COMPETITION TRIBUNAL
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COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34,

AND IN THE MATTER OF the proposed acquisition by Rogers Communications Inc. of Shaw Communications Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 92 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

**ROGERS COMMUNICATIONS INC. AND
SHAW COMMUNICATIONS INC.**

Respondents

– and –

**ATTORNEY GENERAL OF ALBERTA
VIDÉOTRON LTD.**

Intervenors

BOOK OF AUTHORITIES

**DEPARTMENT OF JUSTICE CANADA
COMPETITION BUREAU LEGAL SERVICES**

Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9
Fax: 819-953-9267

John S. Tyhurst
Alexander Gay
Derek Leschinsky
Katherine Rydel
Ryan Caron
Kevin Hong

John.Tyhurst@cb-bc.gc.ca
Alexander.Gay@cb-bc.gc.ca
Derek.Leschinsky@cb-bc.gc.ca
Katherine.Rydel@cb-bc.gc.ca
Ryan.Caron@cb-bc.gc.ca
Kevin.Hong@cb-bc.gc.ca

Counsel to the Commissioner of Competition

CT-2022-002

THE COMPETITION TRIBUNAL

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1982 CarswellOnt 101
Supreme Court of Canada

R. v. Graat

1982 CarswellOnt 101, 1982 CarswellOnt 745, 1982 J.E. 54, [1982] 2 S.C.R. 819, [1982] S.C.J. No. 102, 144 D.L.R. (3d) 267, 18 M.V.R. 287, 2 C.C.C. (3d) 365, 31 C.R. (3d) 289, 45 N.R. 451, 9 W.C.B. 21, J.E. 83-54

GRAAT v. R.

Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Wilson JJ.

Heard: October 12, 1982
Judgment: December 21, 1982
Docket: None given

Counsel: *E.L. Greenspan, Q.C.*, for appellant.
D.C. Hunt, for the Crown.

Subject: Criminal; Public; Evidence
Related Abridgment Classifications
Criminal law
XIII Offences against the person and reputation
XIII.27 Impaired driving/care or control
XIII.27.c Proof of impairment
XIII.27.c.ii Evidence of police officer
Criminal law
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XIII.27.c.iii Miscellaneous
Evidence
XIII Opinion
XIII.3 Miscellaneous
Headnote
Criminal Law --- Driving offences — Impaired driving/care or control — Proof of impairment
Criminal Law --- Driving offences — Impaired driving/care or control — Proof of impairment — Evidence of police officer
Evidence --- Opinion evidence
Evidence --- Opinion evidence — Admissibility
Evidence — Exclusionary rules — Opinion evidence — General — Opinion of lay witness who perceived event admissible if compendious statement of facts — Opinion of police officers on degree of intoxication of accused observed driving admissible but entitled to no special regard.
The accused was convicted of driving a motor vehicle while impaired contrary to s. 234 of the Criminal Code. His appeal to the County Court was dismissed, as was his further appeal to the Ontario Court of Appeal, who rejected the contention that

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the trial judge had wrongly admitted evidence of opinions of police officers that the accused's ability to drive was impaired by alcohol at the time and place in question. The accused appealed.

Held:

Appeal dismissed.

Evidence is admissible if it is relevant and probative and there is no clear ground of policy or law for excluding it. A lay witness who perceived an event may give testimony in the form of an opinion if this more accurately expresses the facts he perceived. The opinion is admitted under the compendious statement of facts exception. There is no closed list of cases in which non-expert opinion evidence is admissible. Non-expert testimony may be excluded where the matter calls for a specialist. The lay opinion can be on the very issue to be decided unless it is a legal issue. In determining whether a lay opinion is admissible the trial judge exercises a large measure of discretion. The trier of fact must also decide the weight to be given to an opinion of a lay witness, and that of a police officer is entitled to no special regard.

The opinion of the police officers on the degree of intoxication based on perceived facts as to the manner of driving and indicia of intoxication of the driver was relevant and the probative value of the evidence was not outweighed by such policy considerations as the danger of confusion, misleading the jury or unfair surprise. The question of intoxication was not such an exceptional condition as to be the subject of special expertise and raised a question of fact rather than law.

Annotation

In *Graat* the Supreme Court of Canada decides that, in an impaired driving trial, a police officer who observed the accused at the material time can advance the opinion in court that the accused's ability to drive a motor vehicle was impaired by alcohol. This is an important adoption (and slight elaboration) of the views of the court below, the Ontario Court of Appeal (per Howland C.J.O.), reported at 30 O.R. (2d) 247, 17 C.R. (3d) 55, 7 M.V.R. 163, 55 C.C.C. (2d) 429, 116 D.L.R. (3d) 143.

To the lay person it would undoubtedly be baffling why lawyers ever thought of barring such evidence. Perhaps the major achievement in *Graat* is to restore some common sense to a branch of the law of evidence which had become so technical, silly and unworkable that it had already become largely honoured in the breach.

To understand the legal significance of *Graat* it is necessary to recall the history of the rule excluding opinion evidence. It developed to bar the testimony of a witness with no personal knowledge. Like the rule excluding hearsay, its concern was reliability: see the Evidence Project of the Law Reform Commission of Canada, Study Paper 7: Opinion and Expert Evidence (1974), p. 27. As Wigmore on Evidence (1978), vol. 7, p. 2, para. 1917, put it, "the witness must speak as a knower, not merely a guesser". However, by the 19th century the rule excluding opinion evidence was clumsily interpreted by English courts to exclude non-expert opinion even if the witness had personal knowledge (see the Evidence Project). It is this lay opinion exclusion rule that *Graat* has abandoned. (It would have been abolished if s. 34 of the Canada Evidence Bill, bill S-33, had been enacted.)

Graat confirms for all Canadian courts that there are two broad categories of exceptions to the rule excluding opinion evidence: (1) lay opinion based on personal knowledge; and (2) expert opinion on matters calling for special knowledge and skill whether or not the expert has personal knowledge.

The judgment of Dickson J. starts by doubting the dichotomy between fact and opinion. It then carves a large swath for the admissibility of lay opinions based on observation. Although Dickson J. speaks of such opinions being admissible if the witness "is able more accurately to express the facts he perceived" (p. 306) or, later, as "under the 'compendious statement of facts' exception" (p. 309), it is also express that there is no closed list of permissible opinions.

The decision in *Graat* is also significant for the full court adopting the long-standing and vehement criticism of Wigmore and others of "the ultimate issue rule" — the so-called principle that there cannot be an (expert or non-expert) opinion offered on the very issue to be decided. The court preserves only one vestige in holding that an opinion must be on a question of fact, not law. At first blush it seems wise to have retained judicial discretion to disallow opinions relating to some difficult legal questions. However, there is a gnawing concern that the distinction between law and fact may prove as difficult to draw in this context as elsewhere. Was the court correct in ruling so easily that negligence but not impairment involves a legal standard? The formulation in s. 36 of the Canada Evidence Bill seems unduly timid but at least does without the law/fact distinction:

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36. A witness may give opinion evidence that embraces an ultimate issue to be decided by the trier of fact where

(*a*) the factual basis for the evidence has been established;

(*b*) more detailed evidence cannot be given by the witness; and

(*c*) the evidence would be helpful to the trier of fact.

In dealing with weight the court in *Graat* pronounces on a question not considered by the Ontario Court of Appeal — the tendency of triers of fact to accept the testimony of a police officer over that of the ordinary citizen. If police officers are giving their opinions as lay witnesses they are, holds the Supreme Court, entitled to "no special regard". This should become a routine authority, especially for defence counsel, when considered with decisions such as *R. v. P.M.*, post, p. 311, that a trier of fact who merely chooses sides in the case of conflicting testimony is not properly applying the standard of proof beyond reasonable doubt.

In respect of the weight to be given to the opinion of experts it is salutory to recall the holding in *R. v. Abbey*, 29 C.R. (3d) 193 at 214, [1983] 1 W.W.R. 251, 39 B.C.L.R. 201, 68 C.C.C. (2d) 394, 138 D.L.R. (3d) 202, 43 N.R. 30 (S.C.C.), that before "any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist".

It was not necessary for the courts in *Graat* or *Abbey* to address the troublesome issue of how to decide whether to hear experts. There is a tendency to enlarge the areas in which courts determine that special knowledge and skill is required (see, for example, *R. v. Morgentaler*, 14 C.C.C. (2d) 459, 42 D.L.R. (3d) 448, reversed [1974] Que. C.A. 129, 17 C.C.C. (2d) 289, 47 D.L.R. (3d) 211, which was affirmed [1976] 1 S.C.R. 616, 30 C.R.N.S. 209, 20 C.C.C. (2d) 449, 53 D.L.R. (3d) 161, 4 N.R. 277, and *R. v. McMillan*, 7 O.R. (2d) 750, 29 C.R.N.S. 191, 23 C.C.C. (2d) 160, affirmed [1977] 2 S.C.R. 824, 33 C.C.C. (2d) 360, 73 D.L.R. (3d) 759, 15 N.R. 20). But the basis for denying others is unclear (see, for example, *R. v. Audy* (1977), 34 C.C.C. (2d) 231 (Ont. C.A.), where the court would not hear a psychologist's opinion as to the dangers of eyewitness identification). Perhaps our courts should follow the test in *Frye v. U.S.* (1923), 293 F. 1013 at 1014, 54 App. D.C. 46, that "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs". This approach received the approval of O'Sullivan J.A. in his dissenting judgment in *R. v. Medvedew*, 6 C.R. (3d) 185 at 200, [1978] 6 W.W.R. 208, 43 C.C.C. (2d) 434, 91 D.L.R. (2d) 21 (Man. C.A.) (concerning the opinion of a voice-print expert).

Don Stuart

Table of Authorities

Cases considered:

A.G. v. Kenny (1959), 94 I.L.T.R. 185 — *followed*
Blackie v. Police, [1966] N.Z.L.R. 910 (C.A.) — *not followed*
Burrows v. Hanlin, [1930] S.A.S.R. 54 (S.C.) — *considered*
Giddings v. R. (1947), 4 C.R. 305, 20 M.P.R. 95, 89 C.C.C. 346 (C.A.) — *not followed*
Grimsteit v. McDonald (1950), 96 C.C.C. 272 (Sask. D.C.) — *not followed*
R. v. Beauvais, [1965] 3 C.C.C. 281 (B.C. S.C.) — *followed*
R. v. Cox, 7 C.R. 39, [1948] 2 W.W.R. 1101, 93 C.C.C. 32, [1949] 1 D.L.R. 524 (Alta. C.A.) — *considered*
R. v. Davies, [1962] 1 W.L.R. 1111, 46 Cr. App. R. 292, [1962] 3 All E.R. 97 (Cts.-Martial A.C.) — *not followed*
R. v. German, [1947] O.R. 395, 3 C.R. 516, 89 C.C.C. 90, [1947] 4 D.L.R. 68 (C.A.) — *followed*
R. v. Kelly, [1958] V.R. 412 (S.C.) — *followed*
R. v. MacDonald (1966), 9 Cr. L.Q. 239 (N.S. Co. Ct.) — *considered*
R. v. Marks, [1952] O.W.N. 608, 15 C.R. 47, 103 C.C.C. 368 (Co. Ct.) — *considered*
R. v. Neal, [1962] Crim. L. Rev. 698 (Cts.-Martial A.C.) — *considered*
R. v. Pollock, 4 C.R. 496, [1947] 2 W.W.R. 973, 90 C.C.C. 171 (D.C.) — *considered*
R. v. Smith (1948), 17 F.L.J. 241 (P.E.I. C.A.) — *not followed*
R. v. Spooner, [1957] V.R. 540 (S.C.)*followed*
R. v. Zarins, [1960] O.W.N. 30, 125 C.C.C. 375 (C.A.) — *followed*

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Sherrard v. Jacob, [1965] N.I. 151 (C.A.) — *not followed*
Wright v. Tatham (1838), 4 Bing. N.C. 489, 132 E.R. 877 (H.L.) — *followed*

Statutes considered:

Criminal Code, R.S.C. 1970, c. C-34, s. 234 [am. 1974-75-76, c. 93, s. 14].

Authorities considered:

Cross on Evidence, 5th ed. (1979), pp. 442, 443, 448, 452, 453.

Federal-Provincial Task Force on Uniform Rules of Evidence.

Law Reform Commission of Canada, Report on Evidence (1975), Evidence Code, s. 67.

Ontario Law Reform Commission, Report on the Law of Evidence (1976), p. 153.

Wigmore on Evidence, Chadbourn revision, vol. 7 (1978), paras. 1917, 1920, 1921.

Appeal by accused from judgment of Ontario Court of Appeal, 30 O.R. (2d) 247, 17 C.R. (3d) 55, 7 M.V.R. 163, 55 C.C.C. (2d) 429, 116 D.L.R. (3d) 143, affirming accused's conviction of impaired driving.

The judgment of the court was delivered by *Dickson J.*:

1 This appeal [from 30 O.R. (2d) 247, 17 C.R. (3d) 55, 7 M.V.R. 163, 55 C.C.C. (2d) 429, 116 D.L.R. (3d) 143] raises the issue whether on a charge of driving while impaired the court may admit opinion evidence on the very question to be decided, namely, Was the accused's ability to drive impaired by alcohol at the time and place stated in the charge?

I

The Procedural History

2 The appellant, Anthony Graat, was charged that on 10th August 1978 at the city of London, county of Middlesex, while his ability to drive a motor vehicle was impaired by alcohol, he did drive a motor vehicle, contrary to s. 234 [am. 1974-75-76, c. 93, s. 14] of the Criminal Code, R.S.C. 1970, c. C-34. He was tried, convicted and sentenced to a fine of $300 or, in default, imprisonment for 30 days. An appeal to the County Court was dismissed. Leave to appeal to the Court of Appeal of Ontario was granted but the appeal was dismissed. The matter is now, by leave, before this court.

II

The Facts

3 At approximately 2:15 a.m. on the date in question, Constables Case and McMullen of the London City Police observed Mr. Graat's vehicle travelling at a high rate of speed. The constables followed for several blocks. They observed Mr. Graat's car weaving in the southbound lane, crossing the centre line on two occasions and driving onto the shoulder of the road on another occasion. When the vehicle turned left it straddled the centre line.

4 Both constables testified they noticed the smell of alcohol on the appellant's breath; both said Mr. Graat was unsteady on his feet, he staggered as he walked, and had bloodshot eyes.

5 At the police station Mr. Graat was observed by a Sergeant Spoelstra. The sergeant testified he smelled alcohol on the appellant's breath, the top part of his body was swaying, and his walk was "kind of wavy".

6 Mr. Graat complained of chest pains. He told the police he suffered from a heart condition and asked to be taken to a hospital. The police complied. By the time Mr. Graat returned to the police station it was too late to take two breath samples because the two-hour time limit for the taking of such samples had expired or was about to expire.

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7 Mr. Graat testified he had had two drinks of gin between the hours of 3:00 p.m. and 7:00 p.m., and two glasses of wine with his dinner at about 11:00 p.m. He said he and two friends, George Wilson and Vincent O'Donovan, were returning from a sailing party; he became tired. Wilson drove the car while he dozed in the back seat. The appellant resumed driving after Wilson had driven O'Donovan and himself home. Wilson testified that if he had thought Mr. Graat was not in a fit condition to drive he would have asked him to stay at his (Wilson's) house.

8 At trial Constable Case was asked the following questions and gave the following answers:

> Q. All right, now, what, if any, opinion, having made those observations, what, if any, opinion did you form regarding the accused man's ability to drive a motor vehicle?
>
> A. I formed the opinion that the accused's ability was impaired.
>
> Q. By?
>
> A. By alcohol.
>
> Q. You said the accused man's ability to what?
>
> A. To drive a motor vehicle was impaired by alcohol.

Constable McMullen was asked the following question:

> Q. Now, Officer, when you were at the scene, and having made the observations of the driving of the accused man, having observed him, having smelled the alcoholic beverage on his breath and observed him walk and observed him standing, observed him speaking to you, what, if any, conclusion did you come to regarding his ability to drive a motor vehicle?
>
> A. It was in my opinion that the accused's ability to operate a motor vehicle was impaired by alcohol beverage.

Sergeant Spoelstra, the desk sergeant, gave similar evidence:

> Q. You saw him standing and you saw him walking. What, if any, opinion did you form regarding his ability to drive a motor vehicle?
>
> A. In my opinion the accused's ability was impaired by the use of alcohol to drive a motor vehicle.

No objection was taken at trial to the admission of any of this evidence. Indeed, at the conclusion of the examination in chief of Sergeant Spoelstra, the following exchange took place:

> MR. ALLAN [Crown Counsel]: Your witness.
>
> Q. Oh, wait a minute, what, if any, opinion did you form regarding his ability to drive a motor vehicle from what you saw?
>
> A. From what I saw.
>
> THE COURT: Just one moment, please. This man's a desk sergeant, he's not the man in the field, so to speak. Do you say I should permit him to give his opinion?
>
> MR. ALLEN: Your Honour, with respect, even if he didn't see the accused man driving, if the sergeant ...
>
> MR. SILVER [then counsel for the defence]: I can save time, Your Honour; I'm quite content with it.
>
> THE COURT: Thank you. Proceed.

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9 I do not think failure on the part of defence counsel to object to the admission of inadmissible evidence should, in the circumstances of this case, stand in the way of directing a new trial if such evidence is held to be inadmissible.

10 The trial judge preferred the evidence of the police witnesses to the evidence of Mr. Graat and Mr. Wilson. In particular, the judge relied on the evidence of Constable McMullen and Sergeant Spoelstra, policemen for 8 and 17 years respectively. Constable Case had been a police officer for only a few months, and had charged only two or three persons with impaired driving. The judge said he accepted the opinions of officers McMullen and Spoelstra in reaching his conclusion that the accused's ability to drive was impaired:

> I am of the view that I am entitled to accept and I do accept the opinions of those two police officers on the issue of impairment as part of the totality of the evidence.

11 On the appeal to the County Court, McNab Co. Ct. J. concluded there was direct evidence upon which the trial judge was justified in making a finding that the ability of the appellant to drive was impaired.

III

The Ontario Court of Appeal

12 The appellant sought leave to appeal to the Court of Appeal of Ontario and at that time the question was raised as to whether the trial judge had erred in law in relying on the opinion evidence of the two police officers that the appellant's ability to drive a motor vehicle had been impaired by alcohol.

13 The court dismissed the appeal, saying [p. 442] that the evidence was admissible under the exception to the rule excluding opinion evidence:

> ... that permits non-expert opinion evidence where the primary facts and the inferences to be drawn from them are so closely associated that the opinion is really a compendious way of giving evidence as to certain facts — in this case the condition of the appellant.

