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 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

CLOSING SUBMISSIONS OF THE COMMISSIONER OF COMPETITION

Contents

PART I OVERVIEW

1. This application is about a core purpose of the *Competition Act*[1] ("**Act**"), the encouragement of competition in order to promote the efficiency and adaptability of the Canadian economy, and more specifically the scope - and increasingly important role - of the Act's abuse of dominance provision in fulfilling this purpose. VAA has engaged in, nakedly, exclusionary conduct that has, is and will in the future substantially lessen and prevent competition. Moreover, VAA has engaged in this conduct without a credible pro-competitive or efficiency enhancing justification and without any authorization, express or implied, from any statute, regulation or other legislative instrument. As the official charged with the enforcement of the economic framework law of Canada, it is the Commissioner of Competition's submission that – on the facts of this case – section 79 of the Act is engaged by VAA's exclusionary conduct and a remedial order is necessary and appropriate for purposes of promoting the reliance on market forces that is the underpinning of the Act.

PART II THE FACTS

2. The Commissioner has provided the evidence that establishes the following facts in his Compendium:[2]

a) VAA operates YVR pursuant to a Ground Lease with the Minister of Transport (II.A)

b) VAA operates in a commercial environment where it needs to and does obtain revenues in excess of its costs of operating YVR (II.B)

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1 Joint Book of Authorities [*JBOA*], Tab 47, RSC 1985, c C-34, as amended, [*Act*] s 79.

2 Further to the observation of the panel on November 2nd that the Compendium should contain "evidence which you think the Panel should be looking at and should be considering in its decision", for each subsection we provide an index of the evidence relied on even if it is not cited in that section. While the Commissioner for the convenience of the Tribunal has organized the compendium by section in these submissions, evidence under one section may be relevant to another section. If necessary, the Commissioner may make additional references to the evidentiary record during final argument.

c) The services that constitute In-flight Catering at YVR are Galley Handling and Catering (II.C)

d) The In-flight Catering industry has prospered over the last business cycle (II.D)

e) Double catering is not a constraining substitute for Galley Handling (or In-flight Catering) at YVR (II.E)

f) Self-supply is not a constraining substitute for Galley Handling (or In-flight Catering) at YVR (II.F)

g) Dr. Niels' analysis supports the evidence from market participants that double catering and self-supply are not constraining substitutes for Galley Handling (or In-flight Catering) at YVR (II.G)

h) Galley Handlers (or In-flight Caterers) must obtain authorization from VAA to access the YVR airside (II.H)

i) VAA refused Newrest's initial December 2013 request (II.I.1)

j) VAA denied Newrest's March 2014 request after a one-hour meeting (II.I.2)

k) VAA denied Strategic Aviation's April 2014 request without obtaining any additional information (II.I.3)

l) Despite receiving further requests from Newrest and Strategic Aviation as well as letters of support from airlines, VAA continued to deny access (II.I.4)

m) The "detailed" August 2014 Briefing Note did not provide a credible justification for VAA's decision(s) to deny Newrest and Strategic Aviation access (II.I.5)

n) Despite repeated requests from Newrest and Strategic Aviation between August 2014 and the present, VAA has continued to deny access (II.I.6)

o) Jazz testified that it paid [redacted] more to Gate Gourmet at YVR than what it would have paid if Strategic Aviation had been permitted to operate at YVR (II.J.1)

p) Air Transat testified that it paid [redacted] more to Gate Gourmet at YVR than what it would have paid if Optimum Stratégies was permitted to operate at YVR (II.J.2)

q) [redacted] than what it would have paid if entry was permitted at YVR (II.J.3)

r) VAA reconsidered its decision to deny access to additional entrants in 2017 but utilized a flawed Market Study (II.K.1) and a flawed RFEOI & RFP to select dnata (II.K.L)

s) Despite dnata's entry, airlines continue to request additional options for Galley Handling (or In-flight Catering) and entrants want to provide these services (II.L)

PART III VAA HAS ABUSED ITS DOMINANT POSITION

3. To prove that VAA has abused its dominant position pursuant to s. 79(1) of the Act, the Commissioner bears the burden of proving the three well-known elements on a balance of probabilities.[3] Where these elements are made out, the Tribunal may make an order prohibiting VAA from engaging in the practice. Pursuant to s. 79(2) of the Act, the Tribunal may also make an order directing VAA to take actions that are reasonable and necessary to overcome the anti-competitive effects of the practice.[4]

A. VAA substantially or completely controls a class or species of business: access to airside at YVR for the supply of Galley Handling (or In-flight Catering) and the supply of Galley Handling (or In-flight Catering) at YVR

4. S. 79(1)(a) requires that VAA substantially or completely control, throughout Canada or any area thereof, a class or species of business. The Tribunal has, generally, commenced this analysis with the identification of the relevant market.[5] Whether there are "close substitutes" for the product or service at issue is central to market definition.[6] Evidence of substitutability

[3] JBOA, Tab 34,*Toronto Real Estate Board v Commissioner of Competition*, 2017, FCA 236, paras 48 and 87 [*TREB FCA*]; JBOA, Tab 5, *Canada (Commissioner of Competition) v Canada Pipe Co.*, 2006 FCA 233, para 46, leave to appeal to the SCC refused 31637 (10 May 2007) [*Canada Pipe FCA*].

[4] JBOA, Tab 47, Act, ss 79(2).

[5] JBOA, Tab 14, *Commissioner of Competition v Toronto Real Estate Board*, 2016 Comp Trib 17 [*TREB CT*], para 114.

[6] JBOA, Tab 7, *Canada (Director of Investigation and Research) v HIllsdown Holdings (Canada) Ltd.* (1992) 41 CPR (3d) 289, [*Hillsdown*], para 27.

can be direct or indirect; the Tribunal examines indirect evidence where direct evidence is unavailable.[7] Anecdotal evidence from buyers about their price sensitivity is persuasive.[8]

5. The "hypothetical monopolist test" ("**HMT**") provides a useful framework to identify sufficient substitutability in cases under s. 79,[9] and suggests that there are two relevant markets in this application: (a) the market for Airport airside access for the supply of Galley Handling (or In-flight Catering) at YVR; and (b) the downstream market for the supply of Galley Handling (or In-flight Catering) at YVR.

6. It is undisputed that VAA controls airside access at YVR, and with this control, VAA has the ability to exclude would-be suppliers of Galley Handling (or In-flight Catering) at YVR. Even though airlines, and not VAA, enter into agreements with suppliers of Galley Handling (or In-flight Catering), those suppliers cannot deliver food to airplanes at YVR unless they have airside access. VAA thus controls a critical input – airside access – for downstream competitors that supply Galley Handling (or In-flight Catering).[10] Through this control, VAA substantially or completely controls a class or species of business and s. 79(1)(a) of the Act is satisfied.

(1) Access to the airside at YVR for the supply of Galley Handling and the supply of Galley Handling at YVR are relevant markets

7. Support for the relevant markets advanced by the Commissioner, as discussed below, arises from the rigorous market definition analysis of Dr. Niels. In analyzing whether VAA faces substantial competitive constraints in restricting airside access, and recognizing the broader competitive

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7 JBOA, Tab 10, *Canada (Director of Investigation and Research) v Tele-Direct (Publications) Inc. (1997), 73 CPR (3d) 1 [Tele-Direct*], para 81. See also JBOA, Tab 12, *Commissioner of Competition v Superior Propane Inc. et al* (2001), 7 CPR (4th) 385, para 67.

8 JBOA, Tab 10, Tele-Direct, para 76.

9 JBOA, Tab 14, TREB CT, para 124.

10 JBOA, Tab 34, TREB FCA, para 13; JBOA, Tab 14, TREB CT, para. 179.

environment in which airports operate, Dr. Niels analyzed (using vast data sets, ordinary course business documents, and other evidence in this proceeding) a number of markets: (1) the airports market (analysing competition between airports for passengers/airlines); (2) the market for airside access (access to certain infrastructure at YVR in order to provide Galley Handling to airlines); and (3) the galley handling market.

a. With respect to the relevant geographic market, the experts agree that YVR is the relevant market

8. Dr. Niels and Dr. Reitman agree that YVR is the relevant geographic market. YVR faces limited competitive constraints from other airports, as demonstrated by Dr. Niels in his report, including through his catchment area and route overlap analyses. (III.A.1.a-1)

b. With respect to the Airport airside access market, the economic experts agree on product market definition

9. Airside access at YVR – as a critical input for the provision of Galley Handling (or In-flight Catering) services at YVR - is a separate relevant market. With its ability to restrict access, VAA has complete control over that market and is therefore dominant. Dr. Reitman neither disputes an airside access market at YVR nor VAA's dominance in that market. (III.A.1.b-3)

c. With respect to the supply of Galley Handling, the experts disagree on product market definition but the evidence clearly establishes that this is a relevant market

i. The HMT does not require a combined Galley Handling and Catering product market

10. Galley Handling and Catering are economic complements; they are not economic substitutes. Accordingly, if a hypothetical monopolist in Galley Handling would profitably impose a SSNIP over competitive levels, then, necessarily, a SSNIP over competitive levels would also be imposed by a

hypothetical monopolist in Galley Handling and Catering (or the combination of the two, being In-flight Catering). The HMT does not require a combined Galley Handling and Catering market because it does not inform what economic complements should be included in a relevant product market. This is uncontroversial. As Dr. Reitman stated, "because there is no demand substitution, it seems clear to me that if defined in the manner suggested by the Commissioner in his Notice of Application, Galley Handling and Catering would be in separate relevant product markets." (III.A.1.c.i-1) Applying the same logic, Dr. Niels concluded that "(t)here are two possibilities. There could be separate markets for catering and for galley-handling services at YVR. Alternatively, catering and galley handling could form a combined or 'bundled' market." (III.A.1.c.i-3)

ii. A demarcation between Galley Handling and Catering is a widely-recognized business reality

11. Demarcations reflected in business realities inform market definition.[11] As Dr. Reitman testified, "(t)here's something to" the notion that a Galley Handling market exists if airlines purchase Catering separately from Galley Handling services. (III.A.1.c.ii-4) The evidence demonstrates that airlines can do so and, in fact, do so.

