts public interest privilege as

well as one or more other forms of privilege over an additional 207 documents. The remaining 3 documents are subject to claims of litigation privilege only.

13. On April 13, 2017, consistent with Tribunal practice, the Commissioner served VAA with his TPS, which consists of information that the Commissioner claims are level A or level B pursuant to the Confidentiality Order. The TPS is 206 pages long.
14. On April 28, 2017, pursuant to his continuing production obligation, the Commissioner delivered a supplemental affidavit of documents producing an additional 3,892 documents. In the supplemental affidavit of documents, the Commissioner asserts privilege over 66 documents; 49 documents are subject to claims of public interest privilege as well as one or more other forms of privilege and the remaining 17 documents are subject to claims of litigation privilege only.
15. On May 8, 2017, following a dispute between the parties over whether this motion should be heard before or after the discovery of the Commissioner's representative, the Tribunal issued a direction that this motion from VAA challenging the adequacy and accuracy of the TPS could be heard prior to examinations for discovery.

C. The detailed TPS provided by the Commissioner

16. The TPS provides facts that have been gathered by the Commissioner during his investigation. The underlying documents are protected by public interest privilege. Thus the TPS must provide the facts in a manner that protects the identity of the parties who provided that information and protects the integrity of the investigation.

17. Acting in the public interest, the Commissioner must balance his obligation to protect third parties and the integrity of the investigation while maximizing the information that can be provided to the respondents in the TPS.
18. The TPS provided by the Commissioner is 206 pages. Because of the nature of the investigation, organizing the TPS by topics is the way that the Commissioner can maximize disclosure of the information while still protecting the identity of third parties and the integrity of the investigation.
19. Below is the table of contents from the Level B and Level A TPS respectively which demonstrates that information has been provided on all topics:

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20. The TPS has been drafted to maximize the amount of disclosure provided to VAA without revealing information that is protected by public interest privilege. VAA's motion asks for the Commissioner to redo this summary based on a bald unsupported allegation that this information lacks context. There are no indicia in the TPS or evidence provided to indicate that information has been withheld.

PART III: ISSUE IN DISPUTE

21. This motion raises the following issue: whether the Commissioner should be ordered to provide a further and better TPS where there is no evidentiary basis on which to do so.

PART IV: SUBMISSIONS

22. VAA's motion should be dismissed for the following reasons:
- a. First, the TPS follows Tribunal jurisprudence and practice by providing the facts gathered during the investigation while protecting the information that is protected by a class-based public interest privilege. It does not contain any indicia that would indicate the TPS is inadequate or inaccurate.
 - b. Second, VAA has failed to file any evidence that the TPS is inadequate or inaccurate, and no evidence that would rebut the presumption that the Commissioner, acting in the public interest, has provided an adequate and accurate TPS.
 - c. Third, there is no breach of procedural fairness and to grant VAA's motion would invite an automatic challenge of the TPS in future applications. VAA has the opportunity to examine the Commissioner's representative on the TPS and then seek a remedy from the Tribunal pursuant to the Scheduling Order.

A. The TPS follows Tribunal jurisprudence and does not contain any indicia that would indicate the summary is inadequate or inaccurate

23. The Tribunal and multiple courts have consistently recognized that it is in the public interest to allow the Commissioner to maintain confidentiality over all information supplied by third parties, including their identities. This class privilege, which need not be established on a case-by-case basis, applies to notes, materials and statements obtained or prepared by the Commissioner and his staff from meetings, discussions or other communications with third parties.³
24. This long-standing recognition of public interest privilege over third party information has been coupled with a well-established practice in Competition Tribunal proceedings for the Commissioner to produce, prior to discovery, a TPS that informs the respondent about the facts the Commissioner has gathered.⁴ The TPS includes information, both favourable and adverse to the Commissioner's case, obtained from third parties.
25. Typically, respondents in Tribunal proceedings use discovery of the Commissioner's representative to help clarify the respondents' understanding of the information in the TPS and its context. Disputes, if any, related to the TPS are then settled at the refusals motion.⁵

³ *Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 6 [VAA Public Interest Privilege Decision]; *Canada (Commissioner of Competition) v Rogers Communications Inc*, 2013 ONSC 5386; *Commissioner of Competition v Toshiba of Canada Ltd*, 2010 ONSC 659; *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2016 BCSC 97; *Director of Investigation and Research v D & B Companies of Canada Ltd*, [1994] FCJ No 1643 (FCA), leave to appeal to the SCC refused.

⁴ *Director of Investigation and Research v. Southam Inc.* (16 July 1991), CT9001/130, Order Regarding Disclosure of Summaries at 4, [1991] CCTD No 21 (QL) (Comp Trib); *Director of Investigation and Research v Canadian Pacific Ltd* (1997), 78 CPR (3d) 421, at paras 9-12 (CT) [*Canadian Pacific*].

⁵ See eg, *Canada (Commissioner of Competition) v Air Canada*, CT-2011-004, available online <<http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=348>>; and

26. Notwithstanding that information regarding third parties will have been provided via the TPS, where a third party is to be called as a witness, the respondent will be informed of the identity of that third party and will be provided that third party's relevant evidence in advance of the hearing in accordance with the *Competition Tribunal Rules*.⁶
27. As required by Tribunal jurisprudence and practice, the Commissioner has produced a TPS that is 206 pages. Acting in the public interest,⁷ the Commissioner has organized the TPS to maximize the amount of disclosure provided to VAA without compromising the public interest privilege. This means drafting the TPS so as to protect the identity of the third parties who provided the information and protecting the integrity of the investigation.
28. On its face, there are no indicia to indicate the TPS is inadequate or inaccurate.
29. The TPS contains information:
- a. that is both helpful and unhelpful⁸ to the Commissioner's Application;
 - b. about every topic at issue in the Commissioner's Application;⁹
 - c. from the time the investigation started;¹⁰ and

Canada (Commissioner of Competition) v Direct Energy Marketing Limited, CT-2012-003, available online <<http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=356>>.

⁶ SOR/2008-141.

⁷ *Commissioner of Competition v Pearson Canada Inc*, 2014 FC 376, at para 43 [*Pearson*].

⁸ Motion Record of the Respondent, Summary of Third Party Information, dated April 13, 2017 (Confidential – Level B), Vol 2 of 2, Tab 6, at p 451, bullet-points 5 & 7 from the top of the page [TPS Level B].

⁹ Motion Record of the Respondent, Summary of Third Party Information, dated April 13, 2017 (Confidential – Level A), Vol 2 of 2, Tab 5, at p 384 [TPS Level A]; and TPS Level B, *supra* note 8, at pp 404-405. The table of contents of the TPS highlight the relevant topics at issue.

d. from every type of market participant.¹¹

30. In this motion, VAA points to purported inconsistent statements contained in the TPS as evidence of inadequacy. VAA also argues that the information is contained in 'snippets' and is without context, and as a result VAA is unable to evaluate the strength and importance of this information.
31. VAA misunderstands the purpose and nature of the TPS. VAA is entitled to know that the Commissioner has been provided with an opinion or view on a relevant subject. The purpose of the summary is not for VAA to be able to assess the weight or importance of the information included in the TPS.¹²
32. Additionally, the nature of an investigation means that the Commissioner could potentially obtain inconsistent information on a given topic or issue. This information may be obtained from different market contacts

¹⁰ Information in the TPS dates from 2007 through 2017. On October 17, 2014, the Commissioner commenced the present inquiry.

¹¹ See *eg*, TPS Level A, *supra* note 9; and TPS Level B, *supra* note 8, Examples include:

- one or more firms that provides In-Flight Catering, at pp 385-402, 406-492, 498-503, and 505-592;
- one or more airlines based in Canada, at pp 399, 406-435, 439-446, 448-457, 459-464, 466-477, 480, 484-498, 500-508, 526, 530-531, 533-539, 546-547, 550-551, 553-557, 560-564, 566-573, 575-579, 581-582, 584-585, and 588-593;
- one or more airlines based in Europe, at pp 400, 406, 415-417, 433, 438, 441, 443, 445-446, 449, 451-454, 456-458, 464-465, 472-476, 483, 485-488, 490, 492-493, 495-496, 499, 501-506, 508, 526-527, 529-532, 534, 543, 546, 553, 555, 559, 571-573, 579, 585, and 587-588;
- one or more airport authorities in Canada, at pp 400-401, 425, 453, 529, 532, 536, 540-546, 548-549, 560, 562, 564, 574, and 593;
- one or more food sourcing firms, at pp 402, 407, 410, 420, 436, 438, 456, 474, 491, 502, 512, 551-552, 555-556, 558, 560-562, 566, 568, 570, 572, 575-576, 581, 588-589, 590, and 592;
- one or more airlines based in the United States, at pp 409, 415, 427-429, 430, 432-434, 444, 457, 461, 467, 492-493, 496-497, 500, 504, 505, 507-508, 530, 536, 546, 577-579, and 590;
- one or more food manufacturers, at pp 413-414, 421, 436-442, 535, and 573-574; and
- one or more airlines based in the Asia-Pacific region, at pp 416, 434, 455, 458, 459, 491, 498-499, 505, 527, 554, 557, and 584.

¹² *Canadian Pacific Ltd*, *supra* note 4, at para 10.

or even the same market contact, in light of differing and different perspectives of various market participants from whom the Commissioner obtains information, and in light of how the Commissioner's understanding of the market evolves over the course of the investigation.

33. VAA has not provided any reason to diverge from Tribunal practice and jurisprudence.

B. VAA has failed to meet the high evidentiary burden required to support claims of the inadequacy or inaccuracy of a Third Party Summary

34. Justice Gascon noted in his direction to counsel for this motion that “in all situations, it will always remain the burden of the moving party to provide the required evidence to support, at the time of its motion, its allegations and the reliefs sought from the Tribunal”.¹³ VAA has filed none.
35. Although the Tribunal has never considered the level of evidence required to challenge the adequacy and accuracy of summaries before discoveries have occurred,¹⁴ analogous situations in other contexts suggest that the evidentiary threshold to challenge the adequacy and accuracy of a TPS should be high.

¹³ *Commissioner of Competition v Vancouver Airport Authority*, Direction to Counsel, CT2016-015, #72 (8 May 2017).

¹⁴ *Commissioner of Competition v Air Canada*, 2012 CACT 21; and *Commissioner of Competition v Direct Energy Marketing Limited*, 2014 CACT 17. But see *Director of Investigation and Research v Canadian Pacific Ltd*, 1997 CarswellNat 3101, [1997] CCTD No 28, where the Respondent sought to override the public interest privilege claim of the Commissioner regarding certain transcripts of examinations pursuant to section 11 of the Act, and where the Respondent raised an alternative request of seeking a further and better summary. The Tribunal left the alternative request unanswered, leaving the Respondent to renew its request.

36. In the context of a challenge to a class-based privilege claim or the sufficiency of production, analogous challenges demonstrate that the evidentiary threshold should be high:
- a. There is a heavy onus on a party attempting to override a class-based privilege.¹⁵ In the present context, one of public interest privilege, the onus is to demonstrate “compelling circumstances” or a “more compelling competing interest”.¹⁶
 - b. Federally, it is well established that the party seeking further and better production must offer persuasive evidence that the documents are available and have not be produced.¹⁷ The discovery process should not be used as a fishing expedition.¹⁸ In Ontario, when challenging the sufficiency of production, speculation, intuition or guesswork are insufficient.¹⁹
37. The evidentiary threshold that a respondent must meet to challenge the adequacy and accuracy of summaries should be at least as high as described in the analogous situations above if not higher, because the Commissioner benefits from a presumption that actions taken pursuant to the *Competition Act*²⁰ are bona fide and in the public interest, absent evidence of bad faith.²¹
38. Acting in the public interest, the Commissioner has organized the TPS to maximize the amount of disclosure provided to VAA without compromising the public interest privilege he has asserted.