This echoes the words of Parke B. in *Wright v. Tatham* (1838), 4 Bing. N.C. 489 at 543-44, 132 E.R. 877 (H.L.):

> ... and though the opinion of a witness upon oath, as to that fact [testamentary capacity], might be asked, it would only be a compendious mode of ascertaining the result of the actual observation of the witness, from acts done, as to the habits and demeanour of the deceased.

14 On behalf of the Court of Appeal, Howland C.J.O. delivered a lengthy, scholarly judgment exhaustively reviewing academic opinion and case law relating to the exclusion of opinion evidence. He began with a passage from Cross on Evidence, 5th ed. (1979), p. 442:

> In the law of evidence 'opinion' means any inference from observed facts, and the law on the subject derives from the general rule that witnesses must speak only to that which was directly observed by them. The treatment of evidence of opinion by English law is based on the assumption that it is possible to draw a sharp distinction between inferences and the facts on which they are based. The drawing of inference is said to be the function of the judge or jury, while it is the business of a witness to state facts.

15 The Chief Justice then spoke of two categories of opinion evidence that has traditionally been admissible: (i) cases calling for expert testimony in matters requiring specialized skill and knowledge, the only questions being whether the subject matter called for expertise and whether the witness was a qualified expert; (ii) non-expert opinion on matters requiring no special knowledge, where it is virtually impossible to separate the witness's inference from the facts on which the inference is based. In the opinion of the Chief Justice, the admission of opinion evidence in the latter circumstance is merely a compendious way of ascertaining the result of the witness's observations.

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16 After canvassing the case law in this country and a number of other countries, Howland C.J.O. summed up in the following passage [at pp. 69-70]:

> In my opinion, impairment is a degree of drunkenness. It is a compendious way of describing a condition based on observed facts. It does not require the evidence of a doctor or other expert, nor should it be limited to persons who themselves drive cars. It is a subject about which most people should be able to express an opinion from their ordinary day-to-day experience of life. To testify that a person is impaired is really tantamount to saying: 'I don't think that he should have been driving'. In each case, the opinion must be based on the observed facts: the car was weaving back and forth across the road, there was a strong odour of alcohol on the driver's breath, his powers of perception and co-ordination were poor, he was drowsy and was not reacting quickly to other cars or pedestrians in the path of his car, and so on. To exclude such non-expert evidence of witnesses who were passengers in the car of the accused or in other cars in the vicinity or who were pedestrians may result in an injustice to the accused and may at the same time impede the police in the prosecution of impaired drivers. Such evidence should be admissible. The weight to be given to such inferential testimony will vary from witness to witness, depending on the observed facts on which it is based.

17 The learned Chief Justice rejected the "ultimate issue" doctrine, i.e., that an opinion can never be received when it touches the very issue before the jury. He also noted that opinion evidence is properly rejected when it involves a legal component, such as the question of whether a person had acted negligently.

18 The judgment concludes [at p. 72]:

> In my opinion, the trial judge did not err in admitting as non-expert testimony the opinion evidence of the police officers as to impairment and in relying on it as part of the totality of the evidence. Having reached this conclusion, it is not necessary to consider whether the police officers could have qualified as experts and what evidence would have been necessary for this purpose. Accordingly, leave to appeal is granted, but the appeal is dismissed.

IV

19

The Case Law

20 The question in issue is a vexed one. The authorities in this country and elsewhere are by no means congruous. One of the earliest and most frequently quoted cases is *R. v. German*, [1947] O.R. 395, 3 C.R. 516, 89 C.C.C 90, [1947] 4 D.L.R. 68, a decision of the Ontario Court of Appeal involving charges of dangerous driving and driving while intoxicated. Counsel for the appellant submitted that the Crown was improperly permitted to introduce opinion evidence of persons who had no special qualifications. This evidence related to whether the accused was intoxicated and was in a fit condition to drive. The court observed that there were several matters on which a person of ordinary intelligence may be permitted to give opinion evidence based on his personal knowledge, such as the identity of individuals, the apparent age of a person, the speed of a vehicle and whether a person was sober or not.

21 Robertson C.J.O. said (at p. 99):

> I am sure there have been many cases where a witness has been asked whether a person was sober or not, and has been allowed to state what is after all, a matter of opinion, but the answer is given as if nothing but a mere question of fact was involved.
>
> In the present case the evidence objected to is that of witnesses who saw the appellant and had opportunity of observing him. While some of the questions allowed to be answered were, I think, improperly framed, it was quite plain to the jury that these witnesses were ordinary observers applying their unskilled knowledge to what they actually saw, and, taken as a whole, I do not think any injustice was done by the occasional putting of a question that was unfortunately framed.

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The case is of limited help as the *degree* of impairment was not really in issue.

22 *German's* case was discussed in *R. v. Marks*, [1952] O.W.N. 608, 15 C.R. 47, 103 C.C.C. 368 (Co. Ct.), in which it was held that it was for the judge to decide whether in the light of the facts the police officer was "competent" to give an opinion as to any condition of impairment by consumption of alcohol. On the evidence in that case the judge held that the officers were not competent because they did not actually observe the accused driving his car and because they disagreed both about the state of intoxication and about the accused's ability to drive.

23 The next case is *R. v. Zarins*, [1960] O.W.N. 30, 125 C.C.C. 375, another impaired driving case, the judgment of the Ontario Court of Appeal being delivered by Porter C.J.O. Two short passages might be quoted (at pp. 380 and 382):

> I would adopt certain language of Harvey C.J.A. in *R. v. Cox*, 7 C.R. 39, [1948] 2 W.W.R. 1101, 93 C.C.C. 32 at 36, [1949] 1 D.L.R. 524 at 528 (Alta. C.A.), and say that the fact of intoxication under s. 222, and impairment under s. 223 [of the Criminal Code, 1953-54 (Can.), c. 51] 'may well be determined by observance of the conduct of the person charged as to which anyone can speak'.

And:

> Following this decision [the decision in *R. v. German*, supra], I think that the evidence of the police officers as to intoxication and impairment was clearly admissible.

24 From the Ontario authorities one would conclude that opinion evidence as to drunkenness, and as to impairment, are currently both admissible.

25 In British Columbia (*R. v. Beauvais*, [1965] 3 C.C.C. 281 (S.C.)) McFarlane J. adopted the reasoning of the Court of Appeal in Ontario in *R. v. German* and held that the opinions of the constables were lawfully admissible evidence on which the magistrate could find impairment.

26 In Alberta, it has been held that the constables could describe the accused's actions, appearance, language and general conduct and, in answer to a question framed as a question of fact, state that the accused was drunk: *R. v. Pollock*, 4 C.R. 496, [1947] 2 W.W.R. 973, 90 C.C.C. 171 (D.C.). In *R. v. Cox*, supra, Harvey C.J.A., delivering the judgment of the court, said (at pp. 35-36):

> It seems clear, however, that the purpose of the prohibition of s. 285 is for the protection of people on the highway, and that when a person is in such a state of intoxication that his driving is a menace to the public safety, he must be intoxicated within the intention, and therefore the meaning, of the term as used in the section.
>
> That fact may well be determined by observance of the conduct of the person charged as to which anyone can speak, and that too perhaps with greater certainty than by any conclusions from the percentage of alcohol in the blood.

27 In some of the other provinces the position is more narrowly circumscribed. For example, in Prince Edward Island, Campbell C.J.P.E.I. held in *Giddings v. R.* (1947), 4 C.R. 305, 20 M.P.R. 95, 89 C.C.C. 346 (C.A.), that in cases where intoxication is the very issue it is neither helpful nor permissible for witnesses to state their own opinions or conclusions as to the fact or degree of intoxication, at least unless they relate the detailed symptoms on which their conclusions are based. In *R. v. Smith* (1948), 17 F.L.J. 241 (C.A.), the same judge held that only evidence of actual symptoms could be regarded, and evidence that the accused was intoxicated should be eliminated. An equally restrictive view was taken by Hogarth D.C.J. in *Grimsteit v. McDonald* (1950), 96 C.C.C. 272 at 286 (Sask. D.C.):

> My opinion has always been that it is for a witness to state the facts and for the Court to draw conclusions from those facts.

28 A midway position was voiced by O'Hearn Co. Ct. J. in *R. v. MacDonald* (1966), 9 Cr. L.Q. 239 at 241 (N.S. Co. Ct.):

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> I ruled that it would probably be improper for the witness to give as his opinion that the defendant's ability to drive a motor vehicle was impaired by alcohol or a drug, as this might involve a conclusion of law, but that any adult person with sufficient experience of the world may be asked his opinion of a person's condition with respect to intoxication.

England

29 Lord Parker, speaking on behalf of the Courts-Martial Appeal Court in *R. v. Davies*, [1962] 1 W.L.R. 1111, 46 Cr. App. R. 292, [1962] 3 All E.R. 97, was of opinion that a witness could properly give his impression as to whether another had "taken drink", but could not testify as to fitness or unfitness to drive. He reached his conclusion on two grounds: (i) he is not in the expert witness category; (ii) that was the very matter the court had to determine on a charge of driving a vehicle on a road while unfit to drive through drink or drugs. The passage reads (at p. 1113):

> The court has come clearly to the conclusion that a witness can quite properly give his general impression as to whether a driver had taken a drink. He must describe of course the facts upon which he relies, but it seems to this court that he is perfectly entitled to give his impression as to whether drink had been taken or not. On the other hand, as regards the second matter, it cannot be said, as it seems to this court, that a witness, merely because he is a driver himself, is in the expert witness category so that it is proper to ask him his opinion as to fitness or unfitness to drive. That is the very matter which the court itself has to determine. Accordingly, in so far as this witness and two subsequent witnesses, the lance-corporal and the regimental sergeant-major gave their opinion as to the appellant's ability or fitness to drive, the court was wrong in admitting that evidence.

30 In *R. v. Neal*, [1962] Crim. L. Rev. 698 at 699, a Courts-Martial Appeal Court (Winn, Widgery and Brabin JJ.) indicated that the scope of *Davies* "might call for consideration in future in relation to particular circumstances". The court in *Neal* upheld the conviction on the somewhat tenuous ground that the members of the Courts-Martial Court "were not invited or directed by the Judge-Advocate to pay attention to opinion as distinct from observation".

Eire

31 An informative discussion of the point under review comes from Eire, *A.G. v. Kenny* (1959), 94 I.L.T.R. 185. Kenny was charged with driving a motor lorry while drunk. The prosecution proposed to ask a police witness whether "in his opinion the defendant was drunk and incapable of driving the vehicle". The solicitor for the defendant objected to the question and submitted that the witness "not being a doctor or like expert was not qualified or competent to give evidence of his opinion of the defendant's condition". The prosecution replied that evidence as to drunkenness or sobriety need not necessarily be that of a medical practitioner or similar witness but that any ordinary witness would be qualified to give evidence on such matters. The District Justice thereupon agreed to state a case for the opinion of the High Court. The question for decision was whether evidence by a member of the Garda Siochana was admissible of his opinion that the defendant driver, by reason of his being drunk, was unfit to drive a mechanically propelled vehicle. It was held by Davitt P. and on appeal by the Supreme Court of Eire (Lavery and O'Daly JJ., Kingsmill Moore J. dissenting) that the question asked should be answered, "Yes". The evidence was admissible.

Northern Ireland

32 The same point arose in Northern Ireland in *Sherrard v. Jacob*, [1965] N.I. 151, on a stated case. The Court of Appeal held that opinion evidence of the police officers as to drunkenness was admissible but (Lord MacDermott C.J. dissenting) opinion evidence of the police officers as to capability to drive was not admissible. The majority of the court followed *R. v. Davies*, supra.

Australia

33 The Australian case of *Burrows v. Hanlin*, [1930] S.A.S.R. 54 at 55 (S.C.), held that mere opinion as to whether a man is drunk or whether he is capable of driving a motor car, unsupported by facts, is not entitled to any weight. Murray C.J. said:

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> Evidence of opinion can be given by experts on questions of science, but as to whether a man is drunk, or whether he is capable of exercising effective control over a motor-car, mere opinion, unsupported by facts (I think I may go so far as to say), is not admissible evidence.

The later case of *R. v. Spooner*, [1957] V.R. 540 at 541 (S.C.), expressed a less strict view, with which I find myself much in accord. Sholl J. said:

> I think I ought to say that my own view would be that it is not only a police officer who may be capable of expressing an opinion whether a man is so intoxicated as to be unable properly to drive a car. Many other persons have had experience in driving a motor-car, and have observed persons under the influence of intoxicating liquor, and must, one would suppose, be in a position to form a view as to the capacity to drive. I see no magic myself in the fact that the witness is a police officer, or anything else. It depends largely, I suppose, on his actual knowledge of what is required in driving a motor-car.

34 In *R. v. Kelly*, [1958] V.R. 412 (S.C.), Smith J. expressed the opinion that if the Crown is merely seeking from a witness a compendious description of what he actually observed, evidence in such form is not properly to be regarded as opinion evidence and the law of evidence does not forbid the giving of evidence in such form. Moreover, the law of evidence does not require that a witness should be qualified as an expert before he testifies.

New Zealand

35 In *Blackie v. Police*, [1966] N.Z.L.R. 910, the New Zealand Court of Appeal divided on whether an experienced traffic officer could give evidence as to whether a driver was so far intoxicated as to be incapable of having control of a vehicle. A majority of the court held that a traffic officer or policeman who can show that he is sufficiently qualified by training or experience may be allowed to express his opinion in evidence as to a person's capacity to drive. The court held also that the fact that a witness is either a traffic officer or a policeman does not, however, automatically qualify him to give opinion evidence on this topic.

The Text Writers

36 Sir Rupert Cross in his work on Evidence (at p. 451) states that the existence of a particular issue may necessitate the reception of evidence which is not that of an expert and yet is nothing short of a witness's opinion concerning an ultimate issue in the case. The author adds (at p. 452) that, subject to the exceptional type of situation, it would seem that if non-expert opinion is in reality evidence of fact given ex necessitate in the form of evidence of opinion, there should be no question of its inadmissibility because it deals with ultimate issues.

37 Professor Cross continues (at p. 452):

> This is borne out by the form of s. 3(2) of the Civil Evidence Act 1972, which suggests that no change in the law was intended:
>
> > It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on a relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.
>
> So far as criminal cases are concerned, the decisions on drunken driving indicate a difference of approach between the English and Northern Irish courts on the one hand, and the courts of Eire on the other.

38 Professor Cross suggests (at p. 453) two main and two subsidiary reasons for the exclusion of non-expert opinion. In the first place it is said that opinion evidence is irrelevant and that this is largely true of non-expert opinion on a subject requiring expertise as well as opinion evidence concerning matters which do not call for expertise. Secondly, it is said that the reception of opinion evidence would "usurp the functions of the jury" in the sense that the jury would be tempted blindly to accept a witness's opinion. The two subsidiary reasons mentioned are the fact that a witness who merely speaks to his opinion cannot

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be prosecuted for perjury, and the danger that the reception of such evidence might indirectly evade other exclusionary rules. Cross speaks of the first subsidiary reason as one of "some antiquity" and suggests that there is more force in the second reason, but that "it has not been stressed by the judges".

39 Professor Wigmore takes a diametrically opposed position. He states (Wigmore on Evidence, Chadbourn revision, vol. 7 (1978), para. 1917), that the disparagement of "opinion" always had reference to the testimony of a person who had no "facts" of his own observation to speak from, and the skilled witness was the person who had to be received by way of exception to that notion. Thus, when an ordinary or lay witness took the stand, equipped with a personal acquaintance with the affair and therefore competent in his sources of knowledge, the circumstances that incidentally he drew inferences from his observed data and expressed conclusions from them did not present itself as in any way improper. It would not occur to any judge that this witness was doing a wrong thing.

40 Wigmore refers to the theory that wherever inferences and conclusions can be drawn by the jury as well as by the witness, the witness is superfluous, the theory being that of the exclusion of supererogatory evidence.

41 Wigmore uses strong language in discussing the "usurp the function of the jury" theory (para. 1920). The phrase, he says, is made to imply a moral impropriety or a radical unfairness in the witness's expression of opinion. He says [at p. 18] that:

> In this aspect the phrase is so misleading, as well as so unsound, that it should be entirely repudiated. It is a mere bit of empty rhetoric.

The author continues [at pp. 18-19]:

> There is no such reason for the rule, because the witness, in expressing his opinion, is not attempting to 'usurp' the jury's function; nor could if he desired.

42 Turning then to an attack on the other theory, which would deny opinions of the "very issue before the jury", Wigmore has this to say [at p. 22, para. 1921]:

> The fallacy of this doctrine is, of course, that, measured by the principle, it is both too narrow and too broad. It is too broad, because, even when the very point in issue is to be spoken to, the jury should have help if it is needed. It is too narrow, because opinion may be inadmissible even when it deals with something other than the point in issue. Furthermore, the rule if carried out strictly and invariably would exclude the most necessary testimony. When all is said, it remains simply one of those impracticable and misconceived utterances which lack any justification in principle.

VI

Law Reform Commission Reports

43 The Law Reform Commission of Canada in Report on Evidence (1975), Evidence Code, s. 67, has proposed an opinion rule based on facts perceived by the witness and on "helpfulness":

> 67. A witness other than one testifying as an expert may not give an opinion or draw an inference unless it is based on facts perceived by him and is helpful to the witness in giving a clear statement or to the trier of fact in determining an issue.

44 The Ontario Law Reform Commission proposed the enactment of the following section (Draft Act, s. 14) in Report on the Law of Evidence (1976), p. 150:

> Where a witness in a proceeding is testifying in a capacity other than as a person qualified to give opinion evidence and a question is put to him to elicit a fact that he personally perceived, his answer is admissible as evidence of the fact even though given in the form of an expression of his opinion upon a matter in issue in the proceeding.

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A majority of the Federal/Provincial Task Force on Uniform Rules of Evidence favoured the adoption of the proposal of the Law Reform Commission of Canada, embodied in s. 67 of the commission's Evidence Code, rather than that of the Ontario Law Reform Commission. The majority opposed the proposal of the Ontario Law Reform Commission as being an enactment of the "collective facts rule", which allows non-expert opinion to be admitted on the basis that it is "a compendious mode of ascertaining the result of the actual observation of the witness". The majority felt that such an approach purported to draw an impossible and illogical distinction between "fact" and "opinion". The task force observed:

> Section 67 would allow a lay witness to testify in the form of opinion if it is relevant, within the realm of common experience and a shorthand expression of the witness's personal observation.

VII

Conclusion

45 I have attempted in the foregoing to highlight the opposing points of view as reflected in some of the cases, texts, and reports of the law reform commissions.