12. The industry recognizes a distinction between Catering (the preparation of the food) and Galley Handling (the logistics of getting that food onto the airplane). Airlines regularly contract with off-airport caterers, such as Delta Dailyfoods, to supply the airline's Galley Handler with high quality food for all passenger classes. Indeed, when seeking entry at YVR in 2014, Newrest was planning to operate an off-airport kitchen, and, soon, dnata will operate an off-airport kitchen. Strategic Aviation sought only to provide Galley Handling services, partnering with Optimum Solutions for off airport food supply. WestJet's history with In-flight Catering also demonstrates the demarcation: in 2004, WestJet began self-supplying both Catering and Galley

[11] JBOA, Tab 10, *Tele*-Direct, para. 76; JBOA, Tab 1, *Brown Shoe Co. Inc. v United States*, 370 US 294 (1962), page 16.

Handling services; in 2013, Westjet outsourced Catering but kept self-supplying its Galley Handling; in 2017, WestJet outsourced Galley Handling. Accordingly, there is a clear demarcation between the amount of Catering services that can be (and is being) done off-airport and Galley Handling services that necessarily must be done on-airport.

13. Dr. Niels demonstrated how the [redacted], allowing Dr. Niels to conduct his analyses. (III.A.1.c.ii-22) Dr. Reitman acknowledged that "[redacted]". (III.A.1.c.ii-24) [redacted] – supplying Galley Handling to those airlines in respect of Catering items sourced directly by the airlines from third parties. (III.A.1.c.ii-24)

iii. While the exact contours of the demarcation between Galley Handling and Catering vary from firm to firm, the core of Galley Handling requires airside access

14. Industry terminology recognizes Galley Handling as separate from Catering. Whether "last-mile logistics" (III.A.1.c.iii-1), "provisioning" (III.A.1.c.iii-3), or "galley handling", (III.A.1.c.iii-4) there is a natural demarcation between Galley Handling and Catering. For example, [redacted]. (III.A.1.c.ii-23) The fact that all firms may not define Galley Handling identically is neither surprising nor relevant to the question of market definition. It is not uncommon for the boundaries of market definition to be imprecise.[12] Indeed, Galley Handling and Catering comprise many individual products and services.

[12] JBOA, Tab 7, Hillsdown, paras 37-38 and 61; JBOA, Tab 11, *Commissioner of Competition v CCS Corporation et al*, 2012 Comp. Trib. 14 [*CCS*], paras 60 and 92-93.

15. There is no evidence that the industry systematically recognizes a distinction between Galley Handling services that require airside access and those that do not. In particular, no Galley Handlers outsource services that do not require airside access to focus on activities that require airside access. As Strategic Aviation testified, "there would be no point" to carrying out only Galley Handling services that do not require airside access. (III.A.1.c.iii-5)

iv. Self-supply and double catering are not constraining substitutes for Galley Handling (or In-flight Catering)

16. VAA submits that substitutes to airside access and the purchase of Galley Handling at YVR are available to airlines in the form of self-supply and double catering. VAA argues that this substitution is sufficient to render unprofitable a SSNIP above competitive levels by a hypothetical monopolist. However, there is overwhelming evidence - particularly from airlines themselves - that self-supply and double catering are not sufficient constraints to render unprofitable a SSNIP in Galley Handling (or In-flight Catering) at YVR above competitive levels. Moreover, airlines would already be "pushing the limits" as far as they can to save costs through double catering or self-supply. Thus, all substitution that is possible would have already taken place and would not increase in response to a SSNIP.

v. A distinct "premium" or "standard" "flight catering" market simply is not plausible

17. VAA conflates the acts of preparing the food and the delivery of food and ancillary products on and off the airplane, and instead, compartmentalizes Catering and Galley Handling by the nature of the food served to passengers on the airplane. Dr. Reitman uses different terminology for VAA's characterizations, namely "Premium Flight Catering" (representing VAA's definition of Catering in its Response) and "Standard Flight Catering" (representing VAA's definition of Galley Handling in its Response).

18. The characterizations of VAA and Dr. Reitman (whatever the terminology) is a vertical distortion of reality unsupported by the actual market participants who supply and purchase these products and services on a regular basis. While Dr. Reitman equivocates as to whether Standard Flight Catering is a relevant market, he offers the opinion that Premium Flight Catering is a relevant market. Dr. Reitman's opinion is untenable because it is driven by assumptions based not on the testimony of market participants or industry expertise but on *instruction from VAA's counsel*, notably that airlines are unlikely to substitute Premium Flight Catering for Standard Flight Catering. (III.A.1.c.v-22) Dr. Reitman's assumptions were, in the end, proven to be inaccurate by the evidence of market participants.

19. In fact, Dr. Reitman's Premium Flight Catering definition (as adopted from VAA's Response) is problematic on its face. According to Dr. Reitman, the food captured by Premium Flight Catering is not necessarily high-quality. Dr. Reitman's distinction between "premium" and "standard" concerns only whether the food is fresh or pre-packaged/frozen. (III.A.1.c.v-30) Yet, Dr. Reitman accepted the fact that fresh items are served to business class and economy passengers and that pre-packaged items and frozen items are served to business class and economy passengers. (III.A.1.c.v-31)

20. The appropriate question is not whether airlines would give first class passengers "chips and pop" when faced with a SSNIP over competitive levels for Premium Flight Catering. The question is whether airlines would consider high-quality pre-packaged alternatives similar to those offered by Air Transat's Chef's Menu. The evidence is clear – airlines not only consider but choose such alternatives.

(2) VAA substantially or completely controls the relevant markets, no matter what market definition is accepted

21. The Tribunal has found that "substantial or complete control" in s. 79(1)(a) is synonymous with market power,[13] but has only required that there exists a (substantial) degree of market power which provides a person considerable latitude to determine or influence price and non-price dimensions of competition in a market, including terms upon which it or others carry on business in the market.[14] The Tribunal considers various indicators of market power, including direct and indirect indicators, market share and barriers to entry.[15] The power to exclude from the market is a strong direct indicator of market power.[16]

22. S. 79(1)(a) captures persons that do not compete in the market that is allegedly substantially or completely controlled,[17] such as a firm that controls a significant input to competitors in a downstream market.[18] Moreover, the ability to exercise the required degree of market power is relevant to s. 79(1)(a) of the Act, not a person's incentive(s) to exercise that power.[19] The actual exercise of such power demonstrates that the person has the requisite market power.[20]

23. VAA substantially or completely controls the market for airside access for the supply of Galley Handling (or In-flight Catering) at YVR and thus the market for the supply of Galley Handling (or In-flight Catering) at YVR. VAA is

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[13] JBOA, Tab 8 *Canada (Director of Investigation and Research) v NutraSweet Co.* (1990), 32 CPR (3d), [*NutraSweet*], paras 73 and 83; JBOA, Tab 33,*Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3, [*Tervita*], para 44; and JBOA, Tab 14, TREB CT, para 165. See also JBOA, Tab 6, *Canada (Commissioner of Competition) v Canada Waste Services Holdings Inc*., 2001 Comp Trib 3, para 7, aff'd 2003 FCA 131, leave to appeal refused [2004] 1 SCR vii (note).

[14] JBOA, Tab 14, TREB CT, paras 173-174. See also JBOA, Tab 9, *Canada (Director of Investigation & Research) v Southam Inc* (1992), 43 CPR (3d) 161, para 48.

[15] JBOA, Tab 8, NutraSweet, para 73.

[16] JBOA, Tab 14, TREB CT, para 176; JBOA, Tab 35, *United States v EI du Pont Nemours & Co* (1956), 351 US 377 (1956), page 8.

[17] JBOA, Tab 34, TREB FCA, para 14; JBOA, Tab 14, TREB CT, paras 179-184, 277-278.

[18] JBOA, Tab 34, TREB FCA, para 13; and JBOA, Tab 14, TREB *CT*, paras 179 and 181.

[19] JBOA, Tab 14, TREB CT, para 189.

[20] JBOA, Tab 14, TREB CT, paras 189-190.

using its dominant position in the airside access market to exclude competition in another market, namely the market for Galley Handling (or In-flight Catering) at YVR, and that exclusion is substantially preventing and lessening competition in that Galley Handling (or In-flight Catering) market (as described more fully in section C below).

24. The evidence — *undisputed by VAA* — demonstrates that: VAA operates YVR and controls access into YVR. Only VAA may supply access to YVR airside. VAA sets the terms on which it supplies access to the YVR airside for the supply of Galley Handling. Airside access at YVR is a critical input for the provision of Galley Handling (or In-flight Catering) at YVR. A firm cannot deliver food to an airplane at YVR unless it can access the airplanes on the tarmac.

25. Self-supply of Galley Handling or double catering, as alternatives to procuring Galley Handling (or In-flight Catering) at YVR, are not feasible or effective options for airlines.