¹⁵ *LLA v AB*, [1995] SCJ No 102, at para 65.

¹⁶ VAA Public Interest Decision, *supra* note 3, at paras 88-91.

¹⁷ *Rhodia UK Ltd v Jarvis Imports (2000) Ltd*, 2005 FC 1628, at para 5; *Pharmascience Inc v GlaxoSmithKline Inc*, 2007 FC 1261, at para 18.

¹⁸ *Apotex Inc v Sanofi-Aventis*, 2011 FC 52, at para 20.

¹⁹ *Seelster Farms Inc v Ontario*, 2016 ONSC 97, at para 45; and *Bow Helicopters v Textron Canada Limited*, [1981] OJ No 2265, at para 7 (Ont Sup Ct), as per Master Sandler.

²⁰ RSC 1985, c C-34.

²¹ *Pearson*, *supra* note 7, at para 43.

39. VAA has failed to file any evidence to support its claims on the TPS' purported inadequacy or inaccuracy, much less to overturn the presumption that the Commissioner has acted in the public interest. There is simply no basis on which to order the Commissioner to provide a further and better TPS.

C. No breach of procedural fairness

40. VAA has provided no evidence that the TPS delivered by the Commissioner is a breach of procedural fairness.

41. Justice Gascon noted in the VAA Public Interest Privilege Decision that:

Considerations of procedural fairness are not to be analyzed in silos or in isolation at various stages of a judicial process. Courts need to look at the whole process involved, not strictly at a preliminary stage like the discovery process, in order to determine whether issues of fairness arise or not. As long as there is no final decision, and as long as there might still be changes or further steps in the judicial process, it would be hard to claim a breach of procedural fairness or for a court to conclude that such a breach occurred.²²

42. VAA's motion hardly raises issues of procedural fairness as described by Justice Gascon above. In fact, it invites an inefficient use of Tribunal process and resources.
43. VAA has not yet examined a representative of the Commissioner for discovery, during which discoveries it could ask the questions that it now poses. It would be more efficient for the Tribunal to have a full factual record on which to assess VAA's claims.

²² VAA Public Interest Privilege Decision, *supra* note 3, at para 171.

44. Pursuant to the Scheduling Order, VAA will have an additional opportunity to make a request to the Tribunal for a further and better TPS, following examinations for discovery. The present motion does not preclude this possibility.

45. Finally, the Tribunal should not encourage unsupported challenges to the TPS. Without requiring evidence, the Tribunal may encourage future respondents to automatically challenge a TPS, even where, as in this case, there is no basis on which to do so.

PART V: ORDER SOUGHT

46. The Commissioner respectfully requests that the motion be dismissed in its entirety with his costs of the motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24TH DAY OF
MAY, 2017**



ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Fax: 819.953.9267

Jonathan Hood
Tel: 416.954.5925
jonathan.hood@canada.ca

Katherine Rydel
Tel: 819.994.4045
katherine.rydel@canada.ca

Ryan Caron
Tel: 819.953.3889
ryan.caron@canada.ca

Fasken Martineau
Bay Adelaide Centre
333 Bay Street, Suite 2400, PO Box 20
Toronto, ON, M5H 2T6
Fax: 416.364.7813

Antonio Di Domenico
Tel: 416.868.3410
adidomenico@fasken.com

Counsel to the Commissioner

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CT-2016-015

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF certain conduct of Vancouver Airport Authority relating to the supply of in-flight catering at Vancouver International Airport;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

—and—

VANCOUVER AIRPORT AUTHORITY

Respondent

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT

(Respondent's Motion to Compel Answers to Questions Refused on Discovery of Kevin Rushton, returnable October 13, 2017)

September 29, 2017

GOODMANS LLP
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Michael Koch
Julie Rosenthal
Rebecca Olscher

Tel: 416.979.2211
Fax: 416.979.1234

Counsel for Vancouver Airport Authority

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PART I – STATEMENT OF FACTS

A. Overview

1. These submissions are filed by the Respondent, the Vancouver Airport Authority (“VAA”), in support of its motion for an Order requiring the Applicant, the Commissioner of Competition (the “Commissioner”), to provide answers to questions that were refused on the examination for discovery of the Commissioner’s representative, Kevin Rushton.

2. Each of the questions at issue is relevant and directed at eliciting factual information. As such, VAA respectfully requests that this Tribunal order the Commissioner to provide the answers sought.

B. The Within Proceedings

3. The Commissioner began this proceeding by Notice of Application, dated September 29, 2016, seeking relief against VAA pursuant to section 79 of the *Competition Act*.

4. Broadly speaking, the proceeding relates to VAA’s decision to permit only two in-flight caterers to operate on-site at the Vancouver International Airport (the “Airport”). The Commissioner’s application is based upon, among other things, allegations that VAA controls the market for “Galley Handling” at the Airport, that it acted with an anti-competitive purpose, and that the effect of its policy decision was a “substantial prevention or lessening of competition”, resulting in “higher prices, dampened innovation and lower service quality”.

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5. VAA delivered its Response on or about November 14, 2016.

6. Among other things, VAA pleads that its decision not to permit additional catering firms to operate at the Airport was not made for an anti-competitive purpose, but rather was (and is) motivated by its concern that, if new firms were permitted to provide Galley Handling services at the Airport, the operations of one or both of the existing firms would no longer be viable. VAA further pleads that it has an efficiency-enhancing, pro-competitive, valid business justification for requiring catering firms to be located on-site at the Airport: it believes that the presence of catering firms on-site ensures optimal levels of quality and service.

Response of Vancouver Airport Authority, paras. 2, 75 and 79, Public Motion Record of the Respondent, Tab 6, pp. 44 and 59-60

7. VAA specifically denies that it has any plausible competitive interest in adversely affecting competition in the market for Galley Handling. In addition, VAA denies that it substantially or completely controls the market for Galley Handling. It explains that airlines can meet their Galley Handling needs through self-supply or double catering.

Response of Vancouver Airport Authority, para. 31-32, 66 and 81-82, Public Motion Record of the Respondent, Tab 6, pp. 50-51, 58 and 61

8. All of the foregoing allegations are expressly denied by the Commissioner.

Reply of the Commissioner of Competition, para. 4, Public Motion Record of the Respondent, Tab 7, p. 70

9. The examination for discovery of the Commissioner's representative took place against the backdrop of two motions brought by VAA to level the playing field in terms of disclosure.

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C. The Privilege Motion

10. On or about February 15, 2017, the Commissioner delivered his Affidavit of Documents, which listed all of the documents – which totaled 11,600 – relevant to matters in issue that were in the Commissioner’s possession or control.

11. However, of the 11,600 relevant documents in the Commissioner’s possession, fewer than 2000 were produced. Almost all of the remaining documents – 9500 to be precise – were withheld from production solely on the basis of a claimed public-interest privilege. The Commissioner subsequently waived privilege over 8300 of the previously withheld documents, leaving approximately 1200 relevant documents which the Commissioner has continued to refuse to produce on the basis of public-interest privilege.

12. VAA brought a motion seeking an Order requiring the Commissioner to produce to VAA all of those documents that were being withheld from production solely on the basis of public-interest privilege. The motion was heard by Gascon J. on March 22, 2017 and dismissed by Reasons for Order and Order dated April 24, 2017.

13. In dismissing VAA’s challenge to the Commissioner’s asserted public-interest privilege, Gascon J. acknowledged that the privilege did pose a risk to the fairness of proceedings before the Tribunal. However, he held that such a risk was adequately mitigated by certain “safeguards” and “special mechanisms”:

[T]he Tribunal has repeatedly discussed the special mechanisms put in place to address the legitimate concerns for the search for truth and for the right to a fair hearing raised by this limit imposed on the full disclosure of relevant documents and communications.

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The Commissioner of Competition v. Vancouver Airport Authority, 2017 Comp. Trib. 6 at para. 82, Book of Authorities of the Respondent, Tab 1

14. Similarly:

Over the years, the Tribunal has thus consistently discussed and referred to the particular safety valves and safeguards endorsed by the Tribunal to compensate for the limited disclosure of information resulting from the Commissioner's claim of public-interest privilege.

The Commissioner of Competition v. Vancouver Airport Authority, 2017 Comp. Trib. 6 at para. 82, Book of Authorities of the Respondent, Tab 1

15. Gascon J. explained that these "safeguard mechanisms" and "safety valves" form an essential and integral part of the privilege:

There is no doubt, in my view, that these safeguard mechanisms have been a key element of the Tribunal's treatment of the Commissioner's public-interest privilege and indeed form an integral part, in the Tribunal's reasons, of the class recognition awarded to the Commissioner's privilege.

The Commissioner of Competition v. Vancouver Airport Authority, 2017 Comp. Trib. 6 at para. 82, Book of Authorities of the Respondent, Tab 1

16. Gascon J. further noted that the jurisprudence has identified three such "safeguard mechanisms":

- (a) the Commissioner's obligation to provide, prior to examinations for discovery, of "detailed", "complete", "adequate" and "accurate" summaries of all information being withheld on the basis of public-interest privilege;
- (b) the respondent's right to have a non-sitting judicial member adjudicate upon the adequacy and accuracy of the summaries; and

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- (c) the fact that, if the Commissioner wishes to rely on certain privileged information at trial, he will have to waive privilege over such information at the time that he provides his witness statements.

17. As Gascon J. stated:

[The] mechanisms put in place to safeguard the respondent's right to a fair hearing include: (1) the provision of detailed summaries, prior to the examination for discoveries, containing both favourable and unfavourable facts to the Commissioner's application; (2) the option for the respondent to have a judicial member of the Tribunal, who would not be adjudicating the matter on the merits, to review the underlying documents to ensure they have been adequately summarized and are accurate; and (3) the fact that the Commissioner will have to waive privilege on relevant documents and communications and provide will-say statements ahead of the hearing, if he wants to rely upon that information in proceedings before the Tribunal.

The Commissioner of Competition v. Vancouver Airport Authority, 2017 Comp. Trib. 6 at para. 161, Book of Authorities of the Respondent, Tab 1

18. Similarly:

The Tribunal decisions have first established that the Commissioner should provide, prior to the start of examinations for discovery, complete summaries of the privileged information including not merely information which supports his case but also information which favours the respondent.

The Commissioner of Competition v. Vancouver Airport Authority, 2017 Comp. Trib. 6 at para. 84, Book of Authorities of the Respondent, Tab 1

19. Lastly, Gascon J. recognized that the "key elements" of the Commissioner's public interest privilege included "mechanisms put in place by the Tribunal to give respondents an

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opportunity to know about the nature of the otherwise privileged documents”, such as the provision of summaries, as well as examination for discovery.

The Commissioner of Competition v. Vancouver Airport Authority, 2017 Comp. Trib. 6 at para. 41(e), Book of Authorities of the Respondent, Tab 1

20. The decision of Gascon J. is under appeal.

D. The Summaries Produced by the Commissioner

21. On or about April 13, 2017, the Commissioner produced a “Summary of Third Party Information”. The summary was divided into two documents. The first contained information which the Commissioner claimed as “Confidential – Level A” pursuant to the Confidentiality Order of Gascon J. dated March 20, 2017. The second contained information which the Commissioner claimed as “Confidential – Level B”.