46 We start with the reality that the law of evidence is burdened with a large number of cumbersome rules, with exclusions, and exceptions to the exclusions, and exceptions to the exceptions. The list of subjects upon which the non-expert witness is allowed to give opinion evidence is a lengthy one. The list mentioned in *Sherrard v. Jacob*, supra, is by no means exhaustive: (i) the identification of handwriting, persons and things; (ii) apparent age; (iii) the bodily plight or condition of a person, including death and illness; (iv) the emotional state of a person, e.g., whether distressed, angry, aggressive, affectionate or depressed; (v) the condition of things, e.g., worn, shabby, used or new; (vi) certain questions of value; and (vii) estimates of speed and distance.

47 Except for the sake of convenience there is little, if any, virtue in any distinction resting on the tenuous and frequently false antithesis between fact and opinion. The line between "fact" and "opinion" is not clear.

48 To resolve the question before the court I would like to return to broad principles. Admissibility is determined, first, by asking whether the evidence sought to be admitted is relevant. This is a matter of applying logic and experience to the circumstances of the particular case. The question which must then be asked is whether, though probative, the evidence must be excluded by a clear ground of policy or of law.

49 There is a direct and logical relevance between (i) the evidence offered here, namely, the opinion of a police officer (based on perceived facts as to the manner of driving and indicia of intoxication of the driver) that the person's ability to drive was impaired by alcohol, and (ii) the ultimate probandum in the case. The probative value of the evidence is not outweighed by such policy considerations as danger of confusing the issues or misleading the jury. It does not unfairly surprise a party who had not had reasonable ground to anticipate that such evidence will be offered, and the adducing of the evidence does not necessitate undue consumption of time. As for other considerations, such as "usurping the functions of the jury" and, to the extent that it may be regarded as a separate consideration, "opinion on the very issue before the jury", Wigmore has gone a long way toward establishing that rejection of opinion evidence on either of these grounds is unsound historically and in principle. If the court is being told that which it is in itself entirely equipped to determine without the aid of the witness on the point then of course the evidence is supererogatory and unnecessary. It would be a waste of time listening to superfluous testimony.

50 The judge in the instant case was not in as good a position as the police officers or Mr. Wilson to determine the degree of Mr. Graat's impairment or his ability to drive a motor vehicle. The witnesses had an opportunity for personal observation. They were in a position to give the court real help. They were not settling the dispute. They were not deciding the matter the court had to decide, the ultimate issue. The judge could accept all or part or none of their evidence. In the end he accepted the evidence of two of the police officers and paid little heed to the evidence of the third officer or of Mr. Wilson.

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51 I agree with Professor Cross (at p. 443) that "the exclusion of opinion evidence on the ultimate issue can become something of a fetish". I can see no reason in principle or in common sense why a lay witness should not be permitted to testify in the form of an opinion if, by doing so, he is able more accurately to express the facts he perceived.

52 I accept the following passage from Cross (at p. 448) as a good statement of the law as to the cases in which non-expert opinion is admissible:

> When, in the words of an American judge, 'the facts from which a witness received an impression were too evanescent in their nature to be recollected, or too complicated to be separately and distinctly narrated', a witness may state his opinion or impression. He was better equipped than the jury to form it, and it is impossible for him to convey an adequate idea of the premises on which he acted to the jury:
>
>> Unless opinions, estimates and inferences which men in their daily lives reach without conscious ratiocination as a result of what they have perceived with their physical senses were treated in the law of evidence as if they were mere statements of fact, witnesses would find themselves unable to communicate to the judge an accurate impression of the events they were seeking to describe.
>
> There is nothing in the nature of a closed list of cases in which non-expert opinion evidence is admissible. Typical instances are provided by questions concerning age, speed, weather, handwriting and identity in general.

53 Before this court counsel for the appellant took the position that although opinion evidence by non-experts may be admissible where it is "necessary" the opinions of the police officers in this case were superfluous, irrelevant and inadmissible. I disagree. It is well established that a non-expert witness may give evidence that someone was intoxicated, just as he may give evidence of age, speed, identity or emotional state. This is because it may be difficult for the witness to narrate his factual observations individually. Drinking alcohol to the extent that one's ability to drive is impaired is a degree of intoxication, and it is yet more difficult for a witness to narrate separately the individual facts that justify the inference, in either the witness or the trier of fact, that someone was intoxicated to some particular extent. If a witness is to be allowed to sum up concisely his observations by saying that someone was intoxicated, it is all the more necessary that he be permitted to aid the court further by saying that someone was intoxicated to a particular degree. I agree with the comment of Lord MacDermott C.J. (at p. 162) in his dissent in *Sherrard v. Jacob*, supra:

> ... I can find no good reason for allowing the non-expert to give his opinion of the driver's observable condition and then denying him the right to state an opinion on the consequences of that observed condition so far as driving is concerned.

54 Nor is this a case for the exclusion of non-expert testimony because the matter calls for a specialist. It has long been accepted in our law that intoxication is not such an exceptional condition as would require a medical expert to diagnose it. An ordinary witness may give evidence of his opinion as to whether a person is drunk. This is not a matter where scientific, technical, or specialized testimony is necessary in order that the tribunal properly understands the relevant facts. Intoxication and impairment of driving ability are matters which the modern jury can intelligently resolve on the basis of common ordinary knowledge and experience. The guidance of an expert is unnecessary.

55 If that be so it seems illogical to deny the court the help it could get from a witness's opinion as to the degree of intoxication, that is to say, whether the person's ability to drive was impaired by alcohol. If non-expert evidence is excluded the defence may be seriously hampered. If an accused is to be denied the right to call persons who were in his company at the time to testify that in their opinion his ability to drive was by no means impaired, the cause of justice would suffer.

56 Whether or not the evidence given by police or other non-expert witnesses is accepted is another matter. The weight of the evidence is entirely a matter for the judge or judge and jury. The value of opinion will depend on the view the court takes in all the circumstances.

57 I would adopt the following passage (at p. 162) from the reasons of Lord MacDermott C.J. in *Sherrard v. Jacob*:

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> The next stage is to enquire if the opinion of the same witnesses was also admissible on the question whether the respondent, if he was under the influence of drink, was so to an extent which made him incapable of having proper control of the car he was driving. On this it seems to me that the reasoning which has led me to the conclusion just stated applies as well to this branch of the matter. The driving of motor vehicles is now so much a matter of everyday experience for ordinary people that I find it difficult to see how inferential or opinion evidence as to being (a) under the influence of drink and (b) thereby unfit to drive a car can be placed in different categories for the purpose of determining admissibility. The one as much as the other seems to be within the capacity of the non-expert to form a reasonable conclusion.

58 A non-expert witness cannot, of course, give opinion evidence on a legal issue as, for example, whether or not a person was negligent. That is because such an opinion would not qualify as an abbreviated version of the witness's factual observations An opinion that someone was negligent is partly factual, but it also involves the application of legal standards. On the other hand, whether a person's ability to drive is impaired by alcohol is a question of fact, not of law. It does not involve the application of any legal standard. It is akin to an opinion that someone is too drunk to climb a ladder or to go swimming, and the fact that a witness's opinion, as here, may be expressed in the exact words of the Criminal Code does not change a factual matter into a question of law. It only reflects the fact that the draftsmen of the Code employed the ordinary English phrase: "his ability to drive ... is impaired by alcohol" (s. 234).

59 In short, I know of no clear ground of policy or of law which would require the exclusion of opinion evidence tendered by the Crown or the defence as to Mr. Graat's impairment.

60 I conclude with two caveats. First, in every case, in determining whether an opinion is admissible, the trial judge must necessarily exercise a large measure of discretion. Second, there may be a tendency for judges and juries to let the opinion of police witnesses overwhelm the opinion evidence of other witnesses. Since the opinion is admitted under the "compendious statement of facts" exception rather than under the "expert witness" exception, there is no special reason for preferring the police evidence over the "opinion" of other witnesses. As always, the trier of fact must decide in each case what weight to give what evidence. The "opinion" of the police officer is entitled to no special regard. Ordinary people with ordinary experience are able to know as a matter of fact that someone is too drunk to perform certain tasks, such as driving a car. If the witness lacks the relevant experience, or is otherwise limited in his testimonial capacity, or if the witness is not sure whether the person was intoxicated to the point of impairment, that can be brought out in cross-examination. But the fact that a police witness has seen more impaired drivers than a non-police witness is not a reason in itself to prefer the evidence of the police officer. Constables McMullen and Spoelstra were not testifying as experts based on their extensive experience as police officers.

61 There was some confusion about this matter in this case as appears from the following cross-examination of Mr. Wilson:

> Q. ... And of course you've not and never have been a police officer. Do you agree or disagree with me?
>
> A. No. No.
>
> Q. You have never been a police officer?
>
> A. No.
>
> Q. And you're not in the habit of checking people as to the amount of alcohol that is consumed in order to make him impaired. Do you agree or disagree with me?
>
> A. I have to agree with you?
>
> Q. Yes. So you're really not in a position to tell us whether or not he was impaired or not impaired by alcohol. Do you agree or disagree with me?
>
> A. I was only ...

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Q. ... But of course you were in no position to judge as to whether or not he was impaired. Do you agree or disagree with me?

A. I don't have any qualifications in that regard, I guess.

62 Mr. Wilson does not need any special qualifications. Nor were the police officers relying on any special qualifications when they gave their opinions. Both police and non-police witnesses are merely giving a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly. Trial judges should bear in mind that this is non-expert opinion evidence, and that the opinion of police officers is not entitled to preference just because they may have extensive experience with impaired drivers. The credit and accuracy of the police must be viewed in the same manner as that of other witnesses and in the light of all the evidence in the case. If the police and traffic officers have been closely associated with the prosecution, such association may affect the weight to be given to such evidence.

63 The trial judge was correct in admitting the opinions of the three police officers and Mr. Wilson.

64 For the foregoing reasons, as well as for the reasons given by Howland C.J.O., I would dismiss the appeal.

Appeal dismissed.

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Competition Tribunal Tribunal de la concurrence

Reference: *The Commissioner of Competition v Vancouver Airport Authority*, 2018 Comp Trib 15
File No.: CT-2016-015
Registry Document No.: 351

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

AND IN THE MATTER OF a motion by Vancouver Airport Authority objecting to the admissibility of certain proposed evidence;

BETWEEN:

The Commissioner of Competition
(applicant)

and

Vancouver Airport Authority
(respondent)

Date of hearing: September 24, 2018
Before Judicial Member: D. Gascon J. (Chairperson)
Date of Order: September 28, 2018

ORDER RELATING TO THE MOTION BY VANCOUVER AIRPORT AUTHORITY OBJECTING TO THE ADMISSIBILITY OF CERTAIN PROPOSED EVIDENCE

[1] **FURTHER TO** the application filed by the applicant, the Commissioner of Competition ("**Commissioner**"), against the respondent, Vancouver Airport Authority ("**VAA**"), pursuant to section 79 of the *Competition Act*, RSC 1985, c C-34, as amended ("**Application**");

[2] **AND FURTHER TO** the witness statements of Ms. Barbara Stewart, former Senior Director of Procurement at Air Transat A.T. Inc. ("**Air Transat**"), and of Ms. Rhonda Bishop, Director for In-flight Services and Onboard Product of Jazz Aviation LP ("**Jazz**"), that were served by the Commissioner on VAA and filed with the Tribunal on July 4, 2018 ("**Witness Statements**");

[3] **AND FURTHER TO** a motion filed by VAA on September 10, 2018, objecting to the admissibility, as proposed evidence in this Application, of certain portions of the Witness Statements on the basis that they constitute improper opinion evidence by lay witnesses and/or inadmissible hearsay ("**Disputed Evidence**"), and asking the Tribunal to immediately rule that the Disputed Evidence is inadmissible ("**Motion**");

[4] **AND UPON** reviewing the Witness Statements and considering the materials and written submissions filed by both parties with respect to the Motion;

[5] **AND UPON** hearing the oral submissions made by counsel for both parties at a hearing held on September 24, 2018;

[6] **AND UPON** considering that, in its submissions, VAA alleges that:

A. In their respective Witness Statements, Ms. Stewart and Ms. Bishop testify as to what their respective companies would have saved and as to increased expenses incurred (or to be incurred in the future), but the Witness Statements contain no indication as to who performed the calculations to arrive at the Disputed Evidence, how the figures were calculated, which data was used, and/or who prepared the documents attached to support these figures;
B. Ms. Stewart and Ms. Bishop express opinions with respect to the Disputed Evidence but did not personally observe (and do not testify to) the facts upon which their respective opinions are purportedly based, and lay out insufficient evidentiary foundations to be able to testify on their conclusions;
C. The conclusions reached by Ms. Stewart and Ms. Bishop with respect to the Disputed Evidence are not within their personal knowledge and appear to be those of other unknown persons, based on facts observed and calculations performed by other unknown persons;
D. The Disputed Evidence should not be admitted into evidence and be excluded as it contains improper opinion evidence and inadmissible hearsay.

[7] **AND UPON** considering the following elements with respect to the Witness Statements:

A. In her witness statement dated October 31, 2017, Ms. Stewart states that, in 2015, Air Transat completed a request-for-proposal process for in-flight catering ("**Air Transat 2015 RFP process**") and refers to savings allegedly realized, or to be

realized in the future, at airports across Canada except for the Vancouver International Airport ("**YVR**"), as well as to increased expenses allegedly incurred, or to be incurred in the future, by Air Transat at YVR as a result of that process;

B. In her witness statement (including Exhibits 10 and 13) dated November 10, 2017, Ms. Bishop states that, in 2014, Jazz conducted a request-for-proposal process for in-flight catering ("**Jazz 2014 RFP process**") and refers to savings allegedly realized, or to be realized in the future, at airports across Canada except for YVR, as well as to increased expenses allegedly incurred, or to be incurred in the future, by Jazz at YVR as a result of that process;

C. In their respective Witness Statements, Ms. Stewart and Ms. Bishop each state that they have "personal knowledge of the matters" discussed in the statements unless indicated otherwise, and provide background information on their specific experience, credentials and roles in their respective companies;

D. In her witness statement, Ms. Stewart indicates that she was responsible for all procurement activities regarding in-flight catering at Air Transat from 2014 to 2017, including the Air Transat 2015 RFP process. She also sets out some background information with respect to her role in the RFP process and to the alleged savings and increased expenses at Air Transat;

E. In her witness statement, Ms. Bishop indicates that she had day-to-day responsibility for the Jazz 2014 RFP process and provided strategic direction to the 2014 RFP process team. She also mentions that she conducted monthly reviews to maintain targets and costs in all areas and oversaw the budget and billings for all in-flight catering, and she provides some background information with respect to the alleged savings and increased expenses at Jazz;

[8] **AND UPON** observing that, in its written submissions to the Tribunal, VAA frequently states that the paragraphs containing the Disputed Evidence "appear" not to be within the personal knowledge of Ms. Stewart and Ms. Bishop, and "appear" to be based on reports and calculations from other unknown persons;

[9] **AND UPON** noting the statement made by counsel for VAA at the September 24, 2018 hearing to the effect that representations made by counsel for the Commissioner at the hearing have dealt with some of her objections to the admissibility of parts of Ms. Stewart's witness statement;

[10] **AND UPON** considering that evidence from lay witnesses is generally admissible if a witness has personal knowledge of the observed facts and testifies to facts within his or her observation, experience and understanding of events, conduct or actions (*Graat v The Queen*, [1982] 2 SCR 819 at page 835; *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 at paras 79-81, leave to appeal to SCC refused, 37932 (23 August 2018); *Commissioner of Competition v Imperial Brush Co Ltd and Kel Kem Ltd (cob as Imperial Manufacturing Group)*, 2007 Comp Trib 22 at para 11);

[11] **AND UPON** considering that, on this Motion, the question to be determined by the Tribunal is whether, at this preliminary stage, VAA has established on a balance of probabilities

that the paragraphs containing the Disputed Evidence, as read in the context of the Witness Statements, constitute improper opinion evidence and/or inadmissible hearsay;

[12] **AND UPON** considering that an assumption of lack of personal knowledge needs to be established in order to convince the Tribunal that proposed evidence should be ruled inadmissible at an early stage, and that only in clear cases would the Tribunal be ready to find proposed lay witness evidence inadmissible on a preliminary motion, prior to the witness being examined and cross-examined;

[13] **AND UPON** finding that, at this stage, VAA has not persuaded the Tribunal that the facts as set out in the Witness Statements are not within the knowledge, understanding, observation or experience of Ms. Stewart and Ms. Bishop, or that Ms. Stewart and Ms. Bishop did not observe the facts contained in their respective Witness Statements with respect to the Disputed Evidence;

[14] **AND WHEREAS** the Tribunal acknowledges that VAA was within its right to bring this issue of admissibility of proposed evidence to the Tribunal's attention at this early stage, as dates had been set aside in the Scheduling Order for this Application to deal with motions relating to the evidence;

[15] **AND WHEREAS** the Tribunal however has the discretion, depending on the factual circumstances before it, to defer a ruling on admissibility of evidence until later, as long as fairness is respected;

[16] **AND WHEREAS**, given the language used by Ms. Stewart and Ms. Bishop in their respective Witness Statements, the Tribunal considers that it will be best placed at the hearing to determine whether or not the Disputed Evidence constitutes improper lay opinion evidence and/or inadmissible hearsay, and to rule on its admissibility;

[17] **AND WHEREAS** both Ms. Stewart and Ms. Bishop will be called to testify by the Commissioner, under oath before the Tribunal, where they will be subject to examination by counsel for the Commissioner, to cross-examination by counsel for VAA and to questioning by the panel;

[18] **AND WHEREAS** the scope of personal knowledge of Mss. Stewart and Bishop with respect to the Disputed Evidence is a matter that will be clarified at the time of their testimonies before the Tribunal;

[19] **AND WHEREAS** the testimonies of Mss. Stewart and Bishop will provide better factual context to assist the Tribunal in making a determination on the admissibility of the Disputed Evidence;

[20] **AND WHEREAS** the Tribunal is therefore of the view that, in the circumstances of this case, the preferable approach is to wait for the hearing before making a ruling on the admissibility of the Disputed Evidence, to allow the Disputed Evidence to be subject to cross-examination, and to then determine its admissibility if needed (*Boroumand v Canada*, 2016 FCA

313 at para 6; *Nadeau Poultry Farm Ltd v Groupe Westco Inc*, 2009 Comp Trib 6 at paras 80-81, aff'd 2011 FCA 188, leave to appeal to SCC refused, 34401 (22 December 2011));

[21] **AND WHEREAS** VAA has not established that it would suffer prejudice if the Disputed Evidence is not ruled inadmissible at this time and, since VAA will have the ability to test the Disputed Evidence on cross-examination, the Tribunal is satisfied that no issue of procedural fairness arises if the Tribunal rules on the admissibility of the Disputed Evidence at a later stage;

[22] **AND WHEREAS**, in exercising its discretion to defer ruling on the admissibility of the Disputed Evidence at this stage, the Tribunal still retains the ability to reject such evidence as inadmissible at the hearing, after the testimonies of each of Ms. Stewart and Ms. Bishop, or at the time of its decision on the merits;

[23] **AND WHEREAS**, for the above reasons and in light of the particular circumstances of this case, a conclusion on the admissibility of the Disputed Evidence would be premature;

[24] **AND WHEREAS** the written submissions and the oral submissions presented at the hearing of the Motion fail to satisfy the Tribunal that, at this stage, VAA's Motion should be granted;

THE TRIBUNAL ORDERS THAT:

[25] VAA's Motion is dismissed, without prejudice to bring a motion at the hearing of the Application, further to the testimonies of each of Ms. Stewart and Ms. Bishop, with respect to the admissibility of the Disputed Evidence, or parts of it;

[26] The decision as to costs is reserved until the Tribunal generally addresses the issue of costs.