26. With control over airside access, VAA has considerable latitude to determine or influence price and non-price dimensions of competition in the market for the supply of Galley Handling (or In-flight Catering) at YVR, not only the terms upon which Galley Handling (or In-flight Catering) firms carry on business in this market but whether they carry on business at all. Dr. Reitman does not dispute VAA's control over these relevant markets. (III.A.2-10)

B. VAA's exclusion of firms that supply Galley Handling (or In-flight Catering) constitutes a practice of anti-competitive acts

(1) VAA's sustained and systematic practice of excluding entrants

27. Since December 2013, VAA has repeatedly and systematically excluded Newrest and Strategic Aviation from competing at YVR, and

continues to do so today. VAA's exclusionary conduct is a practice under s. 79(1)(b) as that term has been defined by the Tribunal.[21]

(2) VAA's exclusion of entrants constitutes an anti-competitive act

28. The VAA conduct in question is its exclusion of firms from the market for the supply of Galley Handling (or In-flight Catering) at YVR. On its face, the purpose of this conduct is to exclude competitors. Anti-competitive acts are identified by their purpose,[22] and the required purpose is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary.[23]

29. The Tribunal determines the overall character of the impugned conduct by weighing several factors, including the reasonably foreseeable or expected objective effects of the practice, the circumstances surrounding the conduct's commission, any business justifications and any evidence of subjective intent, if available.[24] The focus is on determining whether the person intended to exclude, predate or discipline a competitor, not on whether that exclusion was intended to have, actually had or is likely to have an actual negative effect on competition (as that is the subject of analysis in s. 79(1)(c)).[25]

30. Although not required, evidence of subjective intent exists. Mr. Richmond admits that VAA's intention was to deny access to both Newrest and Strategic Aviation, ensuring that they could not compete at YVR. (III.B.2-5) Indeed, this intention was fundamental to VAA's stated objective of preventing the disruptive competition that access could engender, an objective the Tribunal noted with disapproval in TREB.[26] Regardless, the evidence demonstrates that it was reasonably foreseeable that VAA's

[21] JBOA, Tab 8, NutraSweet, para 92.
[22] JBOA, Tab 5 Canada Pipe FCA, para 67.
[23] JBOA, Tab 5, Canada Pipe FCA, para 68.
[24] JBOA, Tab 5, Canada Pipe FCA, paras 68 and 78; JBOA, Tab 34, TREB FCA, para 57.
[25] JBOA, Tab 14, TREB CT, paras 274-276.
[26] JBOA, Tab 14, TREB CT, para 322.

refusals to grant airside access at YVR would prevent these firms from competing for the provision of Galley Handling (or In-flight Catering), and thus the objective purpose of these acts was exclusionary.

(3) VAA does not have a legitimate business justification

31. To be a legitimate business justification, the Tribunal has repeatedly held that the practice must either be pro-competitive or efficiency enhancing and that those benefits must accrue to VAA and be unrelated to the exclusionary effects of the conduct.[27] It is VAA's burden to prove each of these elements.[28]

a. VAA has not established that its exclusionary conduct is pro-competitive

32. VAA's justification in this case is not pro-competitive. VAA has not offered any evidence of how excluding competitors allows VAA to offer better prices or better service to its airlines in the market for the supply of Galley Handling at YVR or to otherwise better enable YVR to compete with other airports for airlines and passengers. On the contrary, the evidence demonstrates that VAA's conduct has harmed competition (and economic efficiency) in Galley Handling (or In-flight Catering) at YVR. Moreover, VAA has failed to provide any credible evidence to support its claim that it needed to exclude Galley Handlers (or In-flight Caterers) from YVR in order to compete better for the business of airlines. The only evidence on this point comes from Mr. Richmond and Mr. Gugliotta, whose testimony is, basically, that they did not want to assume the perceived risk that new entry would result in the exit of one of the two In-flight Caterers.

33. There is no evidence that Asian airlines (or any airlines) have chosen to start flying to YVR since 2014 or indeed have continued to fly to YVR because of VAA's exclusionary conduct or the fact that YVR has two "full

[27] JBOA, Tab 5, Canada Pipe FCA, para 73.
[28] JBOA, TAB 14, TREB CT, para 429.

service" caterers. VAA's own expert admitted that VAA's growth and awards could have been achieved without excluding competitors. (III.B.3.a-2)

b. VAA has not established that excluding Galley Handling competitors enhances YVR's efficiencies

34. VAA has not provided any evidence that VAA's exclusion of competitors would likely result in the attainment of efficiencies. Efficiencies that may be considered include cost reductions in production or other aspects of VAA's operations, improvements in technology or production process that result in innovative new products or enhancements, or improvements in quality of service.[29] VAA has proffered no such evidence; it simply argues that preventing the disruption that entry could have caused assists VAA's efforts to grow YVR's connectivity. Even assuming that entry could cause disruption in VAA's operations (which is denied as described below), this justification does not suggest that YVR will achieve efficiency gains within the meaning of Tribunal jurisprudence, and cannot be sufficient to meet VAA's burden to show that the overall purpose of its conduct is not exclusionary but to enhance the efficiency of YVR's operations.

c. VAA's assertion that the market could not support entry was not credible

i. VAA's inadequate work

35. The work VAA did to analyze the market in 2014 was inadequate and, at least in part, conducted only [redacted]t. (III.B.3.c.i-1) VAA decided that the market for the supply of Galley Handling (or In-flight Catering) at YVR could not support entry within one day of the request by Newrest for authorization to access the Airport airside following a single one-hour meeting between Mr. Richmond and Mr. Gugliotta on April 1, 2014. (III.B.3.c.i-2) For purposes of that meeting, Mr. Richmond received three emails. (II.I.4-13) Neither Mr.

[29] JBOA, Tab 14,TREB CT, para 295.

Richmond nor Mr. Gugliotta at the direction of Mr. Richmond contacted any third parties, or conducted additional research to understand the market. (II.I.2-16 to II.I.2-21)

36. That VAA's "analysis" of the market provides an inadequate justification for VAA's exclusionary conduct is further demonstrated by examining the work that VAA would do in 2017 to determine whether to permit entry (which in itself was inadequate for reasons described below) or the analysis that the parties' respective experts have done to determine whether the market could in fact have supported entry in 2014.

ii. The facts considered by VAA were not enough to conclude that entry could not be supported

37. The facts that VAA considered at the April 1, 2014 Meeting, alone or together, do not provide a sufficient basis for VAA to conclude that entry could not be supported at YVR. Messrs. Richmond and Gugliotta considered [redacted]. The unchallenged evidence of Dr. Niels is that the long-term trend, observable in 2014, was steady growth in passengers, which VAA itself was predicting in 2014. (III.B.3.c.ii-5) As was evident from cross examination, if Mr. Richmond or Mr. Gugliotta had done even basic due diligence using readily accessible public information, they would have found information that the In-flight Catering industry had stabilized and even prospered between 2004 and 2011. (II.I.5-19)

38. Messrs. Richmond and Gugliotta noted that a third In-flight Caterer, LSG Sky Chefs, had left YVR in 2003, inferring from this that a third In-flight Caterer could not be supported at VAA ten years later, in 2014. Of course, this assumed that LSG Sky Chefs left YVR because the size of the In-flight Catering marketplace at YVR could not sustain the operations of a third provider. In fact, as known by VAA, LSG Sky Chefs exited all of Canada because its major customer, Canadian Airlines, was acquired by Air Canada. Furthermore, at the time LSG Sky Chefs exited YVR, it had an ownership interest in CLS, which was already operating at YVR. (III.B.3.c.ii-8)

39. Messrs. Richmond and Gugliotta also concluded that CLS' and Gate Gourmet's businesses were "precarious". However, this conclusion was not based on any information with respect to Gate Gourmet's or CLS' profit margins – confidential or public – or on any discussions with (or warnings from) Gate Gourmet or CLS. Instead, they reached this conclusion [redacted]. (III.B.3.c.ii-14) VAA had no information about this and did not seek any from Gate Gourmet or CLS.

40. Messrs. Richmond and Gugliotta also claim to have considered [redacted]. (III.B.3.c.ii-15)

iii. Dr. Niels shows that the market could support entry in 2014

41. Dr. Niels carried out an economic analysis, based on the financial data from Gate Gourmet and CLS, to explore whether their levels of profitability are such that there may be room for a third (and now a fourth) competitor. His conclusion is that in 2014 (and today) the market could have supported and can support an additional entrant. (III.B.3.c.iii-1)

42. Dr. Reitman's critiques of Dr. Niels analysis are unsupported by the evidence and economic theory and were addressed by Dr. Niels. First, even though Dr. Reitman [redacted]

[redacted]. [redacted]. (III.B.3.c.iii-5) [redacted].(III.B.3.c.iii-9) [redacted]. Second, Dr. Reitman ignored standard economic theory and evidence which establishes that entry provides pressure to decrease costs and the In-flight Catering marketplace at YVR has been shown to have scope for cost reductions. (III.B.3.c.iii-6) Indeed, Mr. Richmond testified [redacted]. (III.B.3.c.iii-10)

iv. The work done for the August 2014 Briefing Note did not render credible VAA's conclusion that entry was not viable

43. On August 27, 2014, Mr. Gugliotta provided Mr. Richmond with a briefing note to summarize the information collected since Newrest and Strategic Aviation had started requesting access to YVR (the "**August 2014 Briefing Note**"). Given the lack of due diligence undertaken by VAA, the conclusions of the August 2014 Briefing Note were not credible. (III.B.3.c.iv-5)

v. VAA did not obtain any information between the August 2014 Briefing Note and 2017 that would make its contention about entry credible

44. After the August 2014 Briefing Note, Newrest and Strategic Aviation continued to request access to YVR and VAA continued to deny access. Despite receiving additional letters of support from Airlines, VAA did not seek input from a single airline nor did it have any further communications with any of the incumbent In-flight Caterers. It was during this time that VAA developed an additional reason for refusing to grant authorization to Strategic Aviation and Newrest to access the YVR airside, namely that each of these firms proposed to operate at YVR from a facility located off-Airport. However, as

Mr. Richmond has now admitted, that was simply his preference and in any event, VAA's decision in 2018 to grant access to dnata, which will be operating at YVR from an off-Airport facility, and the fact that Newrest and Strategic Aviation operate off-airport successfully across Canada, demonstrates that this justification was not credible. (III.B.3.c.v-11)

vi. Despite the 2017 VAA Market Study, VAA still has no credible justification for denying entry

45. Effective [redacted], VAA entered into a [redacted] licence agreement with dnata, pursuant to which VAA granted dnata authorization to access YVR to provide Galley Handling (or In-flight Catering). This was the culmination of the 2017 VAA Market Study and RFP/RFEOI. The VAA Market Study, which Mr. Richmond testified he determined was advisable "on a flight back from Ottawa" (III.B.3.c.vi-3) and was clearly conducted at least in part because the Commissioner commenced this application, concluded that the market could support a third entrant. The Market Study was also fundamentally flawed.

d. VAA's contention that entry would cause disruption is not credible

46. VAA's justification for excluding new competitors was and continues to be that demand could not support entry and that if entry was permitted, it could drive one or both of the incumbent In-flight Caterers out of YVR. As indicated above, the only evidence on this issue comes from Mr. Richmond, Mr. Gugliotta and Dr. Tretheway. VAA has not filed a witness statement from a single airline supporting the concern that the exit of an In-flight Caterer would be problematic for airlines. Neither has any airline testified that a disruption caused by the exit of an In-flight Caterer would damage YVR's reputation such that it would either leave YVR if it was already present or not come to YVR at all.