22. Together, the two documents purported to be a summary of relevant information gathered by the Commissioner from third parties, including relevant information contained in the documents which the Commissioner is withholding from production on the basis of public-interest privilege.

23. On or about June 6, 2017, the Commissioner produced a “Reordered Summary of Third Party Information”, again divided into two documents on the basis of the level of confidentiality asserted. The “Confidential – Level A Reordered Summary of Third Party Information” was marked as Exhibit 3 during the examination of the Commissioner’s representative, and the “Confidential – Level B Reordered Summary of Third Party Information” was marked as Exhibit 4 during the examination of the Commissioner’s representative.

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Confidential – Level A Reordered Summary of Third Party Information,
Confidential Motion Record of the Respondent, Tab 3

Confidential – Level B Reordered Summary of Third Party Information,
Confidential Motion Record of the Respondent, Tab 4

E. The Summaries Motion

24. Following receipt of the summaries, VAA brought a motion challenging the adequacy and accuracy of the summaries, noting that the summaries comprised thousands of snippets of information, provided in a jumbled manner, wholly divorced from context, in such a way as to render their content essentially meaningless and uninformative. In support of its motion, VAA provided certain examples of the summaries' shortcomings, including the following:

- (a) they contained multiple pieces of inconsistent or contradictory information on the same topic, with each piece of information being attributed to an identically described source and with no indication being given as to whether any of the pieces of information were provided by the same source and, if so, which pieces were provided by one source and which by another; and
- (b) within any given section of the summaries, multiple pieces of information on the same topic were scattered across multiple pages, intermixed with hundreds of other pieces of information on different topics.

25. The Commissioner opposed the motion, in part on the basis that there was no need to amend the summaries, because any questions relating to their content could be asked by VAA on discovery. The Commissioner's Memorandum of Fact and Law stated:

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VAA has not yet examined a representative of the Commissioner for discovery, during which discoveries it could ask the questions that it now poses. [emphasis added]

Memorandum of Fact and Law of the Commissioner of Competition to the Respondent's Motion Challenging Adequacy and Accuracy of Summaries, May 24, 2017 at para. 43, Public Motion Record of the Respondent, Tab 8, p. 90

26. VAA's motion was dismissed by Reasons for Order and Order of Phelan J. In dismissing the motion, Phelan J. accepted the Commissioner's argument that the greater detail sought by VAA on the motion need not be provided prior to discovery:

It is not necessary at this stage to disclose whose views are reflected in the Summaries with any greater degree of certainty than has already been disclosed. Further, it is not important at this stage to assess the weight or importance of the views or opinions included in the Summaries – despite VAA's claim that it needs to do so prior to discovery. [emphasis added]

The Commissioner of Competition v. Vancouver Airport Authority, 2017 Comp. Trib. 8 at para. 17, Book of Authorities of the Respondent, Tab 2

27. The case is now post-discovery and the lack of information available to VAA needs to be addressed.

F. Discovery of the Commissioner's Representative

28. On August 23 and 24, 2017, VAA conducted its examination for discovery of the Commissioner's representative, Kevin Rushton. At the examination, a large number of proper and relevant questions were refused or taken under advisement. These questions are contained in three charts contained in Schedule "A" hereto.

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29. On September 22, 2017, the Commissioner delivered his answers to questions that were refused, taken under advisement, or undertaken to be answered at the examination of Mr. Rushton. Many of the questions refused and taken under advisement remain outstanding.

PART II – SUBMISSIONS

A. General Principles Governing Examinations for Discovery

30. The purpose of discovery is to obtain admissions to facilitate proof of all the matters which are at issue between the parties, and to allow the parties to inform themselves prior to trial of the nature of the other party's positions so as to define the issues.

Apotex Inc. v. Wellcome Foundation Ltd., 2007 FC 236 at para. 17, Book of Authorities of the Respondent, Tab 3

Canada v. Lehigh Cement Ltd., 2011 FCA 120 at para. 30, Book of Authorities of the Respondent, Tab 4

31. In determining the propriety of a particular question posed at an examination for discovery, the test is whether it is reasonable to conclude that the answer to the question might fairly lead to a train of inquiry that might either advance the party's case or damage that of its opponent. Such questions may seek to elicit admissions as to relevant facts, information about the existence of relevant documents, or seek production of relevant documents that have not been produced.

Canada v. Lehigh Cement Ltd., 2011 FCA 120 at para. 34, Book of Authorities of the Respondent, Tab 4

Bristol-Myers Squibb Co. v. Apotex Inc., 2007 FCA 379 at para. 30, Book of Authorities of the Respondent, Tab 5

Merck & Co. v. Apotex Inc., 2003 FCA 438 at para. 10, Book of Authorities of the Respondent, Tab 6

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32. In determining whether a question should be answered, a generous and flexible standard of relevance is applied. If the question may fairly lead the examining party to a train of inquiry which may directly or indirectly advance its case, or damage that of its adversary, it is a proper question for discovery and, as a result, must be answered:

It is fair to say, therefore, that the Court will apply a generous and flexible standard of relevance in determining whether a question should be answered. A fair amount of latitude will be allowed on discovery provided that a question is relevant to issues raised by the pleadings. The standard of relevance on discovery is lower than at trial and doubt as to the propriety of the question will be resolved in favour of disclosure.

Apotex Inc. v. Sanofi-Aventis Canada Inc., 2011 FC 52 at para. 19, Book of Authorities of the Respondent, Tab 7

Monit International Inc. v. Canada (1999), 175 FTR 258 at para. 10 (FCTD), Book of Authorities of the Respondent, Tab 8

B. Unique Considerations Arising in this Matter

33. In addition to these basic principles of discovery, the context in which this motion arises ought also to be considered. VAA has received over 13,000 productions from the Commissioner, as well as over 200 pages of Third Party Summaries containing thousands of entries that are devoid of context. VAA has made best efforts to obtain as much information from the Commissioner as possible so as to understand his position and the case to be met (as described above), but in view of the number, nature and scope of the refusals by the Commissioner on discovery, VAA remains unable to assess the Commissioner's case and the facts that underlie it.

34. The Commissioner refused the bulk of questions asked during the examination of Mr. Rushton and provided very little helpful information. Without the information sought on this

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motion to compel, VAA will not know the case it has to meet until it receives the Commissioner's witness statements on November 15, 2017.

35. VAA's materials are due a mere 30 days thereafter. This is a very short period in which to learn of the Commissioner's position and knowledge, re-review over 13,000 productions of the Commissioner and re-review VAA's own productions, determine how best to respond to the Commissioner's case, and draft submissions. In the interests of basic procedural fairness and important normative standards, VAA ought to be provided with the information requested on this motion, all of which is properly sought at this stage in the proceeding.

36. Further submissions relating to the specific questions at issue are set out in Schedule "A" to this Memorandum of Fact and Law. Schedule "A" contains three sections, each including a chart: (A) questions regarding facts known to the Commissioner; (B) questions pertaining to the Third Party Summaries; and (C) miscellaneous questions.

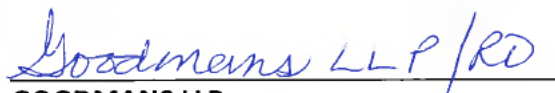
PART III– ORDER SOUGHT

37. In light of the foregoing, and for the reasons set out in Schedule 'A' hereto, VAA seeks:

- (a) an Order requiring the Commissioner to answer the refusals set out in Schedule "A" within fifteen (15) days;
- (b) VAA's costs of this motion; and
- (c) such further and other relief as the Tribunal deems just.

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DATED at Toronto, Ontario this 29th day of September, 2017


GOODMANS LLP

Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Michael Koch
Tel: (416) 597-5156
Fax: (416) 979-1234

Julie Rosenthal
Tel: (416) 597-4259

Rebecca Olscher
Tel: (416) 849-6984

Counsel for Vancouver Airport Authority

PART IV – LIST OF AUTHORITIES AND STATUTES REFERRED TO

Jurisprudence	
1	<i>The Commissioner of Competition v. Vancouver Airport Authority</i> , 2017 Comp Trib 6
2	<i>The Commissioner of Competition v. Vancouver Airport Authority</i> , 2017 Comp Trib 8
3	<i>Apotex Inc. v. Wellcome Foundation Ltd.</i> , 2007 FC 236
4	<i>Canada v. Lehigh Cement Ltd.</i> , 2011 FCA 120
5	<i>Bristol-Myers Squibb Co. v. Apotex Inc.</i> , 2007 FCA 379
6	<i>Merck & Co. v. Apotex Inc.</i> , 2003 FCA 438
7	<i>Apotex Inc. v. Sanofi-Aventis Canada Inc.</i> , 2011 FC 52
8	<i>Monit International Inc. v. Canada</i> (1999), 175 FTR 258 (FCTD)
9	<i>Can-Air Services Ltd. v. British Aviation Insurance Co. Ltd.</i> (1988), 91 AR 258 (ABCA)
10	<i>Montana Band v. R.</i> , 1999 CarswellNat 1290 (FCTD)
11	<i>Ferguson v. Arctic Transportation Ltd.</i> , [1995] FCJ No 1061 (TD)
12	<i>Kun Shoulder Rest Inc. v. Joseph Kun Violin & Bow Maker Inc.</i> , [1997] FCJ No 1386 (TD)
13	<i>Taylor v. Canada</i> , [1992] 1 FC 316 (TD)
14	<i>Sandia Mountain Holdings v. R.</i> , 2005 TCC 65
15	<i>Rule-Bilt Ltd. v. Shenkman Corporation Ltd. et al.</i> (1977), 18 OR (2d) 276 (ONSC)
16	<i>International Minerals & Chemical Corp. (Canada) Ltd. v. Commonwealth Insurance Co.</i> , 1991 CarswellSask 129 (SKQB)
17	<i>Canada (Commissioner of Competition) v. Sears Canada Inc.</i> , 2003 Comp Trib 19
18	<i>Canada (Commissioner of Competition) v. United Grain Growers Ltd.</i> , 2002 Comp Trib 35
19	<i>Commissioner of Competition v. Direct Energy Marketing Limited</i> , 2014 Comp Trib 17
20	<i>Six Nations of the Grand River Band v. Canada (Attorney General)</i> (2000), 48 OR (3d) 377 (Div Ct)
Statutes	
21	<i>Competition Tribunal Rules</i> , SOR/2008-141, s. 36, 60

SCHEDULE 'A'

A. Category A – Facts Known to the Commissioner

38. During discovery, Mr. Rushton was asked to advise as to all facts that the Commissioner knows relating to specific allegations that have been made against the VAA in this proceeding. All such questions were improperly refused. As is discussed below, the case law clearly establishes that such questions are proper and should be answered. A chart of those questions identified as “Category A Chart” is set out below, following the written submissions.

(i) Courts have recognized that questions regarding “all facts known” are proper

39. Questions that seek to elicit the facts known by the party being examined with respect to a specific allegation are proper. As explained in the oft-cited decision of the Alberta Court of Appeal in *Can-Air Services Ltd. v. British Aviation Insurance Co. Ltd.*:

An examining lawyer could properly say, “Paragraph 4(b) of your Statement of Claim alleges that the driver was impaired by alcohol at the time of the collision. Tell me all the facts about that impairment which you know or must properly inform yourself of”. There both the pleading and the question are factual, so the question is proper.