DATED at Ottawa, this 28th day of September 2018
SIGNED on behalf of the Tribunal by the Chairperson

(s) Denis Gascon

APPEARANCES:

For the applicant:

The Commissioner of Competition

Jonathan Hood
Katherine Rydel
Ryan Caron
Antonio Di Domenico

For the respondent:

Vancouver Airport Authority

Julie Rosenthal
Rebecca Olscher

Competition Tribunal Tribunal de la concurrence

PUBLIC VERSION

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

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

BETWEEN:

The Commissioner of Competition
(applicant)

and

Vancouver Airport Authority
(respondent)

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

REASONS FOR ORDER AND ORDER

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I. EXECUTIVE SUMMARY

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

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

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

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

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

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

II. INTRODUCTION AND OVERVIEW

A. The parties

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

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

B. Section 79 of the Act

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

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

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

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

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

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

C. The parties' pleadings

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

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

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

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

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

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

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

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

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

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

D. Procedural history

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

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

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

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

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

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

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

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

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

III. FACTUAL BACKGROUND

A. YVR

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

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

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

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

B. VAA

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

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

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

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

[…]

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

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

[36] According to VAA, it has been remarkably successful in fulfilling its public interest mandate. By any measure – whether growth in passengers, growth in Pacific Rim passengers, growth in flights, growth in destinations served, operating efficiency (measured either by revenues per passenger, by revenues per flight, by operating expenses per passenger, or by operating expenses per flight), green initiatives, investments in public transportation, commitments to First Nations peoples, or industry and governmental awards –, VAA has fulfilled its mandate to operate YVR in a safe and efficient manner for the general benefit of the public, to expand British Columbia's transportation facilities, to contribute to the economy of British Columbia and, more broadly, to assist in the movement of people and goods between Canada and the rest of the world.

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

C. Airport revenues and fees

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

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

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

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

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

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

D. Airlines

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

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

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

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

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

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

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

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

E. In-flight catering

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

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

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

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

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

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

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

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

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

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

F. In-flight catering providers

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

G. In-flight caterers at YVR

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

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

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

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

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

H. The 2013-2015 events

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

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

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

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

[86] **[CONFIDENTIAL]**.

I. The 2017 RFP

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

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

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

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

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

IV. EVIDENCE -- OVERVIEW

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

A. Lay witnesses

(1) The Commissioner

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) VAA

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

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

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

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

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

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

B. Expert witnesses

(1) The Commissioner

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

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

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

(2) VAA

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

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

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

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

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

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

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

(a) Admissibility of expert evidence

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

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

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

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

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

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

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

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

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

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

(b) Dr. Tretheway's evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Documentary evidence

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

V. PRELIMINARY ISSUES

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

A. Admissibility of evidence

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

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

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

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

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

(1) Rules of evidence at the Tribunal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Lay opinion evidence

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

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

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

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

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

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

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

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

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

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

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

(3) Hearsay evidence

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

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

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

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

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

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

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

(4) Conclusion

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

B. Alleged late amendments to pleadings

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

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

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

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

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

(1) Analytical framework

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

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

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

pleadings, as long as, of course, all the parties have been informed of that issue and have been given a fair opportunity to respond to it. […]

[74] These principles also apply to contested proceedings before the Tribunal. It acts as a judicial body: section 8 and subsection 9(1) of the *Competition Tribunal Act*. Though the proceedings before the Tribunal are to be dealt with informally and expeditiously, they are nevertheless subject to the principles of procedural fairness: subsection 9(2) of the *Competition Tribunal Act*. […]

[citations omitted]

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

(2) Expansion of relevant markets

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

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

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

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

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

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

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

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

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

(3) Additional ground for VAA's PCI

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

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

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

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

(4) Conclusion

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

VI. <u>ISSUES</u>

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

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

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

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

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

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

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

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

- What costs should be awarded?

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

VII. ANALYSIS

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

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

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

(1) The RCD

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The parties' positions

(a) VAA

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

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

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

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

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

(b) The Commissioner

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

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

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

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

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

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

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

(3) Assessment

(a) Is the required leeway language present?

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

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

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

(i) The wording of section 79

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) The rationales underlying the RCD

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) Conclusion on the leeway language

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

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

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

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

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

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

(i) Conduct authorized by a federal legislative regime

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) The grounds invoked by VAA

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

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

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

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

[…]

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

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

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

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

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

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

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

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

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

- The 1992 OIC and the 1992 Ground Lease

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

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

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

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

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

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

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

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

- VAA's Board of Directors

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

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

- VAA's additional public interest arguments

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

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

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

- The Canadian Aviation Regulations

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

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

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

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

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

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

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

(iii) Conclusion on the second component of the RCD

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

(4) Conclusion

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

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

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

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

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

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

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

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

(1) Analytical framework

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

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

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

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

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

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

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

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

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

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

(2) The product dimension

(a) The parties' positions

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

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

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

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

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

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

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

(b) The Airside Access Market

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

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

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

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

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

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

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

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

(c) The Galley Handling Market

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

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

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

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

(i) The hypothetical monopolist framework

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

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

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

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

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

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

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

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

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

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

(ii) Evidence supporting a distinct relevant market

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

- Functional interchangeability

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

- The behaviour of airlines and in-flight caterers

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

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

Air Canada

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

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

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

Jazz

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

WestJet

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

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

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

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

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

Air Transat

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

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

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

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

Firms supplying Catering and Galley Handling services

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

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

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

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

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

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

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

Summary

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

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

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

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

- <u>The views and strategies of airlines and in-flight caterers</u>

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

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

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

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

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

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

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

- Physical and technical characteristics

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

- The production of Galley Handling and Catering services

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

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

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

- Price relationships and relative prices

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

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

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

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

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

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

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

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

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

- Fixed or variable proportions

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

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

(iii) Conclusion on the Galley Handling Market

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) The geographic dimension

(a) The parties' positions

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

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

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

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

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

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

(b) The Airside Access Market

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

(c) The Galley Handling Market

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

(i) Double Catering

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) Self-supply

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) Conclusion on the Galley Handling Market

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

(4) Conclusion

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

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

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

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

(1) Analytical framework

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

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

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

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

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

(2) The parties' positions

(a) The Commissioner

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

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

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

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

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

(b) VAA

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

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

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

[434] Notwithstanding the foregoing, in its closing submissions, VAA clarified that "[f]or the purposes of argument," it assumed that it controls the provision of the specific services of loading and unloading Catering products. In making this concession, it acknowledged that without VAA's authorization, a firm other than an airline cannot access the airside to provide these services. However, it maintained that the Commissioner's definition of Galley Handling services includes a wide range of services that do not require access to the airside. In this regard, it stated that "none of warehousing, inventory management, assembly of meal trays and aircraft trolley carts, equipment cleaning, and handheld point-of-sale device management require access to the airport airside or any other authorization by VAA" (VAA's Closing Submissions, at para 33). Therefore, it asserted that VAA cannot be said to control the market for those services.

(3) Assessment

(a) The Airside Access Market

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) The Galley Handling Market

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

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

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

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

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

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

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

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

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

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

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

(4) Conclusion

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

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

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

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

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

(a) Meaning of "plausible"

[459] In *TREB CT* at paragraph 279, the Tribunal observed that "before a practice engaged in by a respondent who does not compete in the relevant market can be found to be *anti-competitive*, the Commissioner will be required to satisfy the Tribunal that the respondent has a plausible *competitive interest* in the market" [emphasis in original]. The Tribunal elaborated as follows:

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

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

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

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

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

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

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

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

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

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

(b) The parties' positions

(i) The Commissioner

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

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

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

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

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

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

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

(ii) VAA

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

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

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

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

(c) Assessment

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

(i) The Commissioner's submissions

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

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

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

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

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

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

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

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

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

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

(ii) VAA's submissions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) Conclusion

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

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

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

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

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

(a) Analytical framework

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

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

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

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

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

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

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

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

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

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

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

(b) The parties' positions

(i) The Commissioner

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

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

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

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

(ii) VAA

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

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

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

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

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

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

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

(c) Assessment

(i) "Practice"

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

(ii) Intention to exclude and reasonably foreseeable effects

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

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

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

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

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

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

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

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

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

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

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

(iv) VAA's justifications for the Exclusionary Conduct

- The evidence

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

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

The April 2014 events

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

110. **[CONFIDENTIAL]**.

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

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

113. At a minimum, it would have caused significant disruption in the availability of full-service in-flight catering at YVR. In particular, a sudden or unexpected departure of an existing caterer would leave dozens of airlines scrambling to find a new supplier for hundreds of flights. There are over 400 flights that depart YVR every day, almost all of which rely on some form of in-flight catering. For most international flights and flights with first class passengers, full-service catering is a requirement, not an option. Airlines cannot fly those routes without full-service in-flight catering, including fresh meals. Moreover, airlines cannot shut down or suspend operations on those flights while they find a new supplier.

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

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

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

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

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

The exchanges with Newrest and Strategic Aviation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The August 2014 Briefing Note

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

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

[emphasis added]

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

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

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

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

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

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

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

The 2017 events

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

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

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

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

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

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

- <u>The legitimacy of VAA's justifications</u>

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

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

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

Preservation of competition

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

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

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

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

Protecting YVR's reputation

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

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

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

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

Avoiding disruption for airlines

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

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

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

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

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

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

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

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

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

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

- The adequacy and credibility of VAA's justifications

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) Conclusion

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

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

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

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

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

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

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

(1) Analytical framework

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

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

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

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

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

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

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

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

[639] "Substantiality" can be demonstrated by the Commissioner through quantitative or qualitative evidence, or both (*TREB CT* at paras 469-471). The Commissioner must however always adduce sufficiently clear and convincing evidence to demonstrate, on a balance of probabilities, that competition has been, is or is likely to be prevented or lessened substantially (*Tervita SCC* at para 65; *TREB FCA* at para 87; *Canada Pipe FCA* at para 46).

[640] In conducting its assessment of substantiality under paragraph 79(1)(*c*), the Tribunal will assess both the degree of the prevention or lessening of competition as well as its duration (*Tervita SCC* at paras 45, 78). Where a prevention or lessening of competition does not extend throughout the relevant market, the Tribunal will also assess its scope and whether it extends throughout a "material" part of the market (*The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14 ("***CCS***") at paras 375, 378, rev'd 2013 FCA 28, rev'd 2015 SCC 3).

[641] With respect to degree, or magnitude, the Tribunal assesses whether the impugned practice has enabled, is enabling or is likely to enable the respondent to exercise materially greater market power than in the absence of the practice (*Tervita SCC* at paras 50-51, 54). The Tribunal has not found it useful to apply rigid numerical criteria in conducting this assessment. What constitutes "materially" greater market power will vary from case to case and will depend on the facts of the case (*Tervita SCC* at para 46; *TREB FCA* at para 88). In assessing whether the degree or magnitude of prevention or lessening of competition is sufficient to be considered "substantial," the Tribunal will consider the overall economic impact of an impugned practice in the relevant market. With respect to the duration aspect of its assessment, the test applied by the Tribunal is whether this material increase in prices or material reduction in non-price dimensions of competition resulting from an impugned practice has lasted, or is likely to be maintained for, approximately two years (*Tervita SCC* at para 80; *CCS* at para 123).

[642] For greater certainty, when assessing whether competition with respect to prices has been, is or is likely to be prevented or lessened substantially, the test applied by the Tribunal is to determine whether prices were, are or likely would be materially higher than in the absence of the impugned practice. With respect to non-price dimensions of competition, such as quality, variety, service or innovation, the test applied is to determine whether the level of one or more of those dimensions of competition was, is or likely would be materially lower than in the absence of the impugned practice (*Tervita SCC* at para 80; *CCS* at paras 123-125, 376-377).

[643] Where it is alleged that future competition has been, is or is likely to be prevented by an impugned practice, this period will run from the time when that future competition would have likely materialized, in the absence of the impugned practice. If such future competition cannot be demonstrated to have been, or to be, likely to materialize in the absence of the impugned practice, the test contemplated by paragraph 79(1)(*c*) will not be met. To be likely to materialize, the future competition must be demonstrated to be more probable than not to occur in the absence of the impugned practice (*Tervita SCC* at para 66). To meet this test, the Commissioner is required to demonstrate that the future competition, whether in the form of entry by new competitors or expansion by existing competitors (including in the form of the introduction of new product offerings), likely would have materialized within a discernible time frame. This time frame need not be precisely calibrated. However, it must be based on evidence of when the entry or expansion in question realistically would have occurred, having regard to the typical lead time for new entry or expansion to occur in the relevant market in question.

[644] It bears emphasizing that the burden to demonstrate both the substantial nature of the alleged prevention or lessening of competition, and the basic facts of the "but for" scenario that are required to make that demonstration, lies with the Commissioner (*Tervita FCA* at paras 107-108).

(2) The parties' positions

(a) The Commissioner

[645] The Commissioner argues that VAA's conduct has had, is having and is likely to have the effect of substantially preventing or lessening competition in the Galley Handling Market. In

support of this position, the Commissioner asserts that, "but for" VAA's Exclusionary Conduct, the market for the supply of Galley Handling services at YVR would be substantially more competitive, including by way of materially lower prices, materially enhanced innovation and/or materially more efficient business models, and materially higher service quality.

[646] The Commissioner submits that in the absence of VAA's impugned conduct, significant new entry into the Galley Handling Market at YVR likely would have occurred, and likely would occur in the future. In this regard, he notes that potential new entrants have already sought authorization to access the airside to provide in-flight catering at the Airport, and would likely have begun operations at the Airport in the absence of VAA's Practices. The Commissioner therefore maintains that VAA's conduct insulates the incumbent in-flight catering firms at the Airport from these new sources of competition, enabling those incumbent firms to exercise a materially greater degree of market power, through materially higher prices and materially lower levels of service quality, than would otherwise prevail in the absence of VAA's practice.

[647] The Commissioner claims that the ability of airlines seeking Galley Handling services at YVR to contract with alternatives to the incumbent providers would allow them to realize at YVR the price and non-price benefits that they have enjoyed at other airports in Canada where new entry has been permitted to occur.

[648] The Commissioner further contends that new entry would also bring to YVR the introduction of innovative and/or more efficient Galley Handling business models. For example, airlines would gain the ability to procure Galley Handling services from a less than full-service in-flight catering firm, or from in-flight catering firms with a lower-cost off-Airport location, delivering efficiencies to service providers and savings to airlines.

[649] In support of his position, the Commissioner relies on the evidence of the market participants directly impacted by VAA's Exclusionary Conduct, namely several airlines and in-flight catering firms, as well as on the expert evidence of Dr. Niels. Dr. Niels' evidence includes: (i) the analysis of switching by airlines at Canadian airports; (ii) Jazz's gains from switching at airports other than YVR; (iii) the price effects for airlines that did not switch; and (iv) **[CONFIDENTIAL]**. The Commissioner claims that, on their own and certainly in the aggregate, these various sources of evidence demonstrate that VAA's anti-competitive conduct has caused, is causing and is likely to cause a substantial prevention and lessening of competition in the supply of Galley Handling at YVR. Specifically, the Commissioner maintains that, "but for" VAA's Exclusionary Conduct, there would likely have been in 2014-2015 and would likely be in the future: (i) <u>entry</u> by new competitors for the supply of Galley Handling at YVR; (ii) <u>switching</u> and threats of switching from airlines at YVR to new competitors for the supply of Galley Handling; (iii) <u>lower prices</u> for airlines for the supply of Galley Handling services at YVR; and (iv) a greater degree of <u>dynamic competition</u> for Galley Handling at YVR.

[650] Finally, the Commissioner argues that the alleged prevention or lessening of competition would be substantial in terms of magnitude, duration and scope: it adversely impacts competition to a degree that is material, the duration of the adverse effects is substantial and the adverse effects impact a substantial part of the Relevant Market.

[651] As stated before, the Commissioner's focus throughout the hearing of this Application was on one of VAA's two alleged impugned Practices, namely, the Exclusionary Conduct. Indeed, the other allegation regarding continued tying of access to the airside for the supply of Galley Handling services to the leasing of land at YVR from VAA was not addressed by the Commissioner during the hearing or in his closing written submissions.

(b) VAA

[652] VAA responds that its Practices do not, and are not likely to, prevent or lessen competition substantially in any market. More specifically, VAA submits that the Commissioner has failed to meet his burden to prove, on a balance of probabilities, that VAA's refusal to license Newrest and Strategic Aviation has had, is having or is likely to have the effect of substantially preventing or lessening competition in the Galley Handling Market.

[653] In its Amended Response, VAA submitted that its decision to limit the number of in-flight caterers at the Airport has not enabled the incumbent firms to exercise materially greater market power than they would have been able to exercise in the absence of the acts. VAA further claimed that there is vigorous competition between Gate Gourmet and CLS, that the presence of two full-service in-flight catering firms is consistent with the number of such competitors at other comparable North American airports, and that airlines can and do change firms in response to price and service competition.

[654] VAA further argued that the airlines (and their large international alliances) have considerable countervailing market power. Finally, VAA submitted that the licensing of dnata and the arrival of this third in-flight caterer at YVR will eliminate any prevention or lessening of competition that could have resulted from VAA's refusal to grant licences to Newrest and Strategic Aviation.

[655] In its closing submissions, VAA elaborated by stating that, on the unique facts of this case where it does not compete in the Relevant Market (i.e., the Galley Handling Market), the Commissioner must prove that its actions materially created, enhanced or maintained the market power of both Gate Gourmet and CLS, in the supply of Galley Handling at YVR. VAA argued that the evidence on the record does not establish that "the market at issue would be substantially more competitive" (*TREB FCA* at para 88), "but for" the Exclusionary Conduct.