47. While not qualified as an industry expert, Dr. Tretheway nonetheless testified that an exit could cause "significant disruption" without providing any economic, or other, evidence to support this "opinion". (III.B.3.d-2) For example, while he discussed the exit of LSG Sky Chefs from YVR, he does not describe any disruption this caused. Dr. Tretheway has never been retained by an airport or an airline to address an In-flight Caterer exit, and has no experience with this. This is not a surprise because, as Dr. Tretheway admitted in cross-examination, since LSG Sky Chefs exited in 2004, no national In-flight Caterer has left the market in Canada. (III.B.3.d-10)

48. As for the claimed "precarious" state of Gate Gourmet or CLS, both suppliers were and are profitable multinational companies. Moreover, [redacted]. A decision by Gate or CLS to cease business at Canada's second largest airport and Asian gateway hub would make it difficult for them to market their ability to serve customers at other major airports in Canada. (III.B.3.d-18)

49. Regardless, even if entry in 2014 or entry today would cause the "disruption" (previously) of concern to VAA, short-term costs of disruption when suppliers enter and exit a market are a standard part of the competitive process; not only do stakeholders take into account and mitigate cost(s) and other impact of such disruption, competition economists generally agree that any such costs are outweighed over time by the benefits of competition.

e. VAA's business justifications are not unrelated to the anti-competitive purpose

50. Regardless, all of the justifications offered by VAA, while they can reasonably be said to accrue to VAA as operator of YVR, only accrue to VAA because of the (intended) exclusionary effects of the conduct. They are not unrelated to the anti-competitive purpose – excluding competitors – as required by the Tribunal and the Federal Court of Appeal.[30] For this reason

[30] JBOA, Tab 5, Canada Pipe FCA, para 91; JBOA, Tab 14, TREB CT, para 297.

alone, VAA's conduct constitutes an anti-competitive act within the meaning of s. 79(1)(b) of the Act.

f. VAA's alleged "public interest" mandate is self-determined and, regardless, irrelevant to the question of whether the overall purpose of VAA's impugned conduct is to exclude competitors

51. The underlying foundation of VAA's business justification arguments would seem to be that VAA's exclusionary conduct is in furtherance of its "public interest" mandate. VAA tries to wrap itself in the cloak of public interest in two ways — neither of which are legally or factually supported.

52. First, VAA has raised the regulated conduct defence ("**RCD**"). As described below, RCD is not available to VAA or its conduct, or with respect to section 79, or with respect to the reviewable practices provisions of the Act generally. Second, VAA appears to argue that its "public interest" mandate lends credence to any claim that its exclusionary conduct is pro-competitive or efficiency enhancing. As demonstrated above, VAA has not established that its exclusionary conduct was or is pro-competitive or efficiency enhancing, or even that this exclusionary conduct furthered or furthers its stated "public interest" objective to grow YVR traffic and enhance connectivity.

53. VAA can point to no case law that supports the proposition that a mandate to operate a facility for the benefit of the public renders an exclusionary practice immune from s. 79, or from being found to constitute an anti-competitive act without establishing, like all other respondents, that its conduct was pro-competitive or efficiency enhancing. There is no such case law because to interpret s. 79 in such a manner would be manifestly

inconsistent with the objectives of the Act and the Act's oft-recognized role as the framework economic law of Canada.[31]

g. The evidence of anti-competitive purpose outweighs the evidence provided in support of the alleged business justification

54. Even if the Tribunal finds VAA to have established that its exclusionary conduct was or is pro-competitive or efficiency enhancing, the Tribunal must still weigh the evidence to determine whether, given evidence of anti-competitive purpose, the overall purpose of the practice is to exclude, predate or discipline a competitor, here exclusionary.[32] Even if VAA's explanations amount to legitimate business justifications (which they do not) the purpose of VAA's conduct, on balance, is still overwhelmingly "anti-competitive", given the subjective evidence of VAA's intent to exclude competitors and the reasonably foreseeable exclusionary effects of VAA's conduct.

(4) VAA's Plausible Competitive Interest

55. In TREB, where the impugned conduct of the respondent occurred in a market in which it did not compete and was not on its face exclusionary, the Tribunal asked whether TREB had a plausible competitive interest in adversely impacting competition ("**PCI**") in the relevant market at issue in assessing the overall purpose of the impugned conduct.[33] In the Commissioner's submission, the PCI test need not be applied in this application, or at a minimum its importance is diminished, because it is clear that the purpose of VAA's impugned conduct was and is exclusionary, and hence an anti-competitive act under s. 79(1)(b). VAA's conduct is distinguished from that in TREB where the exclusion was argued to be collateral to TREB's stated purpose, said to be the protection of privacy and copyright. Exclusion is not collateral to VAA's conduct; exclusion is the

[31] JBOA, Tab 24, *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 [*Nova Scotia Pharmaceutical Society*], paras 84-87. See also JBOA, Tab 18, *General Motors of Canada Ltd. v City National Leasing*, [1989] 1 S.C.R. 641, para 57.
[32] JBOA, Tab 5, Canada Pipe FCA, paras 67 and 87-88; JBOA, Tab 14, TREB CT, para 285.
[33] JBOA, Tab 14, TREB CT, para 279.

express purpose of the conduct. However, even if the PCI test is applied, indeed to the same extent as in TREB, the evidence clearly establishes that VAA had and has the requisite interest - its stated rationale for the conduct confirms that interest.

a. The plausible competitive interest test does not need to be applied, or its importance is attenuated

56. In TREB, the Tribunal was required to determine whether the overall purpose of TREB's data use ("**VOW**") restrictions was to exclude (innovative) competitors downstream for residential real estate brokerage services. TREB did not compete in the market allegedly affected[34] and its data use restrictions were not on their face exclusionary, indeed were argued by TREB to be justified by copyright and/or privacy laws.[35] In this context, in order to assess whether the overall purpose of TREB's data restrictions was exclusionary, the Tribunal considered whether TREB had a PCI in the market for residential real estate brokerage services[36] and concluded that TREB had the requisite exclusionary intent.[37]

57. Unlike in TREB, VAA's conduct is manifestly to exclude a competitor(s) from a market – there is no (potential) ambiguity in this respect. Consequently, the PCI test is unnecessary to conclude that the overall purpose of VAA's conduct was to exclude competitors in the Galley Handling (or In-flight Catering) market at YVR, or if it is, its importance in determining whether the "overall character" of VAA's conduct is exclusionary must, logically, be greatly attenuated.

[34] JBOA, Tab 14, TREB CT, paras 179-181.
[35] JBOA, Tab 14, TREB CT, paras 321 and 717.
[36] JBOA, Tab 14, TREB CT, paras 279-284.
[37] JBOA, Tab 14, TREB CT, para 322.

b. Regardless, VAA clearly has a plausible competitive interest in adversely affecting competition in the Galley Handling (or In-flight Catering) market at YVR

58. Use of the word "plausible" – not probable, not actual – confirms that the Tribunal has set a low threshold for the PCI test, which is an additional screen not expressly included in s. 79 of the Act.[38] Of course, this low threshold is appropriate since an overall exclusionary purpose along with a resulting substantial lessening or prevention of competition, must still be established.

59. In simple terms, for a PCI to exist, VAA must, have a possible or plausible interest (to use VAA's counsel's words in her opening statement, "economic incentive" or "motive") to exclude competitors and there by impact competition in the relevant market. The PCI cannot mean that the Commissioner must prove that the exclusionary conduct could possibly or plausibly lessen or prevent competition (although the Commissioner states he has done so in this case). That is the subject of a separate, distinct, analysis under s. 79(1)(c) and to require this of the Commissioner would conflate the elements of s. 79(1)(b) and s. 79(1)(c) contrary to the decision of the Federal Court of Appeal in *Canada Pipe*.[39]

60. VAA's plausible competitive interest in excluding competitors, and adversely impacting competition, in the Galley Handling (or In-flight Catering) market at YVR is readily apparent on the facts of this case. Indeed, VAA has expressly and repeatedly declared that it has a competitive interest (economic incentive or motive) in the outcome of competition in the relevant market.

61. The Tribunal in TREB held that to demonstrate a PCI, this "may" involve demonstrating that a respondent, here VAA, has an interest that is

[38] JBOA, Tab 39, Cambridge Dictionary, *sub verbo* "plausible"; JBOA, Tab 40, Merriam-Webster Dictionary, *sub verbo* "plausible"; JBOA, Tab 32, *Telus Communications Inc v Telecommunications Workers Union*, 2014 ABCA 199 at para 44.