Can-Air Services Ltd. v. British Aviation Insurance Co. Ltd. (1988), 91 AR 258 at para. 19 (ABCA), Book of Authorities of the Respondent, Tab 9

40. That approach has been repeatedly and consistently adopted by the Federal Court. For example, in *Montana Band v. R.*, Hugessen J. stated as follows:

While it is not proper to ask a witness what evidence he or she has to support an allegation, it seems to me to be quite a different thing to ask

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what facts are known to the party being discovered which underlie a particular allegation in the pleadings.

Montana Band v. R., 1999 CarswellNat 1290 at para. 27 (FCTD), Book of Authorities of the Respondent, Tab 10

See also *Ferguson v. Arctic Transportation Ltd.*, [1995] FCJ No 1061 at para. 15 (TD), Book of Authorities of the Respondent, Tab 11

Kun Shoulder Rest Inc. v. Joseph Kun Violin & Bow Maker Inc., [1997] FCJ No 1386 at para. 16 (TD), Book of Authorities of the Respondent, Tab 12

Taylor v. Canada, [1992] 1 FC 316 at para. 15 (TD), Book of Authorities of the Respondent, Tab 13

41. This same approach has been adopted by the Tax Court of Canada. Thus, in *Sandia Mountain Holdings v. R.*, the Court stated:

Justice Hugessen made a distinction in *Montana* between improperly asking what evidence a witness has to support an allegation, and properly asking what facts were within the witness's knowledge to underlie a particular allegation. This is a fine distinction. One approach goes to getting the witness to determine what proof is required, which would not be proper. The other approach of asking for facts underlying an allegation is limited solely to fact-gathering and is proper.

Sandia Mount Holdings v. R., 2005 TCC 65 at para. 19, Book of Authorities of the Respondent, Tab 14

42. Such questions are "compendious" in nature; they are asked to elicit the essential facts (both helpful and hurtful) known to the examinee in a comprehensive yet concise manner.

Can-Air Services Ltd. v. British Aviation Insurance Co. Ltd. (1988), 91 AR 258 at para. 19 (ABCA), Book of Authorities of the Respondent, Tab 9

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(ii) The Commissioner Improperly Refused to Answer Questions Seeking All Facts Known to the Commissioner Relating to Allegations of Fact

43. Despite the clear case law, discussed above, on the examination for discovery of the Commissioner's representatives, questions that sought to elicit facts known to the Commissioner relating to various factual allegations were refused in one of the two following manners:

- (a) either the witness simply referred the examiner to the entirety of the Third Party Summaries and/or the productions, saying that the facts known to the Commissioner were found within those documents; or
- (b) the witness advised as to certain facts, but then advised that there were "probably" other facts, which other facts were to be found at an unspecified portion of the Third Party Summaries and/or the productions. Requests that the Commissioner advise as to the details of such "probable" additional facts were refused.

44. Thus, for example, the Commissioner's representative was asked to "provide all facts that the Commissioner knows that relate to the allegation in paragraph 14 of the Application that 'the way in which In-flight Catering is provided in Canada has changed in recent years, as airlines have sought to reduce costs, including the cost of In-Flight Catering'. The Commissioner has refused to answer that question, stating simply as follows:

The Commissioner has produced . . .all relevant, non-privileged information in the Commissioner's possession, power and control and

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has further produced to VAA summaries of relevant third party information learned by the Commissioner from third parties in the course of the Competition Bureau's review of this matter.

See Transcript of the Examination of Kevin Rushton, pp. 75:12-76:22,
Confidential Motion Record of the Respondent, Tab 2, pp. 36-37

45. As a further example, the Commissioner's representative was asked to advise as to the facts known to the Commissioner relating to his allegation that VAA "has considerable latitude to determine or influence price and non-price dimensions of competition in the market for the supply of galley handling" at YVR. In response, the witness provided a couple of facts that came to mind "but there could be others" - i.e., that there "could be" other additional facts within the Commissioner's knowledge relating to this particular factual issue. When asked to advise as to whether there were such additional facts and, if so, to provide that information, the Commissioner refused to do so.

See Transcript of the Examination of Kevin Rushton, pp. 253:9-255:15,
Confidential Motion Record of the Respondent, Tab 2, p. 117

46. Such refusals are always improper. They are particularly egregious in the present case, given the voluminous nature of the documentary production made by the Commissioner and the voluminous (and difficult to understand) nature of the Third Party Summaries. The Commissioner has produced a total of 13,182 documents so far in this proceeding, with a further fresh production scheduled for September 29, 2017. The Third Party Summaries run in excess of 200 pages and contain thousands of pieces of information provided without context and not organized by source. This necessitates more fulsome explanation on discovery.

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47. The information sought could be provided on a Confidential Level A basis.

48. Thus, when the Commissioner's representative was asked to advise as to facts in the Commissioner's knowledge, and when the representative merely advised that all facts known to the Commissioner were contained in the productions and/or the Third Party Summaries, VAA asked the Commissioner's representative to identify the specific productions or specific section of the Summaries that contained the relevant facts. Such requests were refused.

49. The Courts have held that, where documentary production is voluminous, a party may be required to identify which documents contained in its productions are related to or support particular allegations. For example, in *Rule-Bilt Ltd. v. Shenkman Corporation Ltd. et al* ("*Rule-Bilt*"), where 7440 documents had been produced, the Court ordered the plaintiff to identify productions relating to various issues in the proceeding:

The plaintiff is far more familiar with its productions and why they were produced and their significance than the defendant. In order for the defendant to accomplish the various purposes of discovery, as above set out, it must have the plaintiff select out, isolate and identify all its productions relating to the various issues in this law suit, the allegations in the pleadings and the various events in the complex history of the dealings between the plaintiff and the defendant.

Rule-Bilt Ltd. v. Shenkman Corporation Ltd. et al. (1977), 18 OR (2d) 276 at paras. 27-28 (OSC) , Book of Authorities of the Respondent, Tab 15

Quoted with approval in *Taylor v. Canada*, [1992] 1 FC 316 at paras. 16-18 (TD), Book of Authorities of the Respondent, Tab 13

And see *International Minerals & Chemical Corp. (Canada) Ltd. v. Commonwealth Insurance Co.*, 1991 CarswellSask 129 at paras. 6-10 (SKQB), Book of Authorities of the Respondent, Tab 16

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50. That reasoning applies with equal force in the present case. The Commissioner is obviously infinitely more familiar with his own productions, why they were produced and their significance than is VAA. The same holds true for the Third Party Summaries, which were prepared by the Commissioner's staff after conducting a wide range of interviews and after compelling production of documentary evidence from third parties. The Summaries contain an aggregation of all information gathered over the course of those interviews, as well as the information contained in over 1200 documents that the Commissioner has refused to produce on the basis of public interest privilege. To the extent that the questions asked require the Commissioner to identify the specific productions or the specific section of the Summaries that contain the relevant information, such questions are wholly appropriate and should be answered.

(iii) Witness statements

51. To some of the questions in the chart below, the Commissioner (through Mr. Rushton and counsel during the examination) took the position that the facts known by the Commissioner with respect to a particular allegation are as reflected in the Third Party Summaries, the productions, and as will be reflected in the witness statements to be delivered by the Commissioner. For example, during the examination Mr. Rushton stated "And I think as my counsel had indicated earlier, there may also be witness statements that are produced at a later point in time that would have information relevant to these points."

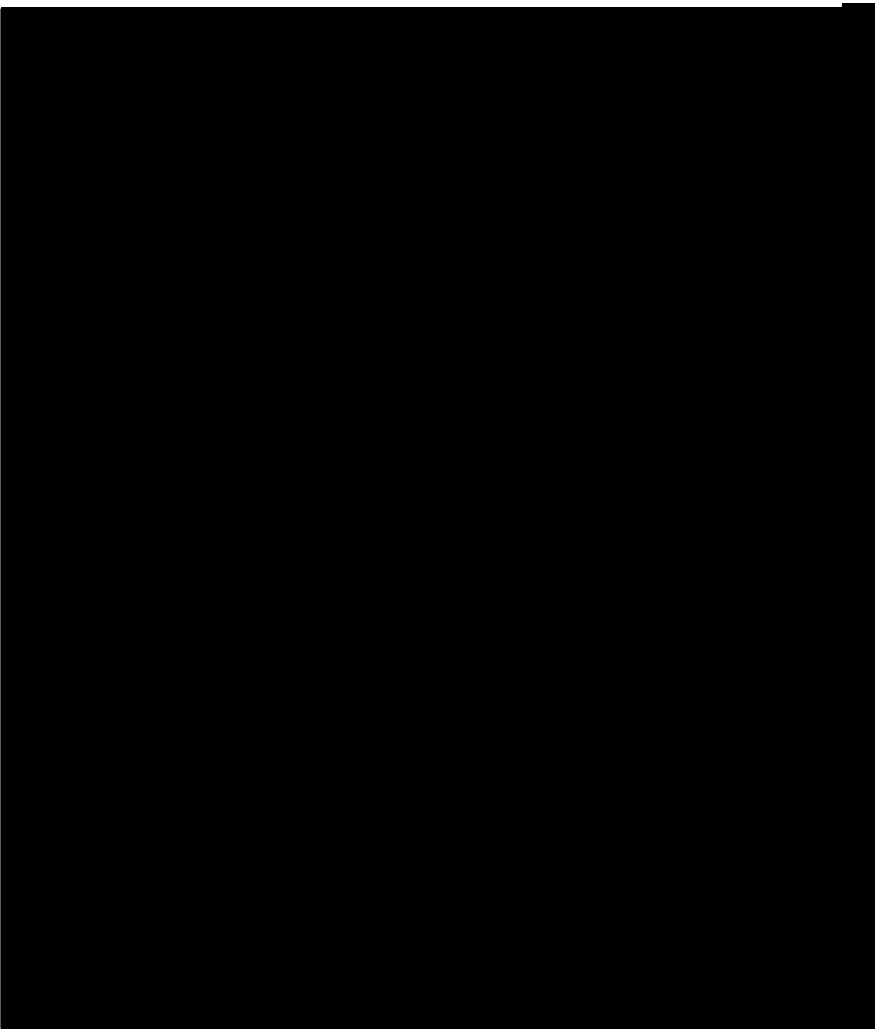

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52. Respectfully, this position is untenable. The Commissioner cannot shield information that he has today, by stating that it will be provided in witness statements, which are due on November 15, 2017. There should be no facts known to the Commissioner today, or at any time prior to November 15, 2017, that are provided to VAA for the first time by way of witness statements. VAA is entitled to this information *now*.

(iv) Chart of Category A questions, with further written representations

53. See chart on next page.

Category A Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
21	Pg. 68-71, Q. 120-125	Provide all facts that the Commissioner knows that relate to the market definition that does not include catering as alleged in paragraph 11 of the Commissioner's Application, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.		See general position above.
24	Pg. 76-77, Q. 133	Provide all facts that the Commissioner knows that relate to the allegation in		See general position above.