[656] VAA reiterated that in evaluating whether its conduct materially enhanced the market power of either Gate Gourmet or CLS, the Tribunal must also consider the interaction between the effect of the denial of licences to Newrest and Strategic Aviation and the countervailing market power exercised or exercisable by the airline customers of Gate Gourmet and CLS.

[657] VAA also maintains that the evidence provided by the Commissioner, whether from the market participants or from Dr. Niels, is not sufficient to meet the test under paragraph 79(1)(*c*). More specifically, VAA submits that the anecdotal evidence from Jazz and Air Transat is unreliable and open to serious question following the cross-examination of the Commissioner's witnesses. VAA further asserts that the Commissioner's evidence is limited to two small carriers. Furthermore, VAA claims that the economic evidence from Dr. Niels suffers from numerous

flaws. For example, it states that the alleged price effects only occur for "small" airlines, that they are largely associated with entry at airports going from a monopoly position to two in-flight caterers, and that these small airlines account only for about **[CONFIDENTIAL]**% of the flights at YVR, with no indication of the proportion they represent of the Galley Handling Market at YVR.

[658] VAA acknowledges that the Tribunal can assess both the quantitative and qualitative effects of the impugned conduct and that the qualitative effects are more relevant to an assessment of dynamic competition in innovation markets, in the sense that innovation or technology plays a key role in the competitive process. However, VAA submits that the Galley Handling Market is not such a market, and that there is no clear and convincing evidence of any adverse effect on innovation in this case.

[659] Finally, VAA adds that the factual circumstances relevant to the consideration of whether there has been or will likely be a substantial prevention or lessening of competition should be updated to the date of the hearing. In this instance, given the imminent entry of dnata, VAA maintains that the Commissioner has to prove that VAA's conduct is likely to have the effect of substantially preventing or lessening competition from a forward-looking perspective. VAA contends that, if any negative price effects have resulted from the impugned conduct, those effects will be remedied and cured with the entry of dnata at YVR.

(3) Assessment

[660] The Tribunal notes at the outset that most of the evidence adduced by the Commissioner was quantitative evidence relating to the alleged price effects of VAA's Exclusionary Conduct. As part of its assessment, the Tribunal has therefore focused significantly on whether prices likely would have been, or would likely be materially lower, "but for" VAA's Exclusionary Conduct. The Tribunal has also evaluated whether entry likely would have been, or would likely be materially greater in the absence of that conduct, whether switching between suppliers of Galley Handling services likely would have been, or would likely be materially more frequent, and whether innovation in terms of Galley Handling services offered likely would have been, or would likely be substantially greater.

[661] For the reasons discussed below, the Tribunal concludes that the Commissioner has not demonstrated that the incremental adverse effect of VAA's Exclusionary Conduct on competition in the Galley Handling Market has been, is or is likely to be material, relative to the "but for" world in which that conduct did not occur. Therefore, the Commissioner has not established that competition has been or is prevented or lessened substantially as a result of the Exclusionary Conduct, or that it is likely to be prevented or lessened substantially in the future.

(a) Alleged anti-competitive effects

(i) Entry

[662] In assessing whether competition has been, is or is likely to be substantially prevented or lessened by a practice of anti-competitive acts, one of the factors to consider is whether entry or expansion into the relevant market likely would have been, likely is or likely would be, substantially faster, more frequent or more significant "but for" that practice (*Canada Pipe FCA* at para 58; *TREB CT* at para 505).

[663] According to the Commissioner, VAA's Exclusionary Conduct constitutes a significant barrier to entry for new providers of Galley Handling services who otherwise would have entered into the Relevant Market.

[664] The Tribunal is satisfied that several of the Commissioner's witnesses provided credible and persuasive evidence regarding the exclusionary impact that VAA's conduct has had on them in terms of entry. Based on that evidence, the Tribunal accepts that this conduct has prevented the development of <u>at least some</u> new competition in the Galley Handling Market. Indeed, VAA does not dispute that Newrest, Strategic Aviation and Optimum would like to compete at YVR. Witnesses from each of these firms (Mr. Stent-Torriani for Newrest, Mr. Brown for Strategic Aviation and Mr. Lineham for Optimum) testified that, "but for" VAA's Exclusionary Conduct, their companies would have entered YVR in 2014-2015 and would have competed for airline business. The evidence shows that they participated in RFPs launched by Jazz and Air Transat in the 2014-2015 timeframe, and were unsuccessful at YVR because of their inability to obtain a licence from VAA to offer their Galley Handling services.

[665] Considering the foregoing, the Tribunal is satisfied that there would have been somewhat more new entry into the Relevant Market than there has in fact been, "but for" the impugned conduct (*Canada Pipe FCA* at para 58).

[666] The representatives of Newrest, Strategic Aviation and Optimum all testified that, despite the entry of dnata at YVR, they would still be interested in commencing operations at YVR and in competing for airline business in the Galley Handling Market. There is also evidence, notably from the witnesses who appeared on behalf Air Canada (Mr. Yiu) and WestJet (Mr. Soni), indicating that airlines are still generally looking for more competition in the in-flight catering business. However, apart from general statements from Newrest, Strategic Aviation and Optimum regarding their continued interest in operating at YVR, and similar statements from Air Canada and WestJet regarding the benefits of increased competition in Galley Handling services, the Commissioner has provided limited evidence regarding the incremental benefits that past, current or future new entry would have yielded in the Galley Handling Market. Normally, as part of an analysis of likely past, present or future entry, the Commissioner is expected to provide evidence regarding the proportion of the market that was, is or is likely to be available to new entrants. As part of this exercise, it is incumbent upon the Commissioner to identify concrete market opportunities that would likely have been, are or would likely be available to new entrants. In other words, the Commissioner has the burden to establish that new entrants would likely have entered or expanded in the relevant market, or would be likely to do so, "within a

reasonable period of time, and on a sufficient scale, to effect either a material reduction of prices or a material increase in one or more levels of non-price competition, in a material part of the market" (*Tervita FCA* at para 108). Such evidence has not been provided in this proceeding. Among other things, the Commissioner has not addressed the fact that the contracts between the incumbent in-flight caterers and the airlines are typically long-term contracts, varying between three to five years.

[667] As a result, the Tribunal is not satisfied that there is clear and convincing evidence to support the conclusion that there were, are or would likely be sufficient opportunities available to new entrants to support entry on a scale that would likely have been or would likely be sufficient to have a material impact on the price and non-price dimensions of competition in the Galley Handling Market.

[668] The Tribunal underscores that the situation is now different from the 2014-2015 and 2017 periods when there were RFPs for Galley Handling services initiated by airlines such as Air Transat, Jazz or Air Canada, and when Newrest, Strategic Aviation and/or Optimum offered their services and participated in the process. No evidence was adduced to demonstrate that new contracts for Galley Handling services are currently available or would soon be available for any airlines at YVR. When relying on an allegation that impugned conduct prevents or would likely prevent new entrants from having a material impact on the price or non-price dimensions of competition, the Commissioner must demonstrate more than the existence of firms that are interested in entering the relevant market. The Commissioner must go further and demonstrate that those firms are likely to be successful and that they are likely to achieve a scale of operations that permitted or would permit them to materially impact one or more important dimensions of competition. He has not done so for present or future entry. Likewise, as to the 2014-2015 and 2017 periods mentioned above, the Commissioner has not established that entry by Newrest, Strategic Aviation and/or Optimum likely would have been on a sufficient scale to result in materially lower prices or a materially higher level of innovation, quality, service or other non-price effects in a substantial part of the market.

[669] Based on the foregoing, the Tribunal finds that the Commissioner has not demonstrated, with clear and convincing evidence, that successful and sufficient entry at YVR has been or is prevented, or will likely be prevented in the foreseeable future, "but for" the Exclusionary Conduct.

(ii) Switching

[670] The Commissioner maintains that, had entry been permitted, switching from Gate Gourmet or CLS likely would have taken place to a materially higher degree than in the presence of VAA's Exclusionary Conduct. He adds that airlines would likely have resorted, and would likely turn in the future, to new providers of Galley Handling services at YVR. VAA replies that the evidence on switching does not demonstrate that VAA's Exclusionary Conduct has had, or is likely to have, the effect of limiting competition in the Galley Handling Market at YVR, let alone substantially.

- Switching by airlines

[671] On this issue, the Commissioner relied on Dr. Niels' analysis of the extent of switching at various Canadian airports. Dr. Niels' switching analysis consisted of counting the number of switches of in-flight catering providers made by the airlines at different airports over the period 2013-2017. In his analysis, Dr. Niels identified **[CONFIDENTIAL]** instances in which airlines switched in-flight caterers during that period. Of these, **[CONFIDENTIAL]** occurred at YVR, **[CONFIDENTIAL]**. Of the other **[CONFIDENTIAL]** which took place at other airports, **[CONFIDENTIAL]** involved switches to new entrants. A little more than half of these changes in in-flight caterers (i.e., **[CONFIDENTIAL]**) were made by **[CONFIDENTIAL]**.

[672] The evidence from Dr. Niels also showed an important change in the average yearly percentage of total airline purchases of in-flight catering services from in-flight caterers who were switched in the period from 2013 to 2017. That percentage was at **[CONFIDENTIAL]**% at YVR whereas it was much higher at every other airport in Canada, ranging from **[CONFIDENTIAL]**% to **[CONFIDENTIAL]**%, including YYZ at **[CONFIDENTIAL]**%. In other words, Dr. Niels found that the proportion of airline spending on in-flight catering that was switched during the period 2013-2017 was much lower at YVR than at other large Canadian airports. Dr. Niels added in reply to Dr. Reitman that **[CONFIDENTIAL]**, implying that VAA's refusal to permit entry has resulted in weaker competitive dynamics at YVR.

[673] According to the Commissioner, this analysis by Dr. Niels demonstrates that: (i) there was very little switching by airlines among the incumbent providers of in-flight catering services at YVR; (ii) comparatively, substantial switching occurred at airports other than YVR; and (iii) switching is often associated with the entry of new in-flight caterers.

[674] The Commissioner submits that this disparity in switching at YVR compared to other airports is relevant for two reasons. First, would-be entrants across Canada were ready to enter in 2014 and they remain ready to enter the Galley Handling Market. Therefore, "but for" VAA's Exclusionary Conduct, more switching would likely have occurred at YVR in the past and more would likely occur in the future. Second, the Commissioner suggests that Dr. Niels and Dr. Reitman agree that it is reasonable to presume that airlines benefit when they switch in-flight catering providers. Based on this, he maintains that there is a direct link between the fact of switching and benefits to airlines, and a direct link between a lack of switching and increased costs and/or reduced quality of service to airlines.

[675] The Tribunal acknowledges that there likely would have been at least some additional switching at YVR, "but for" the Exclusionary Conduct. However, the Tribunal considers that the switching analysis conducted by Dr. Niels has some important shortcomings. First, as pointed out by VAA, the switches counted by Dr. Niels in his analysis were for Catering and Galley Handling together. It is not possible to discern specific effects in the Galley Handling Market, *per se*, or to determine whether the switches observed related to that market or in respect of catering services. Second, Dr. Niels' analysis was incomplete. As Dr. Niels acknowledged, he did not factor into his analysis instances of partial switching made by airlines for their Galley Handling services. Third, apart from the fact that there has been more entry at some other airports than at YVR, it is not clear that there is any material difference between the intensity of

competition in the provision of Galley Handling services at YVR, relative to other airports. Dr. Niels essentially conceded this point.

[676] That said, further to its assessment of Dr. Niels' evidence on this point, and considering also the evidence provided by Air Transat and Jazz showing that they would have switched to a new in-flight caterer further to their respective 2014 and 2015 RFPs, the Tribunal agrees with the Commissioner that, on a balance of probabilities, switching would have been and would likely be greater and more frequent in the absence of VAA's Exclusionary Conduct. However, that is not the end of the analysis. As discussed above, the Commissioner must also address whether such switching likely would have been sufficient to result in materially lower prices, or materially higher levels of non-price benefits, in a substantial part of the market, "but for" the Exclusionary Conduct. For the reasons discussed in Section VII.E.3.b below, he has not satisfied his burden in this regard.

- Entry by dnata

[677] The Commissioner also submits that dnata's entry as a third provider of in-flight catering services at YVR in 2019 will have limited impact on the Galley Handling Market. The Commissioner argues that, unlike the situation for Newrest, Strategic Aviation and Optimum, there is limited evidence that dnata will likely be an effective competitor at YVR.

[678] The Commissioner claims that dnata has no presence in Canada and virtually none in North America (being only present in Orlando, Florida). He submits that dnata's limited presence in North America will be an obstacle to its success at YVR, as it will be unable to offer "network" pricing and satisfy airlines' preferences for a single caterer supplier across Canada.

[679] The Commissioner also contends that **[CONFIDENTIAL]** (Commissioner's Closing Argument, at para 78). The Commissioner further notes that, **[CONFIDENTIAL]**. Stated differently, despite the fact that domestic flights account for 67% of flights per week at YVR, **[CONFIDENTIAL]**. The Commissioner submits that since international flights account for a smaller proportion of flights per week at YVR, **[CONFIDENTIAL]**.

[680] The Commissioner further argues that VAA's process for selecting dnata – namely, the In-Flight Kitchen Report and the 2017 RFP itself – was fundamentally flawed in many respects, as were the results of the process.

[681] Finally, the Commissioner contends that dnata is a "**[CONFIDENTIAL]**" type of new competitor vis-à-vis the two incumbent caterers at YVR, in an in-flight catering environment where innovative business models exist and benefit airlines everywhere but YVR (Commissioner's Closing Argument, at para 77).

[682] The Tribunal disagrees with the Commissioner's position with respect to dnata. In brief, the evidence does not support the Commissioner's contention that dnata is unlikely to be an effective competitor.

[683] Regarding the scope of dnata's presence, the evidence does not support the Commissioner's suggestion that dnata's entry will be limited and targeted. In his cross-examination by counsel for VAA, **[CONFIDENTIAL]**.

[684] As to the RFP conducted by VAA in 2017, the Tribunal is not convinced by the Commissioner's arguments. The Tribunal agrees with VAA that, in light of the evidence regarding the In-Flight Kitchen Report and the RFP itself, the RFP was beyond reproach. The Tribunal does not find that the process was flawed or geared towards a given result. The Commissioner has not pointed to any persuasive evidence in that regard. Indeed, the RFP process was found to be fair by a third-party fairness advisor. It was expressly open to both full-service and non-full-service in-flight catering firms. It was also open to firms operating a kitchen on-Airport as well as those operating off-Airport. And the criteria for analyzing the bids were extremely detailed and objective. Contrary to the Commissioner's suggestion, the Tribunal finds no evidence showing that the RFP process was geared towards a "full-flight kitchen" operator or against providers like Strategic Aviation or Optimum.

[685] The Tribunal also disagrees with the Commissioner's comment that dnata is "**[CONFIDENTIAL]**" and will not be considering "innovative" new business models. On the contrary, the testimony of Mr. Padgett showed that dnata is ready and able to go after any type of in-flight catering work, whether that consists of catering or last-mile logistics or both. In other words, dnata has left the door open to the possibility of providing only Galley Handling services for airline customers who may not wish to source their catering services from dnata.

[686] The Tribunal considers that there is every indication that dnata will enter and compete fully with Gate Gourmet and CLS in the Galley Handling Market at YVR. In fact, Dr. Niels acknowledged that the entry of dnata will bring increased rivalry to the Galley Handling Market at YVR, as his evidence suggests that at least some switches occur upon the entry of new in-flight catering firms. Dr. Niels further accepted that, with the entry of dnata and the presence of three caterers at YVR going forward, there will be stronger competition than with two, though he qualified this increased competition as being a matter of degree. **[CONFIDENTIAL]**.

[687] In light of the foregoing, the Tribunal is not persuaded that dnata will not be an effective competitor. On the contrary, the Tribunal is inclined to accept Mr. Padgett's testimony that **[CONFIDENTIAL]**.

[688] That said, the Tribunal agrees with the Commissioner that as far as paragraph 79(1)(*c*) is concerned, the appropriate "but for" analysis is to compare outcomes with VAA's exclusionary practice in place to outcomes that would likely be realized absent that practice. It is not to compare outcomes with the presence of the two incumbent competitors to outcomes with those same two competitors plus dnata. However, the entry of dnata has made it more difficult for the Commissioner to demonstrate that, "but for" VAA's Exclusionary Conduct, prices likely would be materially lower, or non-price levels of competition likely would be materially greater, relative to the levels of prices and non-price competition that are in fact likely to prevail now that dnata has entered the Relevant Market.

(iii) Price effects

[689] The main focus of the Commissioner's arguments pertaining to alleged anti-competitive effects was on the price dimensions of VAA's Exclusionary Conduct and on how prices for Galley Handling services would likely have been and would likely be lower "but for" the impugned conduct. The Commissioner relied on evidence from a number of market participants, notably the various airlines called to testify, and on the expert evidence of Dr. Niels, to support his position that prices in the Galley Handling Market at YVR are materially higher than they would likely have been or would likely be, "but for" the Exclusionary Conduct. The Commissioner maintains that the aggregate savings resulting from reduced prices of Galley Handling services would likely have been and would likely be in the future, substantial.

[690] VAA responds that the Commissioner has not demonstrated that airlines would likely have benefitted from, or would likely be offered, materially lower prices in the Relevant Market in the absence of VAA's Exclusionary Conduct.

[691] The Tribunal agrees with VAA. Further to its review of the evidence, the Tribunal is not persuaded that VAA's Exclusionary Conduct has increased, is increasing or will likely increase the prices for Galley Handling services to a non-trivial degree in the Relevant Market, relative to the prices that likely would have existed "but for" the Exclusionary Conduct. Stated differently, the Commissioner has not demonstrated that, "but for" VAA's Exclusionary Conduct, the prices of the Galley Handling services at YVR would likely have been or would likely be lower, let alone "materially" lower.

[692] The Tribunal pauses to underscore, at the outset, that the Commissioner's evidence is essentially limited to **[CONFIDENTIAL]** of the total revenues generated by the in-flight catering firms operating at YVR, from 2013 to 2017. No evidence specifically addressed **[CONFIDENTIAL]** of in-flight catering revenues at YVR. This, says VAA, is a fatal flaw in the Commissioner's case, as he has not alleged any form of collusion between Gate Gourmet and CLS. The Tribunal agrees that this significantly weakens the Commissioner's case on paragraph 79(1)(*c*). In the circumstances of this case, the evidence does not allow the Tribunal to infer or imply anything with respect to **[CONFIDENTIAL]** in the absence of the Exclusionary Conduct.