[39] JBOA, Tab 5, Canada Pipe FCA, paras 83 and 99.

different from the typical interest of a supplier cultivating downstream competition for its goods and services.[40]

62. In response to question 4 from the Tribunal's direction dated November 5, 2018 (the "**November 5th Direction**"), it is submitted that the facts in this case do not demonstrate an interest in the downstream market that is a "garden variety" refusal to supply that the Tribunal was concerned about in *TREB*.[41] Unlike regular suppliers, VAA does not suffer from a less competitive Galley Handling (or In-flight Catering) market. No airline has testified that they would fly less at YVR in the event of higher prices for Galley Handling (or In-flight Catering) at YVR. This contrasts with a supplier whose product is sold in the downstream market and suffers when competition lessens in that market because the amount it sells declines. VAA's participation in the upside is also different from a typical supplier whose profits are not formulaically linked to the revenues of the downstream supplier as is the case here.

i. VAA's not-for-profit status is not relevant to its plausible competitive interest

63. VAA seems to suggest that it can have no PCI in adversely impacting competition in the Galley Handling (or In-flight Catering) market at YVR because it is a not-for-profit corporation with no incentive to maximize profits or revenue. However, VAA's corporate status is irrelevant and does not detract from VAA's need to grow revenues to operate YVR, as confirmed by its Ground Lease, which requires VAA to generate high gross proceeds from the operation of the Airport, and Mr. Richmond's testimony that VAA must earn revenues that exceeds YVR expenses. (III.B.4.b.i-3)

[40] JBOA, Tab 14, TREB CT, para 281.
[41] JBOA, Tab 14, TREB CT, para 281.

ii. VAA has a competitive interest in the supply of Galley Handling (or In-flight Catering) at YVR

64. Dr. Niels directly addresses the issues of VAA's incentives in a market where it does not compete, testifying that even if a firm is not vertically integrated, it may have a financial stake in the outcome of competition in the downstream market, and therefore a PCI (economic incentive) in that downstream market. (III.B.4.b.ii-1) VAA has – through its concession fees, land rent charges and the enhanced revenues Dr. Tretheway testified VAA stands to gain from attracting additional business to YVR (III.B.4.b.ii-5) – a plausible interest in excluding competitors from Galley Handling (or In-flight Catering) and in adversely impacting competition at YVR.

65. In response to question five from the November 5th Direction, if the Tribunal finds that VAA has a conceptual plausible competitive interest in pursuing action that may maintain (or enhance) its revenues, then that is sufficient to meet the additional screen created in TREB. Once this threshold is met, it is submitted that the Tribunal need not – indeed should not - determine whether VAA had such an interest on the specific facts of the case. We have described above, the reasons why the application of the PCI test should be limited in this case. Requiring the Commissioner to demonstrate that VAA actually had such an interest would turn the screen into a barrier and it would prevent section 79 from applying to a broad range of cases where exclusionary conduct causes a SLPC in a market that a respondent controls. There is no indication that this was Parliament's intention in enacting s. 79.

C. VAA's anti-competitive conduct has caused, is causing and is likely to continue to cause a substantial lessening and prevention of competition

66. The evidence of the market participants directly impacted by VAA's exclusionary conduct and the expert evidence of Dr. Niels (on their own and

certainly in the aggregate) demonstrate that VAA's anti-competitive conduct has caused, is causing, and is likely to cause a substantial lessening and prevention of competition in the supply of Galley Handling (or In-flight Catering) at YVR. Specifically, "but for" VAA's exclusionary conduct, there would likely have been in 2014 and would likely in the future be ***entry*** by new competitors for the supply of Galley Handling (or In-flight Catering) at YVR, beyond the two, and soon to be three, incumbents; ***switching*** and threats of switching from airlines at YVR to new competitors for the supply of Galley Handling (or In-flight Catering); ***lower prices*** for airlines for the supply of Galley Handling (or In-flight Catering) at YVR; and a greater degree of ***dynamic competition*** for Galley Handling (or In-flight Catering) at YVR.

(1) Analytical Framework applied by the Tribunal to assess the impact of VAA's exclusionary conduct

67. Under s. 79(1)(c), the Tribunal has generally asked: would a (relevant) market(s) — in the past, present or future — be substantially more competitive but for the impugned practice.[42] To answer this question, the Tribunal has compared the level of competition that exists with the implementation of the impugned practice and the level of competition that likely would have existed "but for" the impugned practice. The Tribunal then determines whether the difference between those two levels of competition is, was, or would likely be, substantial.[43] In this regard, the evidence demonstrates that VAA's exclusionary conduct has, and if not remedied, will continue to adversely affect competition in the relevant market(s) to a degree that is material (**the magnitude or degree element**); that the duration of those adverse effects on competition is substantial (**the duration element**); and that the adverse effects on competition will impact a substantial part of the relevant market(s) (**the scope element**).[44]

[42] JBOA, Tab 14, TREB CT, para 698.
[43] JBOA, Tab 14, TREB CT, para 480.
[44] JBOA, Tab 14, TREB CT, paras 459-460; JBOA, Tab 33, Tervita, paras 45 and 78; JBOA, Tab 11, CCS, paras 375 and 378.

(2) Evidence of market participants

68. As noted, evidence of competitive effects arises from two sources: *viva voce* and documentary evidence of market participants and expert evidence. The evidence of the market participants — particularly eight airlines who have no incentive to ask for more competition unless they were likely to benefit from doing so – necessarily reflects the market participants' actual experience and expectations based on that experience. The evidence of market participants should be afforded significant weight, particularly when all such evidence supports the relief sought by the Commissioner and none – not domestic or international airline – supports VAA's position.

a. Summary of select evidence from airlines

i. Jazz

69. Jazz testified in opposition to VAA's exclusion of new In-flight Catering competition. In late 2014 and early 2015, Jazz switched from Gate Gourmet to Newrest at Toronto, Montreal and Calgary airports, and from Gate Gourmet to Strategic Aviation at Edmonton, Halifax, Ottawa, Regina and Winnipeg airports. Switching amounted to savings of $2.9 million (or 16%) in 2015 alone. (II.J.1-11) Unable to switch at YVR, Jazz had to accept a bid from Gate Gourmet approximately [redacted] greater than it would have paid had its preferred provider, Strategic Aviation, been allowed airside access at YVR. (II.J.1-10) Accounting for material changes to Jazz's fleet since 2015, Jazz estimates that it was forced to pay approximately $2 million, or 41% more for In-flight Catering at YVR than had it been able to use its preferred provider. (III.C.2.a.i-1)

70. When it became aware that Jazz intended to switch to other In-flight Caterers at other airports in Canada, Gate Gourmet submitted a bid for YVR that reflected an approximate [redacted], and later [redacted], increase over its 2014 prices to Jazz at YVR. Despite this increase and the bids' non-compliance

with RFP requirements, Jazz had no choice but to award the [redacted] contract to Gate Gourmet ([redacted]). (III.C.2.a.i-1)

ii. Air Transat

71. Air Transat testified in opposition to VAA's exclusion of new In-flight Catering competition. Unable to switch at YVR, Air Transat was not able to contract with its preferred In-flight Caterer at YVR, Optimum. (III.C.2.a.ii-6) Contracting with Gate Gourmet instead, and [redacted] pricing from Gate Gourmet (having only contracted with Gate Gourmet at YVR and no other airports), caused Air Transat to pay approximately [redacted] more at YVR than it expected to pay its preferred In-flight Caterer for service at YVR. (III.C.2.a.ii-6) The high Gate Gourmet pricing at YVR [redacted] cost savings Air Transat expected to save from switching to another provider at stations other than YVR.

72. Further, significant non-price effects resulted from this dynamic, including Air Transat's inability [redacted]

iii. [redacted]

73. [redacted]

[redacted]. (II.J.3-3) [redacted]. (II.J.3-3) Dr. Niels analyzed the actual prices that [redacted]. (II.J.3-2) Dr. Reitman's provided two critiques of Dr. Niels' opinion: (i) [redacted]; and (ii) [redacted]. (III.C.2.a.iii-4) [redacted]:

- [redacted]. (II.J.3-5)
- [redacted].

iv. Air Canada and WestJet

74. Air Canada and WestJet testified in opposition to VAA's exclusion of new In-flight Catering competition. But for VAA's exclusionary conduct, Air Canada and WestJet's evidence is that they would have had and in the future would have access to more competitively priced In-flight Catering options at YVR.

b. Evidence with respect to In-flight Catering firms

75. It is uncontested that Newrest, Strategic Aviation, and Optimum Strategies desire to compete at YVR and are effective competitors. Indeed, each of these firms testified that but for VAA's exclusionary conduct, they would have entered YVR in 2014 and competed for airline business (and, as demonstrated, had entry been permitted, [redacted]). Currently, and despite the entry of dnata, Newrest, Strategic Aviation and Optimum Strategies testified that they would enter YVR and compete for airline business.

76. [redacted]. (III.B.3.c.iii-9)

c. Evidence with respect to entry by dnata

77. Unlike Newrest, Strategic Aviation and Optimum, there is scant evidence that dnata will likely be an effective competitor at YVR. dnata has no presence in Canada and virtually none in North America (only in Orlando). (III.C.3.d-5) VAA's process for selecting dnata – the Market Study and RFEOI/RFP – was fundamentally flawed (for example, [redacted]), as were the results of the process. As one airline testified, dnata is "[redacted]" vis-à-vis the incumbent caterers at YVR in an In-flight Catering environment where innovative business models benefit airlines everywhere but YVR.

78. dnata's limited presence in North America will be an obstacle for its success at YVR (as demonstrated by its own business records). It will be unable to offer "network" pricing and satisfy airline preferences for a single caterer supplier across Canada. Moreover, [redacted]. (III.C.2.c-8) Domestic flights account for 67% of flights per week at YVR; [redacted]. (III.C.2.c-8) International flights account for 33% of flights per week at YVR; [redacted].

79. Of course, dnata has yet to begin operating at YVR and [redacted]. (III.C.2.c-8)

(3) Economic evidence

a. Dr. Niels' analyses

i. VAA's exclusionary conduct is preventing entry of In-flight Caterers and switching by airlines at YVR

80. Dr. Niels conducted an analysis of the extent of switching at various Canadian airports. That study demonstrated that: (a) there was very little switching by airlines among incumbent providers, with [redacted] occurring at YVR over the period 2013 to 2017; (b) [redacted] occurred at airports other than YVR; and (c) [redacted].

81. Dr. Reitman did not contest these conclusions but opined that "the observation that there is very little switching apart from entry is significant because it indicates that there is no real difference between the competitive dynamics between the incumbent firms at YVR and those at other airports."

(III.C.3.a.i-2) Dr. Reitman's position, therefore, would have the Tribunal set aside switching to new entrants. However, switching to new entrants is a major source of competition in this industry. There is no basis to set aside such evidence, especially when it speaks to a major competitive dynamic.