Category A Chart

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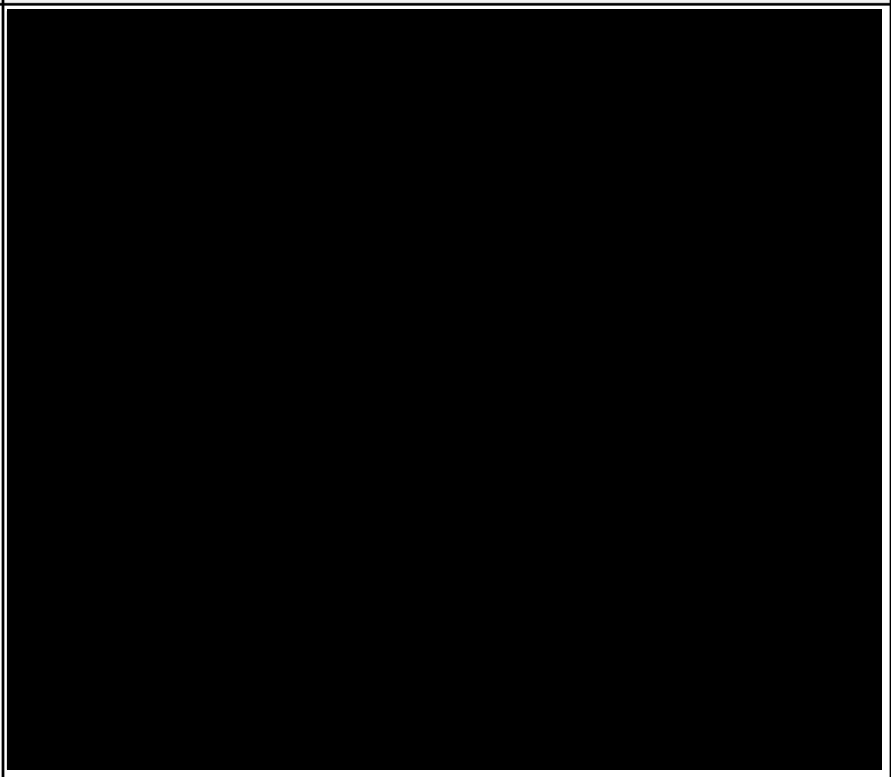
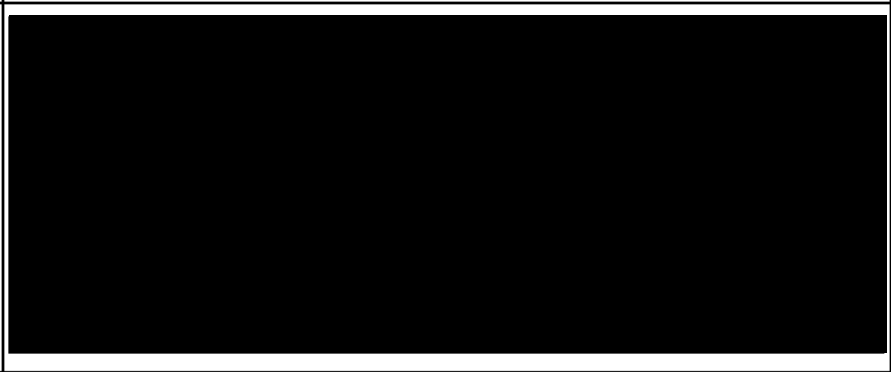
ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		<p>paragraph 14 of the Application, "The way in which In-flight Catering is provided in Canada has changed in recent years, as airlines have sought to reduce costs, including the cost of In-flight Catering", including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p>		
25	Pg. 86-88, Q. 150	<p>Provide all facts that the Commissioner knows that relate to geographic market definition, being characterized solely as Vancouver International Airport, as alleged in paragraph 11 of</p>		See general position above.

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		the Application, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.		
30	Pg. 101, Q. 177	Provide all facts that the Commissioner knows that relate to WestJet's decision to cease self-supply and contract with a supplier of in-flight catering at Vancouver International Airport, including without limitation references to bullets in the Reordered Summary		See general position above. WestJet's decision to cease self-supply is directly related to the issue of the feasibility of self-supply. The issue of the feasibility of self-supply is brought into issue by the Commissioner's Notice of

Category A Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		<p>of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p>		<p>Application, which states: "Self-supply, including double catering, is not a feasible or preferable substitute for In-flight Catering for most airlines in Canada...." (Notice of Application, para. 17, Public Motion Record of the Respondent, Tab 5, p. 27).</p>
47	Pg. 186, Q. 332	<p>Provide all facts that the Commissioner knows that relate to (1) the factors airlines consider when deciding whether to double cater or purchase galley handling services provided by a third party; and (2) the growth or decline of double catering at airports. For each, include references to bullets in the Reordered Summary of Third</p>		<p>See general position above.</p> <p>This question is directly related to the issue of the feasibility of double catering. The issue of the feasibility of double catering is brought into issue by the Commissioner's Notice of Application, which states: "Self-supply, including double catering, is not a feasible or preferable substitute for In-</p>

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.		flight Catering for most airlines in Canada...." (Notice of Application, para. 17, Public Motion Record of the Respondent, Tab 5, p. 27).
48	Pg. 203, Q. 361	Provide all facts that the Commissioner knows that relate to whether Vancouver International Airport competes with other airports to attract airlines or flights, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the		See general position above. VAA has asserted a public-interest mandate as well as a valid business justification for refusing to grant licences to Newrest and Strategic Aviation. Part of this public-interest mandate and business justification is ensuring YVR is able to compete with similarly situated airports and attract airlines (Response of Vancouver Airport Authority, paras. 1-2 and 79, Public Motion

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		documentary productions.		Record of the Respondent, Tab 6, pp. 43-44 and 60). Accordingly, the Commissioner's knowledge with respect to whether YVR competes with other airports is relevant to matters at issue in this proceeding.
49	Pg. 204-205, Q. 363-366	Provide all facts that the Commissioner knows that relate to which factors are considered by airlines in deciding whether to operate at a particular airport, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.		See general position above. VAA has asserted a public-interest mandate as well as a valid business justification for refusing to grant licences to Newrest and Strategic Aviation. Part of this public-interest mandate and business justification is ensuring YVR is able to compete with similarly situated airports and attract airlines (Response of Vancouver Airport Authority, paras. 1-2 and 79, Public Motion Record of the Respondent, Tab 6, pp. 43-44 and 60). Accordingly, the Commissioner's

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
				knowledge with respect to the factors considered by airlines in deciding whether to operate at a particular airport is relevant to matters at issue in this proceeding.
50	Pg. 225-229, Q. 411-417	Provide all facts that the Commissioner knows that relate to Vancouver Airport Authority's general ability to dictate the terms upon which it sells or supplies access to the airside at Vancouver International Airport for the supply of galley handling, as alleged at paragraph 32 of the Application, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary		See general position above.

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		productions.		
53	Pg. 242-243, Q. 447-448	Provide all facts that the Commissioner knows that relate to how the land rents charged to in-flight catering firms by Vancouver Airport Authority compare to the rents charged by other North American airports to on-airport in-flight catering firms, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.		See general position above. VAA has asserted a public-interest mandate as well as a valid business justification for refusing to grant licences to Newrest and Strategic Aviation. Part of this public-interest mandate and business justification is ensuring YVR is able to compete with similarly situated airports (Response of Vancouver Airport Authority, paras. 1-2 and 79, Public Motion Record of the Respondent, Tab 6, pp. 43-44 and 60). Accordingly, the Commissioner's knowledge with respect to how VAA's land rents compare to those of other North American airports is relevant to VAA's assertion that it competes with other

Category A Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
				<p>airports in attracting airlines (by maintaining competitive services required by such airlines).</p> <p>Further, the Commissioner alleges that VAA has a competitive interest in excluding competition partly on the basis that it collects rent from on-airport caterers (Notice of Application, para. 46, Public Motion Record of the Respondent, Tab 5, p. 34). To the extent VAA's land rents are less than the land rents typically charged, it undermines a suggestion that VAA has a viable competitive interest of any significance.</p> <p>Further, the Commissioner alleges that VAA is generally able to dictate the terms upon which it sells or supplies access to the Airport airside for the supply of Galley Handling (Notice of Application, para. 32, Public Motion Record of the Respondent, Tab 5, p. 30). To the extent VAA's land rents are less than the land rents typically charged, this allegation is undermined.</p>
56	Pg. 255, Q. 464	Provide all facts that the Commissioner knows that relate to the Commissioner's allegation that Vancouver Airport Authority has		See general position above.

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		<p>considerable latitude to determine or influence price and non-price dimensions of competition in the market for the supply of galley handling at Vancouver International Airport, as alleged at paragraph 35 in the Application, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p>		
57	Pg. 257-259, Q. 470-471	<p>Provide all facts that the Commissioner knows that relate to whether Vancouver Airport Authority participates in the market for galley handling at Vancouver International Airport, other than sharing in the revenue as alleged at paragraph 47 of</p>		See general position above.

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		the Application, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.		
58	Pg. 262-265, Q. 477-480	Provide all facts that the Commissioner knows that support the allegation at paragraph 45 of the Application that Vancouver Airport Authority has a competitive interest in the market for the supply of galley handling at Vancouver International Airport, including without limitation references to bullets in the Reordered Summary		See general position above.

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		<p>of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p> <p>Furthermore, identify all of the records referred to by Mr. Rushton at page 262 of the examination transcript.</p>		
60	Pg. 274-277, Q. 493-496	Provide all facts that the Commissioner knows that relate to prices that airlines pay for in-flight catering to various competitors at airports across Canada, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-		<p>See general position above.</p> <p>The Commissioner alleges that VAA's alleged conduct insulates CLS and Gate Gourmet from new sources of competition, enabling those firms to exercise a materially greater degree of market power, through materially higher prices (Notice of</p>

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		Level B, as well as references to specific records in the documentary productions.		<p>Application, para. 54, Public Motion Record of the Respondent, Tab 5, p. 36). The Commissioner further alleges that, but for VAA's alleged anti-competitive acts, the market for the supply of Galley Handling would be more competitive including by way of materially lower prices (Notice of Application, para. 57, Public Motion Record of the Respondent, Tab 5, p. 36).</p> <p>Accordingly, the Commissioner's knowledge of the facts regarding prices that airlines pay for in-flight catering at airports across Canada is relevant to matters at issue.</p>
61	Pg. 280, Line 22 to Pg. 281, Line 22	Identify the record (and references in the record) referred to by Mr. Rushton at page 279 of the examination transcript regarding an exchange between [REDACTED] and Vancouver Airport Authority whereby [REDACTED] indicated it would [REDACTED] if VAA allowed new entry of in-flight catering firms at Vancouver		See general position above.

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		<p>International Airport.</p> <p>If there are any further facts beyond those arising from the record referred to by Mr. Rushton at page 279 of the examination transcript, provide all facts that the Commissioner knows that relate to rent payments that support the contention that VAA has a competitive interest in the market for the supply of Galley Handling as stated in paragraph 46 of the Application, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p>		
62	Pg. 278-281, Q. 501-507	Provide all facts that the Commissioner knows that support the contention in paragraphs 45 to 47 of the Application that Vancouver Airport Authority has a competitive interest in the market for the supply of galley handling at Vancouver International Airport, including without limitation references		See general position above.