[693] With respect to the alleged anti-competitive price effects of VAA's Exclusionary Conduct, the Commissioner relied on: (i) Dr. Niels' economic analyses of the price effects for airlines that did not switch providers, Jazz's gains from switching, and **[CONFIDENTIAL]**; and (ii) evidence provided directly by various airlines (i.e., Jazz, Air Transat, Air Canada and WestJet, and the eight airlines having provided letters of complaint).

- <u>Prices to the non-switchers</u>

[694] The main economic analysis relied upon by the Commissioner is a regression analysis conducted by Dr. Niels for airline customers that did not switch in-flight caterers. This is the only econometric evidence relied upon by the Commissioner.

[695] Dr. Niels used an event study methodology to analyze the effect of the entry of Strategic Aviation and/or Newrest on the average monthly price paid by a given airline customer **[CONFIDENTIAL]**, for a given Galley Handling product, at various airports other than YVR between 2014 and 2016. He compared the prices paid **[CONFIDENTIAL]** for Galley Handling services before and after entry by Strategic Aviation (**[CONFIDENTIAL]**) and Newrest (**[CONFIDENTIAL]**), for airlines that did not switch to the new entrants. Dr. Niels' analysis was essentially a comparison of prices paid **[CONFIDENTIAL]** over the two years prior to entry at the airport concerned with the average prices paid during the two years after entry. It yielded what Dr. Niels considered to be an estimate of the average effect of new entry on the prices paid by the airline customers who remained with **[CONFIDENTIAL]** and did not switch.

[696] This regression analysis **[CONFIDENTIAL]**. Dr. Niels also did not look at Catering prices, even though he recognized that he had the data to do so.

[697] Dr. Niels first found that the entry of new competitors <u>did not have</u> a statistically significant effect on the prices paid **[CONFIDENTIAL]** over the period 2013-2017. However, he found that **[CONFIDENTIAL]** "smaller airlines" customers by **[CONFIDENTIAL]**% if price observations are equally weighted, by **[CONFIDENTIAL]**% if they are revenue weighted and by **[CONFIDENTIAL]**% if they are quantity weighted. These results were statistically significant at the 5% level for unweighted and revenue-weighted results, and at the 1% level for quantity-weighted results. **[CONFIDENTIAL]**% if they are revenue-weighted but this result was statistically insignificant. Dr. Niels concluded that the analysis showed "robust evidence of a reduction **[CONFIDENTIAL]** galley handling prices for the smaller airlines in response to the entry of **[CONFIDENTIAL]**, despite these airlines not actually switching themselves" (Niels Report, at para 1.43).

[698] Dr. Niels indicated during his testimony that he had first performed the regression for all airline customers **[CONFIDENTIAL]** that did not switch, **[CONFIDENTIAL]**. He explained that he found no price effect for this "all airlines" sample and then proceeded to re-do the analysis, using a narrower sample for the "smaller airlines."

[699] Dr. Reitman criticized Dr. Niels' regression analysis at three levels.

[700] First, he stated that Dr. Niels' regression was based on a shorter time period than that for which Dr. Niels had the relevant data. Dr. Niels used data for a window of two years preceding and following entry, but had such data for periods of three years before and after entry.

[701] Second, Dr. Reitman criticized Dr. Niels' failure to distinguish between markets where **[CONFIDENTIAL]** a monopoly and markets where **[CONFIDENTIAL]** competition. In other words, Dr. Niels' regression did not differentiate between entry events that reflect the competitive situation at YVR (i.e., two competing in-flight caterers) and those that do not (i.e., monopoly situations). Instead, Dr. Niels' analysis gave the same weight to the impact on **[CONFIDENTIAL]** a monopoly prior to **[CONFIDENTIAL]** entry, as to the impact at other airports which already had pre-existing competition. Of the **[CONFIDENTIAL]** instances in which entry occurred over the period 2014-2016, **[CONFIDENTIAL]** involved the entry of a **[CONFIDENTIAL]**. These all related to airports where **[CONFIDENTIAL]** entered. A number

of other instances (e.g., **[CONFIDENTIAL]**) involved situations where a caterer entered into an airport where two or more incumbents were already present.

[702] Third, Dr. Niels did not define his entry event windows in a manner that ensured that the price changes at airports experiencing entry are compared with the price changes at airports at which no entry occurred. According to Dr. Reitman, Dr. Niels "does not perform a properly designed study that tests the impact of entry in markets where entry occurred against a control group where entry did not occur. […] Instead, he conflates entry effects in multiple markets and periods without a valid control sample" (Reitman Report, at para 196).

[703] Dr. Reitman adapted the regression model used by Dr. Niels to estimate the respective price effects of entry into previously monopolized markets and entry into markets with pre-existing competition. Dr. Reitman compared the pre- and post-entry differences in Galley Handling prices between airports in which entry occurred and a control group of airports in which no entry occurred for three different entry events. In this manner, Dr. Reitman estimated the respective price impacts of **[CONFIDENTIAL]** entry into monopoly airports **[CONFIDENTIAL]**, and **[CONFIDENTIAL]** into airports where there was pre-existing competition. Dr. Reitman did this for an "all airlines" sample and for a "small airlines" sample.

[704] For the all airlines sample, the results for entry that occurred at airports where there were already at least two incumbent caterers provided no statistically significant evidence that prices fell following entry. Dr. Reitman concluded that "there is no evidence that entry at airports that already had at least two providers had any substantial downward effect on pricing" (Reitman Report, at para 210). Dr. Reitman also found that **[CONFIDENTIAL]** with revenue-weights and **[CONFIDENTIAL]** with equal weights, although these estimates were statistically significant only at the **[CONFIDENTIAL]** level.

[705] With his sample confined to "small airlines" customers, Dr. Reitman found that, in the case of entry into a monopoly situation, **[CONFIDENTIAL]** was not statistically significant, except in the case of quantity-weighted prices where there was a statistically significant **[CONFIDENTIAL]**. By comparison, Dr. Reitman found a revenue-weighted **[CONFIDENTIAL]** and an equally-weighted **[CONFIDENTIAL]**, neither of which is statistically significant, **[CONFIDENTIAL]**. Notwithstanding **[CONFIDENTIAL]** of two of his estimates of the **[CONFIDENTIAL]** and **[CONFIDENTIAL]** quantity-weighted estimate, Dr. Reitman averaged the three and stated that**[CONFIDENTIAL]** (Reitman Report, at para 211).

[706] In one case of entry **[CONFIDENTIAL]**, Dr. Reitman found that **[CONFIDENTIAL]**.

[707] The Tribunal is persuaded that Dr. Reitman's critique of Dr. Niels' analysis seriously undermines the conclusions Dr. Niels derived from that analysis. In brief, in view of Dr. Reitman's critique, the Tribunal is of the view that Dr. Niels' analysis does not provide clear and convincing evidence that, "but for" VAA's Exclusionary Conduct, prices for Galley Handling services would likely have been lower at YVR. The Tribunal considers that, for the following reasons, it cannot give much weight to Dr. Niels' regression analysis in assessing the likely adverse price effects of VAA's Exclusionary Conduct.

[708] First, regarding the time frame used for his regression analysis, Dr. Niels was unable to provide, further to questions from the panel, a justification for his curtailment of the study window to a period of two years before and after entry. Dr. Niels conceded that his estimate of the price reduction following new entry becomes statistically insignificant if a longer six-year window (i.e., three years before entry and three after) is chosen.

[709] Second, regarding the statistical results, Dr. Reitman persuasively testified that revenue-weighted figures ranked higher than equally-weighted or quantity-weighted figures when it comes to estimating what happened to prices paid by airlines for in-flight catering. Dr. Reitman also mentioned that both he and Dr. Niels prefer revenue weights to quantity weights (Reitman Report, at para 212). The Tribunal agrees and considers that the revenue-weighted figures of the various regression analyses are the most relevant for its analysis. Dr. Niels' "blended estimate" of the price effects **[CONFIDENTIAL]** but when revenue weights are considered, **[CONFIDENTIAL]**. For his part, when revenue-weighted figures are considered, Dr. Reitman finds **[CONFIDENTIAL]**.

[710] Third, and most importantly, the Tribunal considers that the results relating to entry into markets where there were competing incumbents (as opposed to monopoly situations) are the relevant ones for its analysis, as they better reflect the situation that prevails at YVR. The Tribunal agrees with VAA that observed price effects of entry into previously monopolized markets is not particularly relevant for an assessment of price effects at YVR, which had two competing incumbents in the 2014-2016 timeframe. Likewise, the Tribunal agrees that any effects **[CONFIDENTIAL]** cannot be extrapolated to YVR. Generally speaking, one would expect that the price effect of introducing competition into a monopoly situation may well be different from the price effect of adding a third competitor to a duopoly situation. Indeed, Dr. Reitman's analysis suggests that this is in fact the case. Dr. Niels accepted that, as a matter of theory, the price-reducing effect of entry should decline as the number of incumbent competitors in the market concerned increases. However, he maintained that this decline is "a matter of degree" (Transcript, Conf. B, October 15, 2018, at pp 491-492). Dr. Niels further conceded, upon questioning from the panel, that he could have measured the effects separately for airports that went from one to two providers from those that went from two to three providers, but did not.

[711] Given that dnata has now entered the Galley Handling Market at YVR, it is even more difficult to see how the impact of entry into a monopoly situation can be extrapolated to the Relevant Market at YVR. The effect of the entry of a third competitor (prior to dnata's recent entry) is what is relevant to the case at hand. Moreover, the Tribunal must concern itself with the effect of entry on the prices paid by all airlines, or at least by those accounting for a substantial part of the relevant market, rather than a small and arbitrary subset of them. Only two revenue-weighted parameter estimates qualify to meet those two requirements. The first is Dr. Reitman's parameter for **[CONFIDENTIAL]**. The second is Dr. Reitman's parameter for **[CONFIDENTIAL]**.

[712] The Tribunal notes that on this issue, Dr. Niels responded that there were other factors in addition to the number of competitors that affected the intensity of competition. He cited evidence to the effect that **[CONFIDENTIAL]**. The Tribunal does not accept such statement because the evidence on the record does not establish, on a balance of probabilities, that **[CONFIDENTIAL]**.

[713] For all the above reasons, the Tribunal accepts Dr. Reitman's finding that the effect of the entry of a third competitor on the Galley Handling prices paid by all airlines is not statistically significant. For greater certainty, Dr. Niels's econometric analysis of the prices to non-switchers therefore does not constitute clear and reliable evidence supporting a conclusion that, "but for" VAA's Exclusionary Conduct, the prices of Galley Handling services at YVR would likely have been or would likely be lower, let alone "materially" lower.

- Jazz's gains from switching

[714] The Commissioner also relies on another economic analysis conducted by Dr. Niels, with respect to Jazz's gains from switching subsequent to its 2014 RFP ("**Jazz Analysis**"). This analysis **[CONFIDENTIAL]** Jazz's own estimated gains from switching done by Ms. Bishop, which is discussed later in this section.

[715] Dr. Niels used in-flight caterer data to determine Jazz's savings from switching in-flight caterers in 2015 (from Gate Gourmet to Strategic Aviation and Newrest at eight different airports other than YVR). Dr. Niels' analysis identified specific cost benefits enjoyed by Jazz when entry was not excluded. Dr. Niels found that Jazz saved approximately **[CONFIDENTIAL]** the year following the switch, **[CONFIDENTIAL]** resulted from savings in Galley Handling. Dr. Niels' conclusion was that the savings earned by Jazz resulted from the competition that was introduced by the new entrants.

[716] The Commissioner maintains that the lower prices Jazz paid after switching reflect a change in the competitive position of entrant in-flight caterers and the benefits of competition. The Commissioner submits that **[CONFIDENTIAL]** represent substantial savings with respect to the market for in-flight catering in 2015 at those airports.

[717] VAA responded that the Jazz Analysis is limited to Gate Gourmet, and therefore completely ignores CLS.

[718] Dr. Reitman added that Dr. Niels overstated the savings realized by Jazz. Dr. Reitman submitted that Dr. Niels ignored the savings that Jazz would have realized had it renewed its contract with Gate Gourmet. According to Dr. Reitman, Gate Gourmet initially offered Jazz **[CONFIDENTIAL]** on its new contract, which represented a saving of **[CONFIDENTIAL]**, and **[CONFIDENTIAL]**. Therefore, had Jazz stayed with Gate Gourmet, it would have **[CONFIDENTIAL]**. Dr. Niels responded that **[CONFIDENTIAL]**.

[719] Dr. Reitman also maintained that in any event, the savings realized at other airports do not apply to YVR as prices at YVR may not have been **[CONFIDENTIAL]** as they were at other airports (Reitman Report, at paras 188-190). Stated differently, the other airports where the savings were achieved may not be entirely comparable to YVR. Dr. Reitman testified that the **[CONFIDENTIAL]**. By contrast, he noted that the evidence from Jazz **[CONFIDENTIAL]**. He therefore concluded that the savings in those **[CONFIDENTIAL]** do not reflect the market conditions at YVR.

[720] Furthermore, VAA submitted that the Jazz Analysis is not confined to Galley Handling prices, and so does not control for the possibility that any savings in Galley Handling costs were

partially or entirely offset through higher costs for catering. Therefore, VAA says that these results are not reliable as evidence of lower overall costs from switching. The Tribunal observes that Dr. Niels also performed a similar analysis for Galley Handling prices alone, and cautioned that the "galley handling only result should be interpreted with care" (Niels Report, at para 4.55).

[721] VAA further stated that the Jazz Analysis employed the incorrect "but for" scenario and is therefore not indicative of the actual savings relative to choosing Gate Gourmet. It measured the difference in costs incurred by Jazz at eight stations by comparing what Gate Gourmet had charged Jazz in 2014 to what Jazz paid to Strategic Aviation or Newrest in 2015. However, the contract renewal terms offered by Gate Gourmet for 2015 **[CONFIDENTIAL]**. The relevant "but for" would have compared what Jazz would have paid to Gate Gourmet the next year, if it had not switched, to what Jazz instead paid to the other caterers.

[722] VAA added that the evidence showed that **[CONFIDENTIAL]**.

[723] Further to its assessment of the evidence, the Tribunal agrees with the Commissioner and accepts Dr. Niels' evidence on the **[CONFIDENTIAL]** savings identified in this Jazz Analysis. The fact that Jazz **[CONFIDENTIAL]**. Furthermore, while it is true that the savings are not all confined to Galley Handling, Dr. Niels acknowledged that **[CONFIDENTIAL]** related to Galley Handling. In addition, regarding his statement that **[CONFIDENTIAL]**.

[724] For all the above reasons, the Tribunal concludes that Dr. Niels' Jazz Analysis on the savings obtained by Jazz at airports other than YVR constitutes reliable evidence supporting a conclusion that, "but for" the Exclusionary Conduct, the prices of Jazz's Galley Handling services would likely have been or would likely be somewhat lower. However, that alone is not sufficient to discharge the Commissioner's burden under paragraph 79(1)(*c*), particularly considering that **[CONFIDENTIAL]**.

- **[CONFIDENTIAL]**

[725] A third piece of economic evidence prepared by Dr. Niels and relied upon by the Commissioner at the hearing is evidence relating to the renegotiation of a contract between **[CONFIDENTIAL]** in 2014.

[726] **[CONFIDENTIAL]**.

[727] In his Reply Report, Dr. Niels analyzed **[CONFIDENTIAL]**.

[728] Dr. Reitman provided two critiques of Dr. Niels' analysis: (i) **[CONFIDENTIAL]**; and (ii) with no change in the number of competitors at YVR, the price increase could not have resulted from an increase in market power.

[729] The Tribunal accepts the Commissioner's submission that even though **[CONFIDENTIAL]**.

[730] However, the Tribunal remains unpersuaded that **[CONFIDENTIAL]** resulted from the exercise of market power that **[CONFIDENTIAL]** would not likely have been able to exercise,

"but for" VAA's Exclusionary Conduct. **[CONFIDENTIAL]** was competing against **[CONFIDENTIAL]** both before and after the change, and the Commissioner has not demonstrated that the presence of Newrest, Strategic Aviation and/or Optimum likely would have prevented **[CONFIDENTIAL]** from being able to impose the price increase in question. Moreover, insofar as **[CONFIDENTIAL]** is concerned, the Tribunal reiterates that Dr. Niels' claim that **[CONFIDENTIAL]** was shown to be unsupported by the available evidence, including the **[CONFIDENTIAL]** at YVR. It was also contradicted by the **[CONFIDENTIAL]** at YVR.

[731] The Tribunal therefore concludes that the Commissioner has not demonstrated with clear and convincing evidence that, "but for" VAA's Exclusionary Conduct, **[CONFIDENTIAL]** for Galley Handling services at YVR likely would have been or would likely be lower, let alone "materially" lower.

- Jazz

[732] In support of its argument regarding the anti-competitive price effects of VAA's conduct, the Commissioner also relied on evidence provided directly by certain airlines. One of these airlines was Jazz, which provided evidence in relation to the RFP it launched in 2014. In that 2014 RFP, **[CONFIDENTIAL]**.

[733] Ms. Bishop from Jazz testified that further to the RFP, Jazz switched from Gate Gourmet to Newrest at YYZ, YUL and YYC, and from Gate Gourmet to Strategic Aviation at five other airports. In her witness statement and in her examination in chief, Ms. Bishop provided evidence regarding the increased expenses that Jazz allegedly incurred as a result of being constrained to contract with Gate Gourmet, as opposed to **[CONFIDENTIAL]**, at YVR. She also provided evidence regarding savings allegedly realized by Jazz as a result of contracting with Newrest and Sky Café at the eight other airports across the country. She testified that the switching at those eight airports generated savings of $2.9 million (or 16%) for Jazz, in 2015 alone. As it was unable to switch at YVR, Jazz had to accept a bid from Gate Gourmet that was approximately **[CONFIDENTIAL]** greater than what Jazz would have paid at that airport had its preferred provider, **[CONFIDENTIAL]**, been allowed airside access at YVR. Accounting for material changes to Jazz's fleet since 2015, Jazz estimated that it was forced to pay approximately **[CONFIDENTIAL]** over a period of 2 years and three months, or **[CONFIDENTIAL]**, for in-flight catering at YVR than it would have had to pay had it been able to use its preferred provider.

[734] All of the evidence given by Ms. Bishop in that regard was based on Exhibits 10 and 13 to her witness statement.