82. The disparity in switching at YVR compared to other airports is particularly relevant for at least two reasons. First, would-be entrants servicing airlines across Canada were ready to enter in 2014 and are currently ready; but for VAA's exclusionary conduct, more switching would have occurred at YVR in the past and more would occur in the future. Second, Dr. Niels and Dr. Reitman agree that it is reasonable to presume that airlines benefit when they switch In-flight Catering providers; there is direct link between the fact of switching and benefits to airlines, and a direct link between a lack of switching and increased costs and/or reduced quality of service to airlines. Further, Dr. Reitman's admission also undermines his position that one ought to set aside switches to new entrants because switching — whether to an incumbent or entrant — presumptively benefits airlines. A prevention of switching — to an incumbent or entrant — therefore, harms airlines.

ii. Jazz's gains from switching

83. Dr. Niels used In-flight Caterer data to determine Jazz's gains from switching In-flight Caterers in 2015. Dr. Niels' analysis identified specific cost benefits Jazz enjoyed when entry was not excluded, independent of Jazz's own estimated gains from switching. Dr. Niels found that Jazz saved approximately [redacted] the year following the switch, [redacted]. (III.C.3.a.ii-1)

84. Dr. Reitman did not dispute Dr. Niels' calculations but opined that had Jazz stayed with Gate Gourmet, Jazz would have saved [redacted]. (III.C.3.a.ii-3, III.C.3.a.ii-6) Dr. Reitman's opinion is missing the point. Dr. Niels' conclusion was that the savings that Jazz earned resulted from

competition. Entrants were not in a position to compete before Jazz switched. The lower prices Jazz paid after switching reflect a change in the competitive position of entrant In-flight Caterers and the benefits of competition. Dr. Reitman's position — that this is "the wrong comparison" — is premised on a misunderstanding of the appropriate but-for analysis.

85. Dr. Reitman also claimed that the prices Jazz paid in 2015 were "disequilibrium prices" ([redacted]). (III.C.3.a.ii-6) "Disequilibrium prices" is not contained in Dr. Reitman's report. When confronted with testimony that established that [redacted]. (III.C.3.a.ii-7) [redacted] Dr. Reitman's appeals to "disequilibrium prices" should be given no weight.

86. Further, relying on figures in an email from a non-testifying witness, Dr. Reitman argued that [redacted] at YVR, Dr. Reitman conceded that he assumed the accuracy of these figures and this criticism would only be valid inasmuch as the estimates communicated by [redacted]. (III.C.3.a.ii-9) That admission is important in light of [redacted]. (III.C.3.a.ii-11) [redacted]. (III.C.3.a.ii-10) Further, even if these estimates were accurate, they imply that "the market" prices at Vancouver are significantly higher than at other airports in Canada, a conclusion contrary to Dr. Reitman's empirical analysis.

iii. Gains from entry to non-switchers

87. Dr. Niels found [redacted]

[redacted] (III.C.3.a.iii-1) Dr. Reitman's main critique of that analysis was that Dr. Niels did not distinguish between markets [redacted]. (III.C.3.a.iii-2) Modifying Dr. Niels' analysis to account for these objections, Dr. Reitman produced his Table 10 (the percentage change in price following entry for a sample restricted to small airlines).

88. Dr. Niels compared the results in Dr. Reitman's Table 10 with his own results and noted that "Dr. Reitman and I therefore seem to agree that there is an [redacted] that do not switch. However, I place greater importance on this finding than Dr. Reitman." (III.C.3.a.iii-3) As Dr. Niels noted, "these smaller airlines in aggregate represent approximately [redacted] of the flights at YVR." (III.C.3.a.iii-4)

b. Dr. Reitman's analysis

i. Comparison of prices and margins across airports in Canada

89. Dr. Reitman conducted regression analyses to compare Galley Handling prices at YVR with prices at other Canadian airports. He concluded that [redacted] at YVR (and prices at YVR [redacted] at other Canadian airports) and that entry at non-YVR airports [redacted] at those airports. On this basis, Dr. Reitman opined that VAA's exclusion did not result in a substantial lessening of competition. Dr. Reitman's opinion reflects a fundamental misunderstanding of the relevant economic assessment.

90. First, even if Dr. Reitman's methodology was not flawed and his estimates were correct, they do not speak to the effects of VAA's exclusion. The appropriate but-for question should not ask whether prices at YVR are

low relative to other airports, but whether they would be lower absent VAA's exclusion.

91. Second, Dr. Reitman's regression analysis methodology is fundamentally flawed as evidenced by [redacted]. (III.C.3.b.i-1)

92. Dr. Reitman acknowledged other shortcomings in his regression analysis, testifying that "[redacted]. (III.C.3.b.i-6) Dr. Reitman considered this approach because Dr. Niels used it to show that [redacted], indicating that VAA's exclusionary conduct [redacted]. (III.C.3.b.i-10) Dr. Niels presented this analysis to illustrate his "fundamental problem" with Dr. Reitman's analysis: that is, whether price differentials relative to YVR are driven by cost differences or driven by VAA's exclusion. (III.C.3.b.i-7)

93. Dr. Reitman criticized Dr. Niels for [redacted] (III.C.3.b.i-8) [redacted]

[redacted], (III.C.3.b.i-8) [redacted] linked to VAA's exclusionary conduct.

94. Dr. Reitman's fundamental conclusion concerning prices at YVR relative to other Canadian airports - that YVR prices are [redacted], and [redacted], than at other airports - is contrary to other evidence Dr. Reitman relies on regarding Dr. Niels' analysis of the benefits that Jazz earned when they switched from Gate Gourmet to entrant in-flight caterers. Dr. Reitman's report noted, "[redacted]" (III.C.3.a.ii-5) The fact that [redacted]. In fact, it is clear that [redacted].

c. Unlike Dr. Niels, Dr. Reitman ignored evidence of market participants

95. Dr. Niels opined that the views of market participants — particularly airlines — constitutes important evidence on what is the "optimal market structure" for In-flight Catering at YVR. (III.C.3.c-1) Dr. Reitman discounted entirely airline views, suggesting for the first time during his oral testimony that the airlines supported new In-flight Catering entry at YVR not to obtain lower prices, better quality or service, or greater choice, but to harm competing airlines who "would then have to scramble." if their inflight catering

supplier exited YVR. (III.C.3.c-3) In fact, Dr. Reitman made this new (unsubstantiated) assertion a number of times in his testimony. (III.C.3.c-4, III.C.3.c-5)

96. Of course, no witness — appearing on behalf of the Commissioner or VAA — has suggested that such a predatory motivation pushed airlines to support entry by In-flight Caterers. Common sense dictates that Dr. Reitman's attempt to support VAA's failure to consider the views of the airlines with respect to additional Galley Handling (or In-flight Catering) competition at YVR has no basis in commercial reality. An airline that chooses to switch suppliers cannot target such a switch to affect (the limited) airlines it competes against and moreover has no basis for concluding that any competing airlines would be required to "scramble" given the contractual and other protections commonplace in In-flight Catering contracts. Dr. Reitman's new 'theory' at the hearing should be given no weight.

d. The views of the economic experts with respect to the entry of dnata

97. Dr. Niels opined that "[redacted]." (III.C.3.d-1) In contrast, Dr. Reitman opined that "[redacted]" (III.C.3.d-2)

98. Dr. Reitman's opinion is untenable for at least two separate reasons: (a) it (again) reflects a fundamental misunderstanding of the appropriate but-for analysis; and (b) it relies on an overly simplistic perspective of how the number of competitors affect competitive outcomes.

99. The appropriate but-for analysis compares outcomes with VAA's exclusion in place to outcomes that would be realized absent VAA's exclusion. It does not compare outcomes with two competitors and outcomes with those same two competitors plus one (dnata). Dr. Reitman's testimony demonstrated a misunderstanding of this fact. For example, Dr. Reitman testified that "[redacted]" (III.C.3.d-3) But, of course, if dnata's entry were to increase the number of switches, that does not preclude the possibility that the number of switchers would be higher still if VAA were to allow entry by additional in-flight caterers.

100. Further, it is widely accepted that counting the number of firms active in a market gives little to no insight on the nature of competition in that market.[45] Dr. Reitman ignores this when opining that there can be no prospective effects of VAA's exclusion because dnata's entry raises the number of competitors from two to three. First, Dr. Reitman's apparent opinion that market power can only exist in the presence of something less than three firms (and that once three or more firms compete all market power vanishes) is inaccurate. [redacted]. Third, Dr. Reitman's certainty about dnata's success is not based in evidence given [redacted], as discussed above.

(4) Innovation and dynamic competition

101. Innovation and dynamic competition — the introduction of new products, services and business models — is particularly valuable for economic welfare. This holds for In-flight Caterers which innovate through new business models and processes in addition to new technologies.

[45] JBOA, Tab 41, Competition Bureau, *Merger Enforcement Guidelines*, October 6, 2011, 5.8; and JBOA, Tab 47, Act, ss 92(2).

a. Market participants have confirmed the importance of innovation and dynamic competition for In-flight Catering

102. Innovation in In-flight Catering is an important dimension of competition in this proceeding. Such innovation has created (and is creating) substantial price and non-price benefits to customers through new business models and procedures.

103. Strategic Aviation has introduced a differentiated and cost-efficient business model: a "one-stop-shop" for both Catering and Galley Handling. (III.C.4.a-2) Unlike traditional firms, Strategic Aviation provides Galley Handling using its own personnel but partners with specialized third parties to source Catering for those airlines that require it. This model allows airlines to procure the specific mix of Galley Handling and Catering that they require, without being forced to absorb their share of fixed overhead costs for In-flight Catering services that they do not require. This new business model was itself spurred by new business models among airlines – specifically, the emergence of low-cost airlines. Strategic Aviation testified that "there seemed to be an opportunity there to take advantage of this new – the new airline model, if you like, of how food was being provided to the customers that we could take advantage of." (III.C.4.a-4) It further testified that these more flexible business models not only allow for airlines to source a particular type of food more easily, they also result in important increases in economic efficiency and lower prices to customers by, essentially, allowing airlines to use outside kitchens with excess capacity. (III.C.4.a-5)

104. Optimum Stratégies functions as an amalgamator. It neither operates Catering facilities nor provides Galley Handling. It subcontracts all these services to independent third-party providers, acting as an intermediary to find the best providers for each airline's needs at each airport. Optimum Stratégies testified that its business model allows airlines to "find the right kitchens that can make food that's appropriate..." (III.C.4.a-7) For example,

the Optimum Stratégies business model allows an airline to feature a particular type of food (e.g., Japanese).