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.		
64	Pg. 287-289, Q. 515-519	Provide all facts that the Commissioner knows that relate to whether in-flight catering firms and galley handling firms operate on- or off-airport at North American airports, other than Vancouver International Airport, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-		See general position above. The Commissioner alleges that the VAA's alleged tying of airside access to land leasing is a practice of anti-competitive acts (Notice of Application, paras. 42-44, Public Motion Record of the Respondent, Tab 5, pp. 32-33). Accordingly, the extent to which firms at other North American airports operate on-airport or off-airport is

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		Level B, as well as references to specific records in the documentary productions.		relevant to matters at issue in this proceeding.
66	Pg. 291-296, Q. 523-527	Provide all facts that the Commissioner knows that relate to whether the concession fees charged by Vancouver Airport Authority are constrained by Vancouver Airport Authority's competition with other airports, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary		See general position above. VAA has asserted a public-interest mandate as well as a valid business justification for refusing to grant licences to Newrest and Strategic Aviation. Part of this public-interest mandate and business justification is ensuring YVR is able to compete with similarly situated airports and attract airlines (Response of Vancouver Airport Authority, paras. 1-2 and 79, Public Motion Record of the Respondent, Tab 5, pp. 43-44)

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		productions.		<p>and 60). Accordingly, the Commissioner's knowledge with respect to concession fees charged by VAA are constrained by competition with other airports is at issue in this proceeding.</p> <p>Further, the Commissioner alleges that VAA is generally able to dictate the terms upon which it sells or supplies access to the Airport airside for the supply of Galley Handling (Notice of Application, para. 32, Public Motion Record of the Respondent, Tab 5, p. 30). To the extent concession fees charged by VAA are constrained, this allegation is undermined.</p>
67	Pg. 299-300, Q. 533-536	Provide all facts that the Commissioner knows that relate to the innovation, quality, service levels and more efficient business models that new entrants would have brought in this case that were prevented as a result of VAA excluding those new entrants, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary		<p>See general position above.</p> <p>The Commissioner alleges that VAA's alleged conduct insulates CLS and Gate Gourmet from new sources of competition, enabling those firms to exercise a materially greater degree of market power, through materially lower levels of service quality (Notice of Application, para. 54, Public Motion Record of the Respondent, Tab 5, p. 36). The Commissioner further alleges that, but for VAA's alleged anti-competitive acts, the market for the supply of Galley Handling would be more</p>

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		productions.		<p>competitive including through enhanced innovation and more efficient business models (Notice of Application, para. 57, Public Motion Record of the Respondent, Tab 5, p. 36).</p> <p>Accordingly, the Commissioner's knowledge of the facts regarding innovation, service levels and more efficient business models that airlines would have brought is relevant to matters at issue.</p>
71	Pg. 337-339, Q. 606-610	Provide all facts that the Commissioner knows that relate to the allegation at paragraph 37 of the Application that "the businesses of Gate Gourmet and CLS at the Airport are profitable", including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.		See general position above.

Category A Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
72-73	Pg. 349-351, Q. 629-632	Provide all facts that the Commissioner knows that relate to what transpired at any meeting between Newrest or Strategic Aviation and Vancouver Airport Authority, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.		<p>See general position above.</p> <p>To the extent the Commissioner asserts public-interest privilege over the information regarding meetings between VAA and Newrest or Strategic Aviation, the Commissioner bears the onus of establishing that the information is privileged or falls with a class of privilege. The Commissioner has not done so.</p> <p>VAA is asking a factual question as to the Commissioner's knowledge with respect to meetings that VAA itself attended. VAA is not seeking the identity of the source of the information. Public-interest privilege is simply not engaged by this question.</p> <p>Alternatively, even if public-interest privilege were to apply to this information,</p>

Category A Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
			<div style="background-color: black; width: 100%; height: 100%;"></div>	<p>compelling circumstances outweigh the public-interest element of the privilege.</p> <p>Compelling circumstances can be, and have been, relied on to override the exercise of public-interest privilege when the compelling circumstances outweigh the public-interest element (<i>Canada (Commissioner of Competition) v. Sears Canada Inc.</i>, 2003 Comp. Trib. 19 at para. 40, Book of Authorities of the Respondent, Tab 17).</p> <p>The Commissioner has alleged that VAA refused requests from Newrest and Strategic Aviation for authorization to access the airside to provide in-flight catering at YVR (Notice of Application, para. 38, Public Motion Record of the Respondent, Tab 5, pp. 31-32). Whether VAA had, or demonstrated through its conduct, an anti-competitive purpose in deciding not to grant licenses to Newrest, as well as Strategic Aviation, is central to the Commissioner's application and VAA's defence. Without information regarding the Commissioner's knowledge of the facts underlying this critical issue, VAA is unable to know the case to be met and is unable to properly inform itself of the</p>

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
				<p>Commissioner's position in this proceeding.</p> <p>Moreover, the rationale underlying public-interest privilege does not apply with respect to the information sought in this question. First, VAA is not asking the Commissioner to provide the identity of the entity that provided the information. Second, VAA itself was at the meetings at issue and knows what transpired. Accordingly, the rationale underlying public-interest privilege, namely to protect informants from fear of reprisal and encourage informants to be forthcoming and candid with information to the Bureau, is not undermined.</p> <p>The above arguments are strengthened by the fact that the Commissioner will almost certainly have to disclose the facts with respect to the meetings between Newrest and VAA, and Strategic and VAA, – which lie at the heart of his case against VAA – in witness statements due on November 15, 2017. Accordingly, the benefit of withholding this information until November 15, 2017 is not furtherance of the rationale underlying public-interest privilege (which VAA argues does not apply to this information in any event), it is</p>

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
				simply a strategic advantage gained by the Commissioner in shielding VAA from highly relevant information until as close to the date of trial as is possible.
74	Pg. 352-355, Q. 633-639	Provide all facts that the Commissioner knows that relate to the allegation at paragraph 40 of the Application that Vancouver Airport Authority has "consistently and purposely intended to exclude new-entrant firms from the market for the supply of Galley Handling at the Airport", including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.		See general position above.

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
77	Pg. 359-362, Q. 649-653	Provide all facts that the Commissioner knows that relate to the allegation in paragraph 36 of the Application, "the purpose and effect of VAA's Practice is an intended negative effect on competitors that is exclusionary", including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.		See general position above.



Category A Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
78	Pg. 364-365, Q. 656-660	Provide all facts, excluding lease and licence agreements (with VAA and existing caterers at YVR) as well as excluding correspondence or discussions with potential new entrants, that the Commissioner knows that relate to the allegation in paragraph 42 of the Application that access (to airside for the supply of galley handling at YVR) is tied to leasing land or having a kitchen located on the airport, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.	<p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED] improper and, in any event, disproportionately burdensome.]</p>	See general position above.
81	Pg. 370, Q. 669	Provide all facts that the Commissioner knows suggesting that the market	[REDACTED]	See general position above.

Category A Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		<p>power of VAA in relation to galley handling is affected or would change as a result of VAA's tying of airside access to leasing land at the Airport as alleged at paragraph 29 to 33 of the Application, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p>		
82	Pg. 373-374, Q. 677-679	<p>Provide all facts that the Commissioner knows that relate to the actual events of exclusion alleged by the Commissioner at paragraphs 1 and 38 of the Application (i.e. VAA's refusal of</p>		See general position above.

Category A Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		<p>new entrant firms) and when in 2014 such events took place, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p>		
83	Pg. 384-385, Q. 699-700	<p>Provide all facts that the Commissioner knows that relate to Mr. Eccott's reasons for not granting a licence to Newrest prior to Mr. Richmond's involvement, including without limitation references to bullets in the Reordered Summary of Third Party</p>		<p>See general position above.</p> <p>This question is relevant to the Commissioner's allegation that VAA refused requests from new-entrant firms (including Newrest) for authorization to access the airside to provide in-flight catering at YVR,</p>

Category A Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.		as set out in paragraphs 1 and 38 of the Notice of Application (Notice of Application, paras. 1 and 38, Public Motion Record of the Respondent, Tab 5, pp. 23 and 31-32).

Category A Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
84	Pg. 386-388, Q. 703-705	Provide all facts that the Commissioner knows that relate to whether the reasons expressed in Mr. Richmond's letter to Newrest on 12 May 2014 are or are not the actual reasons for which VAA declined to grant Newrest a licence, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.		See general position above. This question is relevant to the Commissioner's allegation that VAA refused requests from new-entrant firms (including Newrest) for authorization to access the airside to provide in-flight catering at YVR, as set out in paragraphs 1 and 38 of the Notice of Application (Notice of Application, paras. 1 and 38, Public Motion Record of the Respondent, Tab 5, pp. 23 and 31-32).

Category A Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
86	Pg. 388-395, Q. 707-719	Provide all facts that the Commissioner knows that relate to (1) whether [REDACTED] is the only airport, other than YVR, in Canada of which the Commissioner is aware that limits the number of galley handlers (2) whether there are other airports beyond Canada that limit the number of galley handlers in operation at those airports, and (3) the number of galley handlers at Canadian airports other than YVR, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.		See general position above. This question is relevant to the Commissioner's allegation that VAA refused requests from new-entrant firms (including Newrest) for authorization to access the airside to provide in-flight catering at YVR, as set out in paragraphs 1 and 38 of the Notice of Application (Notice of Application, paras. 1 and 38, Public Motion Record of the Respondent, Tab 5, pp. 23 and 31-32).

Category A Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
89	Pg. 409-410, Q. 751	<p>Indicate if the Commissioner agrees or disagrees that food is of particular importance to Asian airlines.</p> <p>If the Commissioner disagrees, provide all facts that the Commissioner knows that relate to the importance of food to Asian airlines, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p>		<p>With respect to the first part of this question, the purpose of discovery is to obtain admissions in order to facilitate proof of all the matters which are at issue between the parties, and to allow the parties to inform themselves prior to trial of the nature of the other party's positions so as to define the issues (<i>Apotex Inc. v. Wellcome Foundation Ltd.</i>, 2007 FC 236 at para. 17, Book of Authorities of the Respondent, Tab 3; <i>Canada v. Lehigh Cement Ltd.</i>, 2011 FCA 120 at para. 30, Book of Authorities of the Respondent, Tab 4). The Commissioner's position regarding whether food is of particular importance to Asian airlines is relevant to the matters at issue in this case. VAA has asserted a public-interest mandate as well as a valid business justification for refusing to grant licences to Newrest and Strategic Aviation. Part of this public-interest mandate and business justification is ensuring Asian airlines have access to the highest quality food (Response of Vancouver Airport</p>

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
				<p>Authority, paras. 16, 25 and 79, Public Motion Record of the Respondent, Tab 6, pp. 47, 50 and 60). As a result, the Commissioner's position regarding the importance of food to Asian airlines is relevant to matters at issue in this proceeding.</p> <p>With respect to the second part of this question, see the general position above.</p>
91	Pg. 424-426, Q. 761-763	<p>Provide the Commissioner's position regarding the importance of food to business class or first class passengers.</p> <p>Provide all facts that the Commissioner knows that relate to the importance of food to business class or first class passengers, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p>		<p>With respect to the first part of this question, the purpose of discovery is to obtain admissions in order to facilitate proof of all the matters which are in issue between the parties, and to allow the parties to inform themselves prior to trial of the nature of the other party's positions so as to define the issues (<i>Apotex Inc. v. Wellcome Foundation Ltd.</i>, 2007 FC 236 at para. 17, Book of Authorities of the Respondent, Tab 3; <i>Canada v. Lehigh Cement Ltd.</i>, 2011 FCA 120 at para. 30, Book of Authorities of the Respondent, Tab 4). The Commissioner's position regarding whether food is of importance to business and first class passengers is relevant to the matters at issue in this case. VAA has asserted a public-interest mandate as well</p>

Category A Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
				<p>as a valid business justification for refusing to grant licences to Newrest and Strategic Aviation. Part of this public-interest mandate and business justification is ensuring business and first class passengers have access to the highest quality food (Response of Vancouver Airport Authority, paras. 2-3 and 79, Public Motion Record of the Respondent, Tab 6, pp. 44-45 and 60). As a result, the Commissioner's position regarding the importance of food to business and first class passengers is relevant to matters at issue in this proceeding.</p> <p>With respect to the second part of this question, see the general position above.</p>
93	Pg. 430-432, Q. 777-779	<p>Indicate if the Commissioner accepts that flight delays can affect an airline's willingness to launch or offer routes to that airport.</p> <p>Provide all facts that the Commissioner knows that relate to the effect of flight delays at an airport on the willingness of airlines to launch or offer routes to that airport, including without limitation references to bullets in the</p>		<p>With respect to the first part of this question, the purpose of discovery is to obtain admissions in order to facilitate proof of all the matters which are in issue between the parties, and to allow the parties to inform themselves prior to trial of the nature of the other party's positions so as to define the issues (<i>Apotex Inc. v. Wellcome Foundation Ltd.</i>, 2007 FC 236 at para. 17, Book of Authorities of the Respondent, Tab 3; <i>Canada v. Lehigh</i></p>

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.		<p><i>Cement Ltd.</i>, 2011 FCA 120 at para. 30, Book of Authorities of the Respondent, Tab 4). The Commissioner's position regarding the impact of flight delays on airlines' willingness to operate at an airport is relevant to the matters at issue in this case. VAA has asserted a public-interest mandate as well as a valid business justification for refusing to grant licences to Newrest and Strategic Aviation. Part of this public-interest mandate and business justification is ensuring YVR is able to compete with similarly situated airports and attract airlines (Response of Vancouver Airport Authority, paras. 1-2 and 79, Public Motion Record of the Respondent, Tab 6, pp. 43-44 and 60). As a result, the Commissioner's position regarding the impact of flight delays on airlines' willingness to operate at an airport is directly to matters at issue in this proceeding.</p> <p>With respect to the second part of this question, see the general position above.</p>
96	Pg. 438-440, Q. 795-797	Provide all facts that the Commissioner knows that relate to the access issues raised by VAA as summarized in paragraph 13 of the Commissioner's		See general position above.