[735] Ms. Bishop further testified that, when it became aware that Jazz intended to switch to other in-flight caterers at other airports in Canada, Gate Gourmet submitted a bid for YVR that ultimately reflected an **[CONFIDENTIAL]** increase over its 2014 prices to Jazz at YVR. Despite this increase and **[CONFIDENTIAL]**, Ms. Bishop stated that Jazz had no choice but to award the **[CONFIDENTIAL]** contract to Gate Gourmet.

[736] However, on cross-examination, Ms. Bishop testified that she had no role in performing the calculations that underlay the figures set out in Exhibits 10 and 13. Nor did she have any detailed understanding as to how the figures were calculated. Ms. Bishop was unable to reconcile inconsistencies between the figures in Exhibit 10 and those appearing in an email sent by her colleague, Mr. Umlah. Similarly, Ms. Bishop was unable to reconcile inconsistencies between the figures in Exhibit 10 and those derived following an attempt to recreate the figures in Exhibit 10, using the explanation provided by Jazz's counsel and adopted by Ms. Bishop. Ms. Bishop was invited by counsel for VAA to reconcile several other inconsistencies and, on each occasion, she stated that she could not do so. The Tribunal observes that there were significant discrepancies in the figures resulting from those calculations, compared to what was reported in Exhibit 10. Ms. Bishop was similarly unable to offer complete information as to how the figures in Exhibit 13 were calculated.

[737] Further to the cross-examination of Ms. Bishop, and having listened to how Ms. Bishop gave her evidence and responded to cross-examination at the hearing, and having observed her demeanour, the Tribunal is not satisfied that either the numbers used in her statement or her testimony regarding those numbers can be considered as reliable. While Ms. Bishop could explain how some arithmetic calculations were made, she could not clarify the apparent discrepancies with other documentation that emanated from Jazz. The Tribunal thus concludes that the evidence in Ms. Bishop's witness statement with respect to Exhibits 10 and 13 and the alleged missed savings or increased expenses at YVR does not constitute reliable, credible and probative evidence, and can only be given little weight. The figures she put forward cannot be verified, and are contradicted by the evidence.

[738] For all of the foregoing reasons, the evidence regarding Jazz's 2014 RFP does not assist the Commissioner to demonstrate anti-competitive price effects linked to VAA's Exclusionary Conduct.

- <u>Air Transat</u>

[739] The Commissioner referred to similar evidence from Air Transat, in relation to a 2015 RFP for in-flight catering at a total of 11 airports serviced by Air Transat. As part of the RFP, Air Transat received proposals from **[CONFIDENTIAL]**.

[740] Similarly to Ms. Bishop, Air Transat's witness, Ms. Stewart, testified as to the alleged increased expenses that Air Transat expected to incur at YVR as a result of contracting with Gate Gourmet, as opposed to Optimum. She also testified regarding the alleged savings by Air Transat as a result of contracting with Optimum, as opposed to Gate Gourmet, at other airports across the country.

[741] Ms. Stewart stated that the actual prices of Optimum represented cost savings of approximately **[CONFIDENTIAL]**, or **[CONFIDENTIAL]**, over **[CONFIDENTIAL]** years for stations across the country, compared to the actual costs being paid by Air Transat to **[CONFIDENTIAL]**. Ms. Stewart further stated that at YVR, the fact that it contracted with Gate Gourmet at only that airport caused Air Transat to pay approximately **[CONFIDENTIAL]**

% more at YVR than it expected to pay Optimum, its preferred in-flight caterer for service at YVR.

[742] Furthermore, Ms. Stewart indicated that **[CONFIDENTIAL]**. Nevertheless, **[CONFIDENTIAL]** were not quantified by Ms. Stewart in her witness statement.

[743] With respect to the alleged increased expenses at YVR, Ms. Stewart affirmed in her witness statement that "Air Transat determined that Optimum's bid for YVR was superior to that of Gate Gourmet from both a price and service perspective" (Stewart Statement, at para 33). However, on cross-examination, Ms. Stewart agreed that **[CONFIDENTIAL]**.

[744] On cross-examination, Ms. Stewart also acknowledged an important error in her witness statement, relating to her affirmation that as a result of contracting with Gate Gourmet at YVR, Air Transat paid "approximately **[CONFIDENTIAL]** than what it would have paid to Optimum for service at YVR" (Stewart Statement, at para 35). Ms. Stewart clarified that Air Transat paid approximately **[CONFIDENTIAL]**, not **[CONFIDENTIAL]** than what it would have paid to Optimum.

[745] The Tribunal agrees with VAA that, even as corrected, Ms. Stewart's statement is not particularly persuasive evidence of likely increased prices relating to Galley Handling at YVR. First, Ms. Stewart's claim of a **[CONFIDENTIAL]**% increase in costs paid to Gate Gourmet encompasses both food and Galley Handling together. Second, in her testimony, Ms. Stewart acknowledged that she was not able to identify whether the cost savings offered by Optimum were coming from the Galley Handling services or from the Catering services. Third, even if it is assumed that **[CONFIDENTIAL]**'s bid for Galley Handling services **[CONFIDENTIAL]**, that price **[CONFIDENTIAL]** for Galley Handling services **[CONFIDENTIAL]**. Finally, comparing the prices **[CONFIDENTIAL]** would have charged at YVR **[CONFIDENTIAL]** with the prices it charged **[CONFIDENTIAL]** does not provide persuasive evidence of any market power **[CONFIDENTIAL]** at YVR. In both cases, **[CONFIDENTIAL]**.

[746] There were similar problems with respect to Ms. Stewart's evidence relating to Air Transat's alleged savings as a result of contracting with Optimum, as opposed to Gate Gourmet, at airports other than YVR. Ms. Stewart admitted on cross-examination that, when only the prices for Galley Handling services are considered, **[CONFIDENTIAL]**. Air Transat's costing analysis further revealed that **[CONFIDENTIAL]**.

[747] The Tribunal pauses to observe that even Dr. Niels, the Commissioner's expert, acknowledged that **[CONFIDENTIAL]**, it was not possible to accurately determine the amounts of any gains resulting from that airline's switch from Gate Gourmet to Optimum.

[748] In summary, for the reasons set forth above, and having heard Ms. Stewart during her testimony and having observed her demeanour, the Tribunal does not consider that her evidence on Air Transat's alleged increased expenses and expected savings constitutes clear, compelling and reliable evidence in this regard. The Tribunal concludes that this evidence does not merit much weight in terms of the alleged anti-competitive price effects of VAA's Exclusionary Conduct, compared to the "but for" world.

- Testimony from Air Canada and WestJet

[749] The Commissioner also referred to the testimonies of witnesses from Air Canada (Mr. Yiu) and WestJet (Mr. Soni), regarding the price effects of VAA's Exclusionary Conduct. The Commissioner submits that this evidence demonstrates that, "but for" that conduct, those airlines would have likely had, and in the future would have, access to more competitively priced in-flight catering options at YVR.

[750] However, the Tribunal notes that the evidence relied on by the Commissioner consists of general and generic statements contained in the witness statements about the lack of competition and the benefits of increased competition in Galley Handling services, with no specific concerns or examples given by these two major airlines, which accounted for nearly 70% of all flights at YVR in 2016 and 2017. In the same vein, and as further discussed in the next section below, the Air Canada **[CONFIDENTIAL]**, expressing concerns about the refusals to grant licences to Newrest and Strategic Aviation, do not provide any specific examples or concerns with respect to Galley Handling services at YVR, despite the fact that Air Canada is, by far, the major airline operating at YVR, and **[CONFIDENTIAL]** across Canada and **[CONFIDENTIAL]** at YVR.

[751] The Tribunal considers that this generic evidence from Air Canada and WestJet does not provide clear, convincing and non-speculative evidence, with a sufficient degree of particularity, with respect to adverse price effects of VAA's Exclusionary Conduct.

[752] The Tribunal appreciates that airlines would prefer more, rather than less, in-flight catering options. But, to constitute evidence that is sufficiently clear and convincing to meet the standard of balance of probabilities, and to support a finding of a likely prevention or lessening of competition in the Galley Handling Market attributable to VAA's Exclusionary Conduct, the evidence from these two major airlines would have needed to be more precise and particularized.

- Airlines' letters

[753] During the hearing, the Commissioner put much emphasis on letters from eight airlines that expressed their support for more competition in Galley Handling services at YVR. These consist of four letters sent in April 2014 by each of Air Canada, Jazz, Air France / KLM and British Airways, and five letters sent in November and December 2016 by **[CONFIDENTIAL]**, Korean Air, Delta Airlines and Air France.

[754] For the following reasons, the Tribunal does not find these letters from the airlines to be particularly convincing and considers that it can only give them limited weight in terms of evidence of likely anti-competitive effects in the Galley Handling Market due to VAA's Exclusionary Conduct.

[755] With respect to the first four letters written in April 2014, the Tribunal notes that they were sent by the airlines at the request of Newrest, in the context of Newrest's application to be granted a licence for in-flight catering services at YVR. Only two of those letters (i.e., those from Air Canada and Jazz) were addressed to VAA. (The other two were addressed to Newrest.) The letters were short, expressed the airlines' support for Newrest's (and Strategic Aviation's)

requests for catering licences at YVR, and stated that competition was not optimized at YVR, where there were only two major in-flight caterers. Apart from their general support for new entry, none of the letters mentioned particular concerns with respect to the Galley Handling services at YVR.

[756] In their witness statements and in their testimonies before the Tribunal, Mr. Richmond and Mr. Gugliotta underlined that the letters were limited to a few sentences expressing each airline's general support for Newrest's request. They noted that none contained particular information or complaints specific to in-flight catering at YVR that VAA had not considered. Likewise, the letters did not provide any reasons to reconsider VAA's decision.

[757] During the month of May 2014, Mr. Richmond wrote response letters to the President and CEO of Air Canada and to Jazz (the only two airlines which had written directly to VAA), providing VAA's explanation for its decision not to authorize a third in-flight caterer to access the airside at YVR. With one exception, there is no evidence that, following Mr. Richmond's response and explanation for VAA's decision not to grant a licence to Newrest and Strategic Aviation, Air Canada or Jazz replied to VAA regarding the situation of in-flight catering at YVR. The Tribunal notes that, in her witness statement prepared for this Application, Ms. Bishop stated that Jazz disagreed with VAA's assessment of the in-flight catering marketplace at YVR, as expressed by Mr. Richmond at the time. However, the evidence from 2014-2015 does not show that those two airlines voiced particular concerns to VAA further to the May 2014 response. The exception is a telephone conversation with Jazz's CEO mentioned by Mr. Richmond in his witness statement, about which Mr. Richmond had no clear recollection and which did not change VAA's views.

[758] There is also no evidence on the record of specific concerns or complaints expressed to VAA by Air France / KLM or British Airways (i.e., the two airlines that wrote the other 2014 letters) regarding the Galley Handling services at YVR.

[759] As to the five letters from late November and early December 2016, the Tribunal observes that they were sent in the context of the Commissioner's Application, shortly after the Commissioner had filed the Application in late September 2016. The Tribunal further notes that the letters are all fairly succinct, they again contain only general statements about the benefits of competitive markets, and they do not refer to any particular issues or problems regarding in-flight catering services at YVR. In addition, they are very similarly worded (with some sentences being virtually identical), even though they come from airlines spread all across the globe (i.e., **[CONFIDENTIAL]**, Air France, Delta Airlines and Korean Airlines).

[760] Each letter starts with a paragraph stating that the letter is sent in the context of the Application made by the Commissioner. It then indicates that competition is always "most welcome" at airports where the airline operates and that competition is insufficient or not optimized at YVR, as there are only two in-flight catering firms. Finally, it affirms the airline's support for Newrest's request for a catering licence at YVR. Turning more specifically to **[CONFIDENTIAL]** save for an added introductory reference to the Commissioner's Application.

[761] These general letters (and the evidence provided by witnesses who appeared on behalf of these airlines, namely, Air Canada and Jazz) have to be balanced against the evidence from Mr. Richmond and Mr. Gugliotta which demonstrates that VAA had regular and continuous interactions with all airlines operating at YVR and that, during these interactions in the relevant time frame, airline executives with whom Mr. Richmond and Mr. Gugliotta dealt did not raise concerns with VAA relating to in-flight catering services or competition at YVR (except for the telephone conversation with Jazz mentioned above). More specifically, there is no evidence to indicate that, **[CONFIDENTIAL]** voiced any concerns with VAA about the price or quality of Galley Handling services at YVR.

[762] Mr. Richmond further noted that in his experience, when airlines have a serious problem about airport operations, they do not hesitate to raise it immediately with airport management. Mr. Richmond also testified that in April 2014, no airlines had raised operational or financial concerns about catering, and that "no airline either before or since has called [him] about catering at the airport" (Transcript, Conf. B, October 30, 2018, at p 818). Mr. Gugliotta added that there is a formal mechanism at YVR, the Airline Consultative Committee, where VAA and the airlines meet on a frequent basis. However, no airlines have raised any issues there, or in the other regular interactions between VAA and the airlines, with respect to the service quality or the pricing of in-flight catering services.

[763] Mr. Gugliotta also referred to the regular meetings that VAA has with the senior management of Air Canada and WestJet, the two biggest airlines operating at YVR. He stated that "this flight kitchen issue in terms of either service or pricing was never raised" by either of these airlines during those regular meetings (Transcript, Conf. B, November 1, 2018, at p 1036). This specific evidence provided by VAA was not contradicted by the witnesses who appeared on behalf of Air Canada and WestJet, namely, Mr. Yiu and Mr. Soni, respectively.

[764] The Tribunal found the testimony of Mr. Richmond and Mr. Gugliotta on this point to be credible and reliable. The Tribunal attributes more weight to their specific evidence regarding their interactions with airline customers than to the general statements made by the eight airlines in the 2014 and 2016 letters sent at the request of Newrest or in the context of these proceedings, which simply expressed a general preference for more competition in catering services at YVR.

[765] To support a finding of likely adverse price or non-price effects, relative to the required "but for" scenario, the Commissioner must adduce sufficient clear, convincing and cogent evidence to satisfy the balance of probabilities test. Letters and documents from customers affected by the impugned conduct can of course be highly relevant and probative in that context. However, where sophisticated customers are involved, it is not unreasonable to expect the letters in question to provide a minimum level of detail regarding the actual or anticipated effects of the impugned conduct on their respective business or on the market in general. The Tribunal finds that the particular letters discussed above do not materially assist in meeting that test. When the Commissioner relies on letters from sophisticated industry participants such as the airlines in this case, the Tribunal needs more than boiler-plate statements supporting increased competition.

[766] In the circumstances, the Tribunal is of the view that the letters produced by the Commissioner from the airlines do not amount to clear and convincing evidence supporting a

conclusion that, “but for” VAA’s Exclusionary Conduct, the prices of Galley Handling services at YVR would likely have been or would likely be lower.

[767] The Tribunal pauses to observe that VAA argued that the countervailing power of airlines has to be taken into account as a constraining factor on any exercise of market power by the in-flight catering firms. However, in the absence of specific evidence to that effect, the Tribunal is not prepared to give much weight to this argument.

- VAA’s Pricing Analyses

[768] The Tribunal makes one additional comment regarding the pricing analyses submitted by VAA. In response to Dr. Niels’ switching analysis, Dr. Reitman conducted regression analyses to compare Galley Handling prices at YVR with prices for those services at other Canadian airports.

[769] Dr. Reitman tendered two econometric models of his own (using data from Gate Gourmet prepared by Dr. Niels). In them, he compared the prices paid for all in-flight catering products by all airlines at YVR with the corresponding prices paid at other Canadian airports. He also compared prices across airports for all in-flight catering and Galley Handling products, as well as for just Galley Handling, for all airline customers from 2013-2017. In addition, he estimated the effect of entry on the difference between the prices charged **[CONFIDENTIAL]** at airports where entry occurred and the prices at airports where no entry occurred.

[770] In his analyses, Dr. Reitman found that the prices charged to airlines at YVR **[CONFIDENTIAL]**, than at the other airports. In other words, he found **[CONFIDENTIAL]** at YVR relative to prices at other airports. Dr. Reitman’s conclusion was robust to numerous sensitivity tests including confining the sample to Galley Handling products and smaller airline customers. He reached the same conclusion when he confined his analysis to comparing the period before there was any entry at the airports concerned to the period after all entry had taken place. With respect to all in-flight catering and Galley Handling products, he concluded that “[t]he regression results **[CONFIDENTIAL]** coefficients on the variables for other airports” (Reitman Report, at para 163). With respect to just Galley Handling, he observed that **[CONFIDENTIAL]** (Reitman Report, at para 171). Dr. Reitman also ran different variations of the model to test whether there were price differences between YVR and other airports for in-flight catering products and services in the period before those other airports experienced additional entry by flight caterers **[CONFIDENTIAL]**, as well as in the period after the last entry of **[CONFIDENTIAL]**. Dr. Reitman concluded that **[CONFIDENTIAL]**.

[771] In response to this evidence, the Commissioner submitted that Dr. Reitman’s opinion reflects a fundamental misunderstanding of the relevant economic assessment to be made.

[772] Dr. Niels argued that Dr. Reitman did not properly control for inter-airport differences in wages, prices of relevant inputs and taxes. For example, **[CONFIDENTIAL]** used by Dr. Reitman does not reflect inter-city differences in prices. As a result, the effect of VAA’s entry restrictions on **[CONFIDENTIAL]** at YVR relative to other airports may be obscured by other influences for which he has not controlled. To control for that, Dr. Niels compared

[CONFIDENTIAL] EBITDA margins across airports instead of its prices across airports. Dr. Niels found that these margins **[CONFIDENTIAL]** at YVR. Dr. Reitman agreed that margins were a better measuring tool than prices. However, he criticized Dr. Niels for using EBITDA margins instead of variable cost margins to assess competition. When variable cost margins are used, Dr. Reitman found that the differences in variable cost margins being earned **[CONFIDENTIAL]** across Canadian airports **[CONFIDENTIAL]**.

[773] More fundamentally, the Commissioner submitted that Dr. Reitman's methodology does not address the anti-competitive effects of VAA's Exclusionary Conduct, because the appropriate "but for" question is not to ask whether prices or margins at YVR are low relative to other airports, but whether they would likely have been lower absent VAA's conduct.

[774] The Tribunal agrees with the Commissioner on this point and finds that Dr. Reitman's pricing analyses are not of much assistance with respect to the assessment of the actual and likely effects of VAA's Exclusionary Conduct that is contemplated by paragraph 79(1)(*c*). Dr. Reitman did not assess price changes in his analysis. He looked at price levels overall, as well as during the before and after periods, and concluded that prices at YVR **[CONFIDENTIAL]** than at other airports, either before or after entry had occurred at them. However, his analysis did not properly hold constant other sources of differences in price levels across airports. Nor does it test to see whether the difference in prices between YVR and the other airports changed between the pre- and post-entry periods. Accordingly, this aspect of his analysis failed to persuasively address the effect of entry on prices. As a result, this evidence merits little, if any, weight.