105. Newrest testified that innovation falls into two categories: (a) the "front end customer side" and (b) the production side. With respect to the "front end customer side", "a great deal that can be done with respect to point of sales, i.e., digital, pre order, et cetera. So there are a number of items which you can bring to innovation on the front end customer side." (III.C.4.a-8) With respect to the production side, "there is also technological improvements that you can do on the production side which give your customers more confidence. For example, we have robotics, so robots put into – or special robots put into certain of our facilities which give them a higher level of traceability, a higher level of quality, et cetera. And these – and, of course, releases a certain dependence on labour markets which are sometimes tight. In some areas, particularly in North America, it's very difficult to get labour in some of the sections of catering at this stage around the airport." (III.C.4.a-8)

106. Airlines also testified that they value fresh approaches to doing business spurred by entry and competition. Air Transat, a former long time user of Gate Gourmet at airports across Canada (except YVR) testified that [redacted] (III.C.4.a-9)

b. Dr. Reitman ignores innovation and dynamic competition for In-flight Catering

107. Dr. Reitman ignores dynamic competition in In-flight Catering on the sole basis that Strategic Aviation's business model was "does not appear to be innovative at least not [redacted]" because Gate Gourmet can provide Galley Handling services separately. (III.C.4.b-1) Dr. Reitman's misunderstands

dynamic competition. As Professor Carl Shapiro emphasized, "for our purposes, 'innovation' encompasses a wide range of improvements in efficiency, not just the development of entirely novel processes or products."[46]

108. Dr. Niels expert opinion accords not only with Professor Shapiro's definition but also that of Professor Schumpeter. (III.C.4.b-3) As noted by Schumpeter, competition is a dynamic process "wherein firms strive to survive under an evolving set of rules that constantly produce winners and losers."[47] Such an "evolving set of rules" certainly reflects the changes the In-flight Catering industry has witnessed over the past decades. Moreover, there is no requirement that a Schumpeterian winner or loser be created solely by the introduction of cutting-edge new technology. As evidenced by the success of Delta Dailyfoods and the trend to move more Catering operations off airport, winners and losers can be created through more mundane, although highly effectual, changes in business models and processes.

109. But for VAA's exclusionary conduct, airlines could choose to procure Galley Handling at YVR from firms other than the two (soon to be three) full-service incumbent In-flight Caterers. As a result, but for VAA's exclusionary conduct, innovation and dynamic competition would be substantially greater at YVR.

(5) Substantiality of anti-competitive effects

a. Magnitude or degree

110. But for VAA's exclusionary conduct, there would likely have been in 2014 and would likely in the future (notwithstanding dnata's upcoming entry) be **entry** by new competitors for the supply of Galley Handling (or In-flight Catering) at YVR, beyond the two, and soon to be three, incumbents; **switching** from airlines at YVR to new competitors for the supply of Galley

[46] JBOA, Tab 43, Shapiro, Carl, "Competition and innovation: Did Arrow hit the bull's eye?" in Lerner, J and Stern, S, eds, *The Rate and Direction of Inventive Activity Revisited* (University of Chicago Press, 2003), pages 376-7.
[47] JBOA, Tab 14, TREB CT, para 618.

Handling (or In-flight Catering); **lower prices** for airlines to pay for the supply of Galley Handling (or In-flight Catering) at YVR; and a greater degree of **dynamic competition** for Galley Handling (or In-flight Catering) at YVR. The impact of each of these incremental anti-competitive effects (described above through the evidence of market participants and Dr. Niels) constitutes, or is likely to constitute, a substantial prevention or lessening of competition. Their impact in the aggregate is undeniable.

111. Gate Gourmet and CLS have not faced any entry at YVR for 25 years. The customers of In-flight Catering services — the airlines — want more competition at YVR. The suppliers of In-flight Catering services were (and remain) prepared to enter YVR and, *importantly, compete for the business of these airlines*.

112. Importantly, the anti-competitive effects attributable to VAA's exclusionary conduct rise to the level of substantiality because VAA has, and continues to, foreclose rivalry in the market for the supply of Galley Handling at YVR. Gate Gourmet, CLS and, soon, dnata service airlines at YVR *without threat of entry*. As this Tribunal has noted, "(i)n the absence of rivalry, competition does not exist and cannot constrain the exercise of market power, unless the threat of potential entry is particularly strong."[48]

b. Duration and scope

113. With respect to duration (namely, the time dimension of the anti-competitive effects), the evidence shows that the adverse effects of VAA's exclusionary conduct have been manifesting since at least 2013 and continue, notwithstanding dnata's upcoming entry at YVR. Accordingly, the duration of those adverse effects on competition is substantial.

114. With respect to the scope of the anti-competitive effects within the relevant market, the evidence shows that the anti-competitive effects of

[48] JBOA, Tab 14, TREB CT, para 462.

VAA's exclusionary conduct are materially impacting, and in the absence of an order, will continue to materially impact (notwithstanding dnata's upcoming entry at YVR), Galley Handling (or In-flight Catering) competition at YVR. Further, and in any event, dnata would only provide a competitive discipline for a very small part of YVR, as noted above. Accordingly, the scope of the anti-competitive effects is impacting a substantial part of the relevant market.

D. THE RCD IS NOT AVAILABE TO VAA

115. VAA's exclusionary conduct is not immunized, either as a matter of law or as a matter of fact, by the RCD or any other defence or doctrine. The RCD is a doctrine of statutory interpretation that grew out of concerns that parties acting under valid provincial legislation may be convicted under the Act's criminal provisions, and is only applicable in the limited circumstances described below.

(1) The RCD is not available to VAA as a matter of law

116. In response to Questions one and three from the November 5th Direction, it is submitted that VAA cannot rely on the RCD as a matter of law for three reasons. First, the RCD does not apply to the reviewable matters (or civil) provisions of the Act. Second, even if the RCD is available for reviewable matters, Parliament did not, in the words of s. 79(1), leave the required "leeway" for VAA to operate outside of s. 79(1). Third, the RCD does not apply where the conduct is alleged to be authorized by federal legislation, which is the case here.

a. The RCD provides a defence to criminal conduct

117. With one exception, the RCD has only been applied in matters that engage the criminal provisions of the Act.

118. In his recent decision in *Hughes v. Liquor Control Board of Ontario,*[49] Justice Perell reviewed in detail the history of the RCD in Canada, [50] including the seminal Supreme Court of Canada (SCC) decisions in *Garland* (where the SCC held that the criminal provision must contain "leeway language" for the RCD to be available)[51] and *Jabour*[52]. Pursuant to this review, Justice Perell concluded that the RCD is fundamentally "a principle of statutory interpretation under which a *criminal law statute* [emphasis added] leaves room for certain conduct that otherwise would be regarded as criminal to be innocent. For the culpable conduct to be innocent it must be mandated, directed or authorized by a public law or statue".[53]

119. Indeed, Justice Perell addressed the issue of RCD's application to civil matters head on and found that the RCD can apply to a civil action for damages under s. 36 of the Act because the underlying conduct was alleged to have violated the criminal provisions of the Act.[54] The RCD has also been considered in non-*Competition Act* cases but those cases have always involved criminal conduct.[55]

120. That the RCD is only available to immunize conduct found to contravene the criminal provisions of the Act is further confirmed by the 2009

[49] JBOA, Tab 19, 2018 ONSC 1723 [*Hughes*].
[50] JBOA, Tab 23, *R v Chung Chuck*, [1929] 1 DLR 756 (BCCA), para 4; JBOA, Tab 22, *R v Canadian Breweries Ltd*, [1960] OR 601 (HCJ), paras 1-2; JBOA, Tab 3, *Attorney General of Canada v Law Society of British Columbia,* [1982] 2 SCR 307 [*Jabour*], para 22; JBOA, Tab 25, *Reference Re Farm Products Marketing Act*, [1957] SCR 198, para 9; JBOA, Tab 37, *Waterloo Law Association v AG of Cana*da, (1986), 58 OR (2d) 275 (HCJ), para 1; JBOA, Tab 20, *Industrial Milk Producers Association v British Columbia (Milk Board)*, [1989] 1 FC 463 [*Industrial Milk*], para 3; JBOA, Tab 26, *R v Independent Order of Foresters*, (1989), 26 CPR (3d) 229 (Ont CA), para 1; JBOA, Tab 30, *Society of Composers, Authors and Music Publishers of Canada v Landmark Cinemas of Canada Ltd*., (1992), 45 CPR (3d) 346, para 7; JBOA, Tab 28, *Rogers Communications Inc. v Shaw Communications Inc*. [2009] OJ No 3842, para 57; JBOA, Tab 15, *Fournier Leasing Co. v Mercedes-Benz Canada Inc*., 2012 ONSC 2752, para 8; JBOA, Tab 2, *Cami International Poultry Inc. v Chicken Farmers of Ontario*, 2013 ONSC 7142, para 22; JBOA, Tab 16, *Garland v Consumers' Gas Co.,* [1998] 3 S.C.R. 112, [*Garland 1998*], para 1; JBOA, Tab 17, *Garland v Consumers' Gas Co*., 2004 SCC 25, para 1.
[51] JBOA, Tab 16, Garland 1998.
[52] JBOA, Tab 3, Jabour.
[53] JBOA, Tab 19, Hughes, para 200. See also paras 204, 205 and 220.
[54] JBOA, Tab 19, Hughes, para 230.
[55] See for example, JBAO, Tab 16, Garland 1998.

amendments to the Act. Parliament removed from the conspiracy provision in s. 45 the requirement that competition be "unduly" lessened. However, because Parliament removed the "leeway language" required by the Supreme Court in *Garland*, being the "unduly" requirement, Parliament added s. 45(7) to make clear that the RCD is available as a defence to a prosecution under s. 45(1).[56] Moreover, when the Act was amended in 2009, Parliament created a reviewable matters provision in s. 90.1[57] for agreements or arrangements between competitors that are not naked criminal restraints on competition but nevertheless prevent or lessen competition substantially, similar to the unilateral conduct covered by s. 79. While including many of the same exceptions found in s. 45, Parliament did not enact any provision stating that the RCD was available under this section, as it did for its criminal counterpart in s. 45.