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		Reply, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.		
100	Pg. 448-454, Q. 814-824	Provide all facts that the Commissioner knows that relate to the impact at YVR of a reduction from two caterers to one, including without limitation references to bullets in the Reordered Summary of Third Party Information,		See general position above. VAA has asserted a public-interest mandate as well as a valid business justification for refusing to grant licences to Newrest and Strategic Aviation. Related to this public-

Category A Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.		interest mandate and business justification is VAA's concern that there was insufficient demand to justify the entry of additional firms providing Galley Handling services at YVR (Response of Vancouver Airport Authority, para. 73, Public Motion Record of the Respondent, Tab 6, p. 59). As a result, the Commissioner's position regarding the impact at YVR of a reduction from two caterers to one is relevant to matters at issue in this proceeding.
102	Pg. 456-458, Q. 831-834	Provide all facts that the Commissioner knows that relate to the ability of the existing galley handlers at YVR to service the demand at YVR and the capacity of those providers at YVR, including without limitation references to bullets in the Reordered Summary of Third Party Information,		See general position above. VAA has asserted a public-interest mandate as well as a valid business justification for refusing to grant licences to Newrest and Strategic Aviation. Related to this public-interest mandate and business justification is VAA's concern that there was insufficient

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.		demand to justify the entry of additional firms providing Galley Handling services at YVR (Response of Vancouver Airport Authority, para. 73, Public Motion Record of the Respondent, Tab 6, p. 59). As a result, the Commissioner's position regarding the ability of the existing galley handlers at YVR to service the demand at YVR is relevant to matters at issue in this proceeding.
103	Pg. 460-461, Q. 839-842	Provide all facts that the Commissioner knows that relate to why LSG Sky Chefs left YVR in 2003, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.		See general position above. VAA has asserted a public-interest mandate as well as a valid business justification for refusing to grant licences to Newrest and Strategic Aviation. Related to this public-interest mandate and business justification is VAA's concern that there was insufficient demand to justify the entry of additional firms providing Galley Handling services at

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
				<p>YVR (Response of Vancouver Airport Authority, para. 73, Public Motion Record of the Respondent, Tab 6, p. 59). Part of the source of that concern was that fact that LSG Sky Chefs left YVR in 2003 due to a lack of demand (Response of Vancouver Airport Authority, para. 47, Public Motion Record of the Respondent, Tab 6, p. 54). As a result, the Commissioner's knowledge of facts relating to why LSG Sky Chefs left YVR in 2003 is relevant to matters at issue in this proceeding.</p>
104	Pg. 465-467, Q. 853-856	Provide all facts that the Commissioner knows that relate to scale and scope economies in catering, scale and scope economies in galley handling and scale and scope economies that could cross over from catering to galley handling, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary		<p>See general position above.</p> <p>VAA has asserted a public-interest mandate as well as a valid business justification for refusing to grant licences to Newrest and Strategic Aviation. Related to this public-interest mandate and business justification is VAA's concern that there was insufficient demand to justify the entry of additional firms providing Galley Handling services at YVR (Response of Vancouver Airport Authority, para. 73, Public Motion Record</p>

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		productions.		of the Respondent, Tab 6, p. 59). Related to that concern is the fact that both economies of scale and scope could be sacrificed if additional entry of either full service or limited service flight kitchens were allowed at YVR. As a result, the Commissioner's knowledge of facts that relate to scale and scope economies in catering, scale and scope economies in galley handling and scale and scope economies that could cross over from catering to galley handling are relevant to matters at issue in this proceeding.
105	Pg. 468-469, Q. 858-860	Provide all facts that the Commissioner knows that relate to competition between Gate Gourmet and CLS for galley handling and catering services at YVR, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.		See general position above. The Commissioner asserts that VAA is protecting CLS and Gate Gourmet from competition at YVR (Notice of Application, Schedule A, para. 9, Public Motion Record of the Respondent, Tab 5, p. 25). It is VAA's position that Gate Gourmet and CLS compete with each other to meet the Catering and Galley Handling needs of airlines operating at YVR (Response of Vancouver Airport Authority, para. 30, Public Motion Record of the Respondent, Tab 6, p. 50). Accordingly, the competition

Category A Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
				<p>between Gate Gourmet and CLS for galley handling and catering services at YVR is at issue in this proceeding.</p>
106	Pg. 474-475, Q. 866-867	<p>Provide all facts that the Commissioner knows that relate to how prices for catering and galley handling at Vancouver International Airport compare to prices at airports where new entry is not limited, including without limitation references to bullets in the Reordered Summary of Third Party Information, Confidential-Level A and Confidential-Level B, as well as references to specific records in the documentary productions.</p>		<p>See general position above.</p> <p>The Commissioner alleges that VAA's alleged conduct insulates CLS and Gate Gourmet from new sources of competition, enabling those firms to exercise a materially greater degree of market power, through materially higher prices (Notice of Application, para. 54, Public Motion Record of the Respondent, Tab 5, p. 36). The Commissioner further alleges that, but for VAA's alleged anti-competitive acts, the market for the supply of Galley Handling would be more competitive including by way of materially lower prices (Notice of Application, para. 57, Public Motion Record</p>

Category A Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
				<p>of the Respondent, Tab 5, p. 36).</p> <p>Accordingly, the Commissioner's knowledge of the facts regarding how prices for catering and galley handling at YVR compare to prices at airports where new entry is not limited is relevant to matters at issue.</p>

B. Category B – Questions regarding the Third Party Summaries

54. During and following the examination for discovery of Mr. Rushton, the Commissioner refused to answer several questions pertaining to the Third Party Summaries. These questions are contained in the chart below. These questions are proper and should be ordered answered.

(i) The information sought is not privileged

55. To the extent the Commissioner asserts public-interest privilege over information, the Commissioner must establish that the information is in fact privileged or falls within a class of privilege. Instead, the Commissioner has made a bald assertion of public-interest privilege over the answers to many questions regarding the Third Party Summaries. The Commissioner has not addressed the scope of the public-interest privilege or how such information falls within that scope.

56. Public-interest privilege extends only in so far as is necessary to avoid revealing the source of the information gathered by the Commissioner.

The application of the public-interest privilege, in the discovery process, should be limited to refusing to disclose facts which the Commissioner has which would reveal the source of the information.

Canada (Commissioner of Competition) v. United Grain Growers Ltd., 2002
Comp. Trib. 35 at para. 93, Book of Authorities of the Respondent, Tab 18

57. The questions in the chart below do not elicit information that would reveal the Commissioner's source of information.

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(ii) The Commissioner recognizes the propriety of these questions

58. The Commissioner himself recognized that the exact type of questions addressed in the chart below would be proper on discovery in his argument in response to VAA's motion challenging the adequacy and accuracy of the summaries. On that motion, VAA sought an order requiring the Commissioner to produce complete, detailed, adequate and accurate summaries of the documents and information over which the Commissioner has claimed public-interest privilege. The Commissioner opposed the motion, in part, on the basis that there was no need to amend the summaries because any questions relating to their content could be asked by VAA on discovery. The Commissioner's Memorandum of Fact and Law stated:

VAA has not yet examined a representative of the Commissioner for discovery, during which discoveries it could ask the questions that it now poses. [emphasis added]

Memorandum of Fact and Law of the Commissioner of Competition to the Respondent's Motion Challenging Adequacy and Accuracy of Summaries, May 24, 2017 at para. 43, Public Motion Record of the Respondent, Tab 8, p. 90

59. VAA's motion was dismissed by Reasons for Order and Order of Phelan J. In dismissing the motion, Phelan J. accepted the Commissioner's argument that the greater detail sought by VAA on the motion need not be provided prior to discovery:

It is not necessary at this stage to disclose whose views are reflected in the Summaries with any greater degree of certainty than has already been disclosed. Further, it is not important at this stage to assess the weight or importance of the views or opinions included in the Summaries – despite VAA's claim that it needs to do so prior to discovery. [emphasis added]

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The Commissioner of Competition v. Vancouver Airport Authority, 2017 Comp. Trib. 8 at para. 17, Book of Authorities of the Respondent, Tab 2

60. Having himself recognized that questions regarding the summaries would be proper at the time of discovery, the Commissioner cannot now refuse to answer such questions.