121. As indicated above, the RCD was applied in one reviewable matters case, *Law Society of Upper Canada v. Canada,* in express reliance on the agreement of the parties that the RCD, if engaged, applied to reviewable matters without any analysis by the Court.[58] This decision preceded the governing case law of the Supreme Court of Canada in *Garland* relied upon by Justice Perell in *Hughes* and the above referenced amendments to the *Competition Act.*

b. Section 79(1) does not contain "leeway language" that would permit RCD to apply

122. If the Tribunal concludes that the RCD can apply to reviewable matters under the Act, then the Tribunal needs to review the language of section 79(1) to determine whether it permits the application of the RCD. As indicated above, the Supreme Court in *Garland* requires that there be words in the provision at issue, "leeway language", that indicates a Parliamentary intention to leave leeway for conduct that is authorized by a valid law. There is no such

[56] JBOA, Tab 47, Act, ss 45(7)
[57] JBOA, Tab 47, Act, s 90.1.
[58] JBOA, Tab 21, JBOA, Tab 20, *Law Society of Upper Canada v Canada (AG)*, (1996), 28 OR (3d) 460 (Gen Div), para 27.

language in s. 79.[59] This is not surprising as, to answer the second part of question 1 from the November 5th Direction, the normative rationale for applying RCD to criminal cases is absent from conduct covered by s. 79(1), indeed from all reviewable matters.[60]

c. The RCD does not apply to conduct regulated by federal legislation

123. VAA alleges that its mandate is ultimately derived from the federal government. In response to question three of the November 5th Direction, the Commissioner submits that for conduct alleged to be authorized by federal legislation (other than the *Competition Act*), the Tribunal should apply the ordinary principles of statutory interpretation. According to these principles, federal statutes applicable to the same facts will concurrently apply absent some "unavoidable conflict".[61] While s. 45(7) of the Act, as discussed above[62], does indicate that RCD may apply to criminal matters where the authorizing conduct is federal, the court in *Wakelam v. Johnson & Johnson* observed that "whether RCD applies equally where the authorizing legislation is also federal, as the defendants assert, is not free from doubt."[63]

124. Applying the ordinary principles of statutory interpretation, it is clear that, there is no conflict between the Act and any statute, regulation, or subordinate legislation (or even the constating documents) VAA relies on,[64]

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[59] See for example, JBOA, Tab 4, *Canada (Attorney General) v PHS Community Service Society,* 2011 SCC 44, paras 55-56, where the SCC held that residual discretion in a provision does not create leeway for a provincial regime to operate. See also JBOA, Tab 24, Nova Scotia Pharmaceutical Society, para 87 where the SCC ascribed the meaning of unduly a normative concept that unduly meant detriment or against the public interest. This normative concept is absent from evaluating the concept of substantiality. See for example, JBOA, Tab 5, Canada Pipe FCA, paras 37 and 38.

[60] For a discussion on the rationale, see JBOA, Tab 42, Competition Bureau, *Regulated Conduct Bulletin*, September 27, 2010, section 2.

[61] JBOA, Tab 44, Ruth Sullivan, *The Construction of Statues*, 5th ed. (Markham: LexisNexis Canada, 2008), page 442.

[62] JBOA, Tab 19, Hughes, para. 204. Perrell J referenced the RCD as applying to federal and provincial law, however, this statement was in obiter as only provincial laws were in issue.

[63] JBOA, Tab 38, [2011] BCJ No 2477, para 100.

[64] VAA relies on the Order-in-Council made pursuant to the *Airport Transfers (Miscellaneous Matters) Act* that transferred management of YVR to VAA pursuant to a ground lease. VAA also relies on its Certificate of Continuance and Articles of Continuance. Neither the Ground

let alone an unavoidable one. While an unavoidable conflict can occur where applying one federal law would frustrate the purpose of another, there is no suggestion – let alone evidence – that such is the case here.[65]

(2) VAA's conduct is not covered by the RCD as a matter of fact

125. If the Tribunal concludes that s. 79(1) of the Act grants leeway for federal legislation to authorize conduct contrary to s. 79 (1), then the next step is to determine whether the RCD is available to VAA on the facts of this case. In order for the RCD to be available, Justice Perell, relying on Supreme Court case law, held that the proponent must be regulated by valid legislation and that the exclusionary conduct must be required, directed or authorized by that legislation. Indeed, the party relying on the defence must identify a provision(s), in the relevant legislation, that expressly or by necessary implication directs or authorizes it to engage in the impugned conduct.[66]

126. Even assuming that the laws relied upon by VAA - the *Airport Transfer (Miscellaneous Matters) Act* and the *Aeronautics Act*, and/or the Order-in-Council ("**OIC**") "regulates" VAA (which is not accepted), it is clear that VAA's exclusionary conduct is not required, directed, or authorized (expressly or impliedly) by any statute, regulation or subordinate legislative instrument.

127. VAA seems to rely most heavily on the OIC, issued pursuant to the *Airport Transfers (Miscellaneous Matters) Act*. The OIC permits the Minister of Transport to designate a body to which the Minister is to "sell, lease or otherwise transfer an airport".[67] The *Aeronautics Act*, s. 4.31, allows the Minister to "make an order prohibiting the development or expansion of a given aerodrome or any change to the operation of a given aerodrome, if, in

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Lease nor the constating documents are legislative instruments, or even quasi-legislative instruments such as the Order in Council.

[65] If Parliament's intent is to exhaustively regulate an industry to the exclusion of laws of general application by crafting a comprehensive regime, applying the Act may frustrate this purpose. JBOA, Tab 27, *Reference re Broadcasting Regulatory Policy*, CRTC 2010-167, 2012 SCC 68, paras 37-44.

[66] JBOA, Tab 19, Hughes, para 220.

[67] JBOA, Tab 46, SC 1992, c 5, ss 2(2).

the Minister's opinion, the proposed development, expansion, or change is likely to adversely affect aviation safety or is not in the public interest".[68] Neither the OIC nor the *Aeronautics Act* statute directs, or, expressly or by necessary implication, authorizes VAA to engage in its exclusionary conduct.

128. While the Commissioner submits that neither the Ground Lease nor VAA's constating documents are sources of federal legislation, even if they are, these documents do not direct or, explicitly or implicitly, authorize VAA to engage in the exclusionary conduct. Indeed, the express terms of these documents demonstrate the opposite. S. 8.06.01 of the Ground Lease stipulates that VAA must "observe and comply with any applicable law now or hereafter in force". (III.D.2-2) The President and CEO of VAA, Craig Richmond, confirmed that VAA must comply with the laws of Canada, which include the Act. (III.D.2-3) Indeed, he acknowledged that VAA's form of ground handling licence references compliance with the Act (III.D.2-4) and that VAA was developing a competition law compliance program. (III.D.2-5, III.D.2-6) It seems highly unlikely that VAA would have been developing a competition law compliance program if it thought the RCD immunized its conduct from the application of the Act.

129. This case can manifestly be contrasted with other situations in which the court has applied the RCD. For example, in *Hughes*, the plaintiff was challenging the authority of the Liquor Control Board of Ontario whose mandate was expressly established in *Liquor Control Act* to regulate and supervise the sale of alcohol in Ontario.[69] In *Jabour*, the plaintiff challenged the authority of the B.C. Law Society whose express mandate was to regulate the conduct of lawyers pursuant to the *Legal Professions Act*.[70] In fact, instead of being required, directed or authorized to engage in the conduct,

[68] JBOA, Tab 45, RSC, 1985, c A-2, s 4.31.
[69] JBOA, Tab 19, Hughes, paras 72 and 241. The conduct engaged in by the LCBO, entering the 2000 Beer Framework Agreement, was expressly set out in the powers and rights conferred on the LCBO and Brewers Retail under the Liquor Control Act; indeed, the LCBO was ordered to engage in the conduct by the Ontario minister responsible for the LCBO.
[70] JBOA, Tab 3, Jabour, paras 12-13.

VAA asserts that the Federal Government has no authority to stop it from engaging in this conduct. (III.D.2-1)

130. In its Opening Statement, VAA referenced *Sutherland v Vancouver International Airport Authority*[71] as supporting its position that the RCD shields its conduct from liability under s. 79(1). In short, this case – to the extent it could be relevant with respect to the RCD – only serves to confirm the above submissions. First, Sutherland was a case that considered the application of the "defence of statutory authority" – a narrow defence whose application is limited to the tort of nuisance. Second, the defence of statutory authority is only available when (a) legislation imposes a positive duty to perform the act in question; or (b) the legislation, although it only confers an authority, is specific as to the manner or location of the act in question. In either case the nuisance must be the "inevitable result" of the "clear and unambiguously statutory authority for the work, activity or conduct complained of, in the place where that work, activity or conduct takes place, and express or implied authority to cause a nuisance as the only reasonable inference from the statutory scheme".[72] Thus, were the Tribunal to transpose principles from the defence of statutory authority to the RCD, the Tribunal should impose on a party relying on the RCD the onus of establishing a clear and unambiguous statutory authority for the impugned conduct, and express or implied authority to cause a substantial lessening or prevention of competition as the only reasonable inference from the statutory scheme.

131. For the foregoing reasons, the Commissioner requests that the remedy set out in his Notice of Application dated September 29, 2016, be granted.

[71] JBOA, Tab 31, 2002 BCCA 416 [*Sutherland*].
[72] JBOA, Tab 31, Sutherland, para 118. The BCCA relied on the SCC in JBOA, Tab 29, *Ryan v. Victoria (City),* [1999] 1 SCR 201, para 54, in which Major J said "statutory authority provides, at best, a narrow defence to nuisance".

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 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

CLOSING SUBMISSIONS OF THE COMMISSIONER OF COMPETITION

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