(iii) Chart of Category B questions, with further written representations

61. See the chart beginning on the following page.

Category B Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
32	Pg. 107-108, Q. 190-191	<p>Identify [REDACTED] referenced on page 74, fifth bullet from the bottom of the page, of Exhibit 4 to the examination of Mr. Rushton.</p> <p>Exhibit 4 is the Reordered Summary of Third Party Information, Confidential-Level B. The fifth bullet from the bottom of page 74 in Exhibit 4 states: [REDACTED]</p>	[REDACTED]	See general position above.
39	Pg. 144-147, Q. 256-264	<p>For the first five bullets listed on page 21 of Exhibit 4 to the examination of Mr. Rushton, indicate when the information was provided to the Bureau.</p> <p>Exhibit 4 is the Reordered Summary of Third Party Information, Confidential-Level B.</p>	[REDACTED]	<p>See general position above.</p> <p>The first five bullets listed on page 21 of Exhibit 4 are [REDACTED] and pertain to [REDACTED]</p> <p>As reflected on the examination transcript, VAA seeks to understand when the Bureau obtained the information in the first five bullets, given [REDACTED]</p> <p>[REDACTED] (Transcript of the Examination of Kevin Rushton, pp. 144:14-145:13,</p>

Category B Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
				Confidential Motion Record of the Respondent, Tab 2, p. 54).
43	Pg. 156-157, Q. 282-283	<p>Indicate whether the Commissioner requested or received any [REDACTED] as referenced in the last bullet on page 22 of Exhibit 4 to Mr. Rushton's examination.</p> <p>Exhibit 4 is the Reordered Summary of Third Party Information, Confidential-Level B. The last bullet on page 22 of Exhibit 4 states [REDACTED]</p>	[REDACTED]	<p>See general position above.</p> <p>The Commissioner put the feasibility of [REDACTED] directly at issue in his Notice of Application, stating: [REDACTED]</p> <p>[REDACTED] (Notice of Application, [REDACTED] Public Motion Record of the Respondent, Tab 5, [REDACTED] Moreover, the Commissioner has included an entire section on [REDACTED]</p> <p>The completion of an [REDACTED] as to the [REDACTED]</p>

Category B Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
117	Pg. 522-523, Q. 965	<p>With respect to each party that the Commissioner calls as a witness and thus submits a witness statement for, to provide references to each of the bullet points in Exhibits 3 and 4 that related to information obtained from each of those witnesses. For example, if the Commissioner files a witness statement from [REDACTED] [REDACTED] to provide references to each of the bullet points in Exhibits 3 and 4 that related to information obtained from [REDACTED]</p> <p>Exhibit 3 is the Reordered Summary of Third Party Information, Confidential-Level A. Exhibit 4 is the Reordered Summary of Third Party Information, Confidential-Level B.</p>	[REDACTED]	<p>See general position above.</p> <p>The witness statements provided by the Commissioner will not contain <i>all</i> of the information provided by a witness to the Commissioner. Rather, they will contain information that the Commissioner intends to tender in support of his case.</p> <p>The right of a respondent to a fair hearing means that the respondent has the right to know the case against it and the right to have a meaningful opportunity to present evidence supporting its own case. VAA is entitled to know <i>all</i> of the information a witness has provided to the Commissioner, whether that information is helpful or <i>hurtful</i> to the Commissioner's case (<i>Commissioner of Competition v. Direct Energy Marketing Limited</i>, 2014 Comp Trib 17 at para. 16, Book of Authorities of the Respondent, Tab 19).</p> <p>Given that much of this information is</p>

Category B Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
				<p>contained in the Third Party Summaries due to the Commissioner's assertion of public-interest privilege thereover, and given that VAA is not going to be able to determine which entries in the Third Party Summaries contain information provided by each of the Commissioner's witnesses, VAA is seeking an undertaking from the Commissioner to identify all of the information from its witnesses in the Third Party Summaries (whether contained in the witness statements or not) once the Commissioner serves his witness statements.</p>
121	Pg. 530-531, Q. 982-983	<p>Identify which entries in section C, beginning on page 8 of Exhibit 3 to the examination of Mr. Rushton, refer to the same [REDACTED] (i.e. whether entries one and two are the same [REDACTED] whether three and four are the same [REDACTED] etc.).</p> <p>Exhibit 3 is the Reordered Summary of Third Party Information, Confidential-Level A.</p>	[REDACTED]	See general position above.

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
122	531:21	<p>Identify all the references, throughout the summaries, which refer to the same [REDACTED] that is referenced in the second full entry on page 15 of Exhibit 4 to the examination of Mr. Rushton.</p> <p>Exhibit 4 is the Reordered Summary of Third Party Information, Confidential-Level B.</p>		See general position above.

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
123	532:13	Identify at which [REDACTED] the [REDACTED] referenced in Request 122 operates.	[REDACTED]	See general position above.
124	534:6	For each of the [REDACTED] identified in Request 123, indicate how many other [REDACTED] identified.	[REDACTED]	See general position above.

Category B Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
125	Pg. 536, Q. 990	For each [REDACTED] identified in Request 123 that the [REDACTED] identified in Request 122 services from [REDACTED] [REDACTED] how far is that [REDACTED] from the [REDACTED] in kilometers and travel time.		See general position above.

Category B Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
126	Pg. 539, Line 1	Confirm if [REDACTED] [REDACTED] are the [REDACTED] identified in Request 123.		See general position above.

Category B Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
127	Pg. 537-540, Q. 991-999	Identify which [REDACTED] are served by the [REDACTED] identified in Request 122 at each [REDACTED] identified in Request 123.		See general position above.

Category B Chart

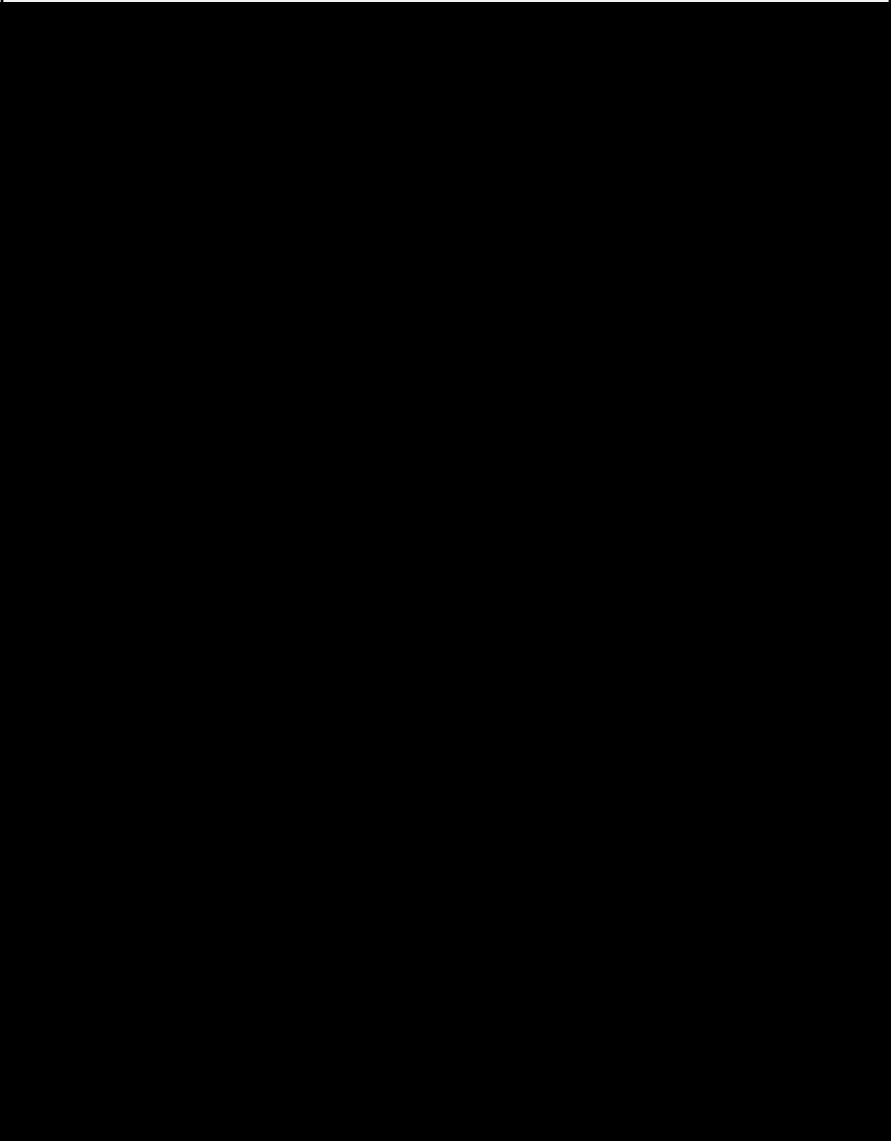
ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
128	Pg. 540-542, Q. 1000-1004	For each [REDACTED] identified in Request 127 at each [REDACTED] identified in Request 123 indicate what services are offered by the firm identified in Request 122 (i.e. [REDACTED] etc.).	[REDACTED]	See general position above.
129	Pg. 544-545, Ln. 7-13, Q. 1007	For each entry throughout Exhibits 3 and 4 to the examination of Mr. Rushton that references a [REDACTED] that	[REDACTED]	See general position above. Each of the questions (identified as (a) to (g) in the "Description" column) contained

Category B Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		<p>provides [REDACTED] identify: (a) all other references to [REDACTED] throughout the summaries</p> <p>Furthermore, answers should draw on all facts known by the Commissioner, not just those contained within the summaries.</p>		<p>in this single item are individual questions. They were asked together on the basis of an agreement between counsel to expedite the discovery of Mr. Rushton.</p> <p>The Commissioner's position that "<u>often</u> individually" (emphasis added) the information requested in these questions is protected by public-interest privilege is a recognition that sometimes, individually, the answer to these questions would <i>not</i> be protected by public-interest privilege. The Commissioner must provide any such non-privileged information to VAA.</p>

Category B Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		Note, Exhibit 3 is the Reordered Summary of Third Party Information, Confidential-Level A. Exhibit 4 is the Reordered Summary of Third Party Information, Confidential-Level B.		

Category B Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
130	Pg. 545-547, Ln. 18-22	<p>For each entry throughout Exhibits 3 and 4 to the examination of Mr. Rushton that references an [REDACTED] identify:</p> <p>1. all other references to [REDACTED] throughout the summaries</p>	[REDACTED]	<p>See general position above.</p> <p>Each of the questions (identified as (1) to (9) in the "Description" column) contained in this single item are individual questions. They were asked together on the basis of an agreement between counsel to expedite the discovery of Mr. Rushton.</p> <p>The Commissioner's position that "<u>often individually</u>" (emphasis added) the information requested in these questions is protected by public-interest privilege is a recognition that sometimes, individually, the answer to these questions would <i>not</i> be protected by public-interest privilege. The Commissioner must provide any such non-privileged information to VAA.</p>

Category B Chart

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
		<p>Furthermore, answers should draw on all facts known by the Commissioner, not just those contained within the summaries.</p> <p>Note, Exhibit 3 is the Reordered Summary of Third Party Information, Confidential-Level A. Exhibit 4 is the Reordered Summary of Third Party Information, Confidential-Level B.</p>		

Category B Chart

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ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION

C. Category C – Miscellaneous

See individual item positions below.

ITEM	PG., Q.	DESCRIPTION	COMMISSIONER'S POSITION/ANSWER	VAA'S POSITION
110	Pg. 498-502, Q. 912-917	Provide a list of the customary requirements in each category – health, safety, security, and performance – that the Commissioner is asking the Tribunal to impose as part of its order.	[REDACTED]	<p>The Commissioner requests as ancillary relief that the Tribunal order VAA to authorize any firm that meets certain customary requirements. However, the Commissioner has not provided any particulars with respect to the specific customary requirements upon which the relief sought is based (Notice of Application, para. 59(a)(ii), Public Motion Record of the Respondent, Tab 5, p. 38).</p> <p>A notice of application shall set out the particulars of the order sought (<i>Competition Tribunal Rules</i>, SOR/2008-141, s. 36(2)(e), Book of Authorities of the Respondent, Tab 21). VAA has the right to know specifics with respect to the order that the Commissioner seeks to impose on VAA, in order to properly prepare for trial (<i>Six Nations of the Grand River Band v. Canada (Attorney General)</i>, 48 O.R. (3d) 377 at para. 7 (Div. Ct.), Book of Authorities of the Respondent, Tab 20).</p>
114	Pg. 515-517,	To confirm that the [REDACTED]	[REDACTED]	The mere fact of the existence of further

PUBLIC VERSION

CT-2016-015

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF certain conduct of Vancouver Airport Authority relating to the supply of in-flight catering at Vancouver International Airport;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

—and—

VANCOUVER AIRPORT AUTHORITY

Respondent

MOTION RECORD OF VANCOUVER AIRPORT AUTHORITY

(Respondent's Motion to Compel Answers to Questions Refused on Discovery of Kevin Rushton, returnable October 13, 2017)

GOODMANS LLP

Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

**Michael Koch
Julie Rosenthal
Rebecca Olscher**

Tel: 416.979.2211
Fax: 416.979.1234

Counsel for Vancouver Airport Authority