- <u>Conclusion on price effects</u>

[775] In light of the foregoing, the Tribunal is left with unpersuasive and insufficient evidence regarding the alleged price effects of VAA's Exclusionary Conduct in the Galley Handling Market. The Tribunal therefore concludes that the Commissioner has not demonstrated that VAA's Exclusionary Conduct has had, is having or is likely to have the effect of adversely impacting the prices charged for Galley Handling services in the Relevant Market.

(iv) Innovation and dynamic competition

[776] Turning to the non-price effects of VAA's Exclusionary Conduct, the Commissioner submits that VAA's conduct has stifled innovation or shielded the airlines from innovative forms of competition, by excluding new in-flight catering business models from the Relevant Market and by preventing in-flight caterers from offering innovative hybrid or mixed-model services to the airlines. The Commissioner argues that market participants have confirmed that innovation in in-flight catering is an important dimension of competition, which has created (and is creating) substantial price and non-price benefits to customers through new business models and processes. The Commissioner states that, "but for" VAA's Exclusionary Conduct, airlines would have the option to choose to procure Galley Handling at YVR from firms other than the full-service incumbent in-flight caterers and that as a result, innovation and dynamic competition would be substantially greater at YVR.

[777] Relying on an article from the economist Carl Shapiro (Carl Shapiro, "Competition and innovation: Did Arrow Hit the Bull's Eye?" in Josh Lerner and Scott Stern, eds, *The Rate and Direction of Inventive Activity Revisited*, (Chicago: University of Chicago Press, 2012) at pp 376-377), the Commissioner emphasizes that innovation encompasses a wide range of improvements and efficiencies, not just the development of novel processes and products. He claims that there is overwhelming evidence of improvements in efficiency and business models for existing products and services, and that these are just as important for dynamic competition and innovation as the products and service offerings themselves.

[778] The Commissioner relies on four sources of evidence on this issue, namely, the testimonies of in-flight catering firms Strategic Aviation, Optimum and Newrest, as well as the evidence provided by the representative of Air Transat, Ms. Stewart.

[779] According to the Commissioner, Strategic Aviation has introduced a differentiated and cost-efficient business model, namely, a "one-stop-shop" for both Catering and Galley Handling. Unlike traditional firms, Strategic Aviation provides Galley Handling using its own personnel but partners with specialized third parties to source Catering for those airlines that require it. This model allows airlines to procure the specific mix of Galley Handling and Catering that they require, without being forced to absorb their share of fixed overhead costs for in-flight catering services that they do not want. This new business approach was itself spurred by the emergence of a new airline business model, namely, the low-cost carrier model and its focus on BOB. Mr. Brown from Strategic Aviation testified that there was an opportunity to take advantage of the emerging airline model of providing improved food to passengers. He further stated that these more flexible business models not only allow for airlines to source a particular type of food more easily, they also result in important increases in economic efficiency and lower prices to airlines by, essentially, offering them the possibility to use outside kitchens having excess capacity.

[780] Another example relied on by the Commissioner is Optimum. Optimum does not operate Catering facilities nor does it provide Galley Handling. It subcontracts all these services to independent third-party providers. In essence, it acts as an intermediary to find the best providers for each airline's needs at each airport. Mr. Lineham from Optimum testified that its business model allows airlines to "find the right kitchens that can make food that's appropriate" (Transcript, Public, October 3, 2018, at p 180).

[781] Turning to Newrest, Mr. Stent-Torriani testified that innovation falls into two categories: (i) the "front end customer side" and (ii) the production side. With respect to the "front end customer side," Mr. Stent-Torriani testified that there is "a great deal that can be done with respect to point of sales, i.e., digital, pre order, et cetera" (Transcript, Public, October 4, 2018, at p 239). With respect to the production side, he added that there are also technological improvements that can be pursued in terms of robotics, giving customers a higher level of traceability and quality.

[782] The representative of Air Transat also testified that Air Transat values fresh approaches to doing business spurred by entry and competition. Ms. Stewart testified that **[CONFIDENTIAL]** (Transcript, Conf. B, October 9, 2018, at p 356).

[783] VAA responds that the Galley Handling Market is not a "dynamic market" in the sense of featuring significant technological change or innovation, the two hallmarks of a market in which it states that qualitative effects are of particular relevance. VAA submits that Galley Handling is an activity into which the major inputs are labour, physical facilities such as warehouses, and equipment such as trucks. According to VAA, Strategic Aviation was not proposing to "innovate;" rather, it was proposing to follow a business model of providing only the Galley Handling component of in-flight catering services, while partnering with Optimum or others for the provision of food. During cross-examination, **[CONFIDENTIAL]**.

[784] As it affirmed in *TREB CT*, the Tribunal considers that dynamic competition, including innovation, is the most important dimension of competition (*TREB CT* at para 712). To echo the words of the economist Joseph Schumpeter, competition is, at its core, a dynamic process "wherein firms strive to survive under an evolving set of rules that constantly produce winners and losers" (*TREB CT* at para 618). The Tribunal also does not dispute that innovation can take multiple incarnations and that it encompasses more than the development of new products or novel processes or the introduction of cutting-edge new technology. It can indeed extend to competing firms coming up with different or improved business models.

[785] However, in the present case, the evidence pertaining on innovation falls short of the mark. The Tribunal is not persuaded that the evidence on the record demonstrates that, "but for" the Exclusionary Conduct, there would likely have been, or would likely be, a realistic prospect of material changes in innovation linked to the arrival of new entrants in the Galley Handling Market.

[786] First, apart from one reference made by **[CONFIDENTIAL]**, there is no clear and convincing evidence of qualitative benefits, distinct and separate from a reduction of input costs, that would likely be brought by Strategic Aviation, Optimum or Newrest. The evidence from these three in-flight caterers did not provide persuasive examples of materially more innovative products or approaches to be offered to airlines.

[787] Second, Strategic Aviation's and Optimum's business models of offering Catering and Galley Handling separately are not new. The evidence shows that Gate Gourmet and other full-service in-flight caterers have also evolved in that direction and can and do provide Galley Handling services separately. In other words, the allegedly innovative Galley Handling services that Strategic Aviation is proposing to provide (i.e., to provide only the Galley Handling portion of in-flight catering) are currently being provided by Gate Gourmet at YVR and may well be provided by dnata once it commenced operations.

[788] There is evidence that Gate Gourmet is prepared to offer the Galley Handling subset of its full-line services to airlines that do not wish to take advantage of Gate Gourmet's ability to prepare the food. Notably, since 2017, Gate Gourmet has provided WestJet solely with Galley Handling services at YVR. Similarly, Gate Gourmet provides services to Air Canada that involve loading and unloading pre-packaged frozen food prepared by Air Canada's **[CONFIDENTIAL]** and Optimum. As evidenced by the success of **[CONFIDENTIAL]** and the trend of airlines moving more Catering operations off-airport, these options already exist and the in-flight catering incumbents already offer evolving business models and processes, adaptable to the

needs of airline customers. Incumbent in-flight catering firms are also using their kitchens to supply non-airline customers.

[789] [CONFIDENTIAL].

[790] [CONFIDENTIAL].

[791] The Tribunal recognizes that the business models of Gate Gourmet, CLS and dnata are not identical to those of Strategic Aviation and Optimum, as the latter focus on sourcing from different restaurants with excess capacity. But, as far as Galley Handling services are concerned, the Commissioner has not demonstrated that, "but for" the Exclusionary Conduct, new entrants likely would have brought, or would likely bring, materially new models or particularly significant incremental innovations to the Relevant Market. Put differently, with respect to this non-price dimension of competition, the Tribunal does not find that innovation or the range of services offered in the Galley Handling Market was, is or likely would be significantly lower than it would have been in the absence of VAA's Exclusionary Conduct.

[792] Indeed, Mr. Brown from Strategic Aviation and Ms. Bishop from Jazz confirmed that the Galley Handling services provided by Strategic Aviation were no different from Gate Gourmet or other full-service in-flight catering firms.

[793] The evidence reveals that the only firm that explicitly stated that it would hesitate to provide Galley Handling services on a stand-alone basis to airline customers at YVR was one of the new entrants, namely Newrest. In his testimony, Mr. Stent-Torriani indicated that Newrest might offer catering services without Galley Handling, but that this was not its preference, and that it would "almost certainly" not provide such Galley Handling services separately (Transcript, Public, October 4, 2018, at pp 236-237).

[794] There is also no clear and convincing evidence of lower service quality in the Galley Handling Market at YVR, relative to the "but for" scenario in which VAA did not engage in the Exclusionary Conduct. Apart from one example from the witness from Air Transat in the context of the 2015 RFP (referred to above), no evidence was adduced to demonstrate that there were material service or product quality improvements as a result of airlines switching to the "innovative" catering providers at other airports.

[795] For the above reasons, the Tribunal finds no clear and convincing evidence that VAA's decision not to license Newrest or Strategic Aviation resulted in less innovation or a lower quality of services, than would likely have existed in the absence of the Exclusionary Conduct. Moreover, the evidence demonstrates that dnata intends to provide the full range of in-flight catering services from its flexible, modern kitchen located off-airport, in proximity to YVR in Richmond. Therefore, particularly when one considers dnata's entry as part of the existing factual circumstances, there is no persuasive evidence of reduced choice, service or innovation at YVR as a result of the Exclusionary Conduct. In other words, it has not been established that the levels of such non-price dimensions of competition would not likely have been, and would not likely be ascertainably greater "but for" VAA's Exclusionary Conduct.

[796] The Tribunal underscores that the incumbent in-flight catering firms have developed new types of offerings and other innovations that provide new and valuable offerings to airlines, as

food served on airplanes has moved away from fresh meals and more towards frozen meals and pre-packaged food. This has had an important impact on the Tribunal's assessment of whether innovation would likely be, or would likely have been, materially greater in the absence of VAA's Exclusionary Conduct, and whether the elimination of the Exclusionary Conduct likely would permit innovative in-flight catering firms with new business models to advance the Galley Handling Market substantially further on the innovation ladder. The Tribunal is not persuaded that this is more likely than not to be the case in this Application.

(v) Conclusion

[797] Having regard to all of the foregoing, the Tribunal therefore concludes that, "but for" the Exclusionary Conduct, there may have been some fairly limited and positive price and/or non-price effects on competition in the Galley Handling Market at YVR. In this regard, there likely would have been some new entry into the Galley Handling Market; there likely would have been some additional switching; and Jazz may have paid somewhat lower prices to Gate Gourmet, including at airports other than YVR. However, those effects are far less than what the Commissioner alleged. Moreover, the conclusion stated above does not represent the end of the required analysis.

(b) Magnitude, duration and scope

[798] The Tribunal will now address whether the limited anti-competitive effects identified above, taken together, rise to the level of "substantiality," as required by paragraph 79(1)(*c*) of the Act. The Tribunal finds that this is not the case. In brief, the aggregate impact of the limited anti-competitive effects that have been demonstrated to result from VAA's Exclusionary Conduct does not constitute an actual or likely <u>substantial</u> prevention or lessening of competition in the Relevant Market. In other words, the Tribunal is not satisfied, on a balance of probabilities, that "but for" VAA's Exclusionary Conduct, the prices for Galley Handling services would likely have been, or would likely be, materially lower in the Galley Handling Market, or that there would likely have been, or would likely be, materially greater non-price competition in that market, for example in respect of service levels or innovation.

[799] The Tribunal is not persuaded that the evidence regarding the likelihood of additional entry and regarding the likelihood of additional switching in the Relevant Market is sufficient to enable the Commissioner to discharge his burden under paragraph 79(1)(*c*). Without a link between, on the one hand, such additional entry and switching and, on the other hand, some material impact on the price or non-price dimensions of competition in a material part of the Galley Handling Market (*Tervita FCA* at para 108), the Commissioner's evidence falls short of the mark. In this regard, the Tribunal agrees with VAA that the Commissioner's evidence does not provide clear and compelling evidence that there would likely have been, or would likely be, materially greater price or non-price competition at YVR "but for" VAA's Exclusionary Conduct.

[800] In his closing submissions, the Commissioner made a general statement that the anti-competitive effects attributable to VAA's Exclusionary Conduct rise to the level of substantiality "because VAA has, and continues to, foreclose rivalry in the market for the supply of Galley

Handling at YVR" and because "Gate Gourmet, CLS and, soon, dnata service airlines at YVR without threat of entry" (Commissioner's Closing Argument, at para 112). The Commissioner further referred to the Tribunal's statement in *TREB CT* to the effect that "[i]n the absence of rivalry, competition does not exist and cannot constrain the exercise of market power, unless the threat of potential competition is particularly strong" (*TREB CT* at para 462).

[801] However, the anti-competitive effects attributable to VAA's Exclusionary Conduct cannot necessarily be said to rise to the level of substantiality simply because VAA has foreclosed entry in the market for the supply of Galley Handling services at YVR.

[802] As the SCC stated in *Tervita*, it is not enough that a potential competitor must be likely to enter the market. "[T]his entry must be likely to have a substantial effect on the market. […] [A]ssessing substantiality requires assessing a variety of dimensions of competition including price and output. It also involves assessing the degree and duration of any effect it would have on the market" (*Tervita* at para 78). Accordingly, the Commissioner must demonstrate that entry likely would have decreased the market power of the incumbent firms, or that it would be likely to have this effect in the future. In the absence of such evidence, the impugned conduct cannot be said to prevent competition substantially (*Tervita* at para 64). In this case, the Commissioner has not demonstrated the extent to which either of the two incumbents had market power, and how VAA's Exclusionary Conduct has permitted those market participants to maintain their market power, or is likely to have this effect in the future.

[803] There has to be evidence that the prevention of entry or of increased switching translates into likely and material price or non-price effects in the Relevant Market. This evidence has not been provided in this case. This is a fatal shortcoming in the Commissioner's case.

[804] With respect to Jazz's gains from switching, the fact that there is evidence of savings in the order of **[CONFIDENTIAL]** is of limited use to the Tribunal's analysis under paragraph 79(1)(*c*), because it relates to one airline's savings at airports other than YVR. Moreover, no evidence was provided by the Commissioner with respect to the size of the Galley Handling markets at those other airports, or of Jazz's total expenditures on Galley Handling services at those airports. Therefore, even though the **[CONFIDENTIAL]** figure estimated by Dr. Niels **[CONFIDENTIAL]**, the Tribunal does not have the necessary evidence to determine the relative significance and magnitude of these savings made by Jazz from its switching of in-flight caterers at other airports, and to determine the materiality of these savings. The measure has to be a relative one, compared to the size of the market as a whole and to Jazz's overall expenditures for Galley Handling services at those airports other than YVR. That evidence has not been provided, and the Tribunal cannot therefore determine the relative materiality of this alleged price effect and how much of it ought to be attributed to the Exclusionary Conduct at YVR.

[805] Even if the Tribunal was to consider that some of the other evidence adduced by the Commissioner regarding the price effects of VAA's conduct could be interpreted as having established an actual or likely prevention or lessening of competition in the Relevant Market, the Tribunal would not conclude, on the evidence before it, that the Galley Handling Market would likely have been, or would likely be, <u>substantially</u> more competitive, "but for" VAA's Exclusionary Conduct. For example, the Commissioner's evidence regarding

[CONFIDENTIAL] and the **[CONFIDENTIAL]**% price decrease for non-switching "smaller" airlines do not significantly assist the Commissioner to demonstrate a prevention or lessening of competition that rises to the level of "substantial," either in terms of magnitude or scope.

[806] With respect to **[CONFIDENTIAL]**, this evidence related to one very small airline at YVR and a **[CONFIDENTIAL]**, for a specific product. The only evidence provided by Dr. Niels of an increase to the Galley Handling prices charged to **[CONFIDENTIAL]** was an increase to the price of "**[CONFIDENTIAL]**", which represented **[CONFIDENTIAL]**. And this airline is a **[CONFIDENTIAL]** operating at YVR.

[807] Similarly, regarding the evidence of price decreases at other airports for smaller airlines, the Tribunal considers the revenue-weighted **[CONFIDENTIAL]** found by Dr. Niels to be fairly modest and hardly material, in the context of this particular Relevant Market. Even Dr. Niels qualified this as "evidence of **[CONFIDENTIAL]** of entry for the smaller airlines" (Exhibits A-085, CA-086 and CA-087, Reply Report of Dr. Gunnar Niels, at para 5.89). Furthermore, it relates solely to "smaller airlines" which, in the aggregate, represent approximately **[CONFIDENTIAL]** of the traffic (in terms of flights) at YVR. Even in his "blended" analysis which included entries into monopoly situations, Dr. Niels did not find significant price effects for an "all airlines" sample comprising the **[CONFIDENTIAL]** airline customers of **[CONFIDENTIAL]**. Moreover, no evidence was provided on the proportion that these "smaller airlines" account for in the Galley Handling Market, as opposed to the number of flights at YVR. The above-mentioned "**[CONFIDENTIAL]**" figure does not reflect a share of passengers, nor does it necessarily reflect a share of Galley Handling expenditures at YVR. As mentioned by Dr. Reitman, the appropriate metric for the assessment of an alleged substantial prevention or lessening of competition is the fraction of the Galley Handling expenditures at YVR represented by those airlines, not the fraction of flights at YVR that they represent. As Dr. Niels himself reported, the **[CONFIDENTIAL]** airlines **[CONFIDENTIAL]** that were excluded from his smaller sample represent a significant proportion of **[CONFIDENTIAL]**.

[808] It bears emphasizing that there is no evidence indicating that the percentage of flights accounted for by an airline is a good proxy of the percentage of the Galley Handling services it purchases. Indeed, the evidence instead suggests that airlines having a larger proportion of international flights likely account for a larger share of the Galley Handling services than their actual proportion of flights. This further undermines the significance of Dr. Niels' evidence with respect to "smaller airlines".

[809] The Tribunal pauses to observe that one problem with the Commissioner's argument regarding the alleged substantial prevention or lessening in the Galley Handling Market is that the Commissioner has not provided clear, convincing and reliable evidence regarding the relative significance of the various airlines in the Galley Handling Market.

[810] In addition, as stated above, the Commissioner's evidence regarding the price effects of VAA's Exclusionary Conduct is limited to **[CONFIDENTIAL]** of the total revenues generated by the in-flight catering firms operating at YVR, from 2013 to 2017. No evidence specifically addressed **[CONFIDENTIAL]** of in-flight catering revenues.

[811] In light of all of the foregoing, the Tribunal is not satisfied that the above-mentioned anti-competitive price or non-price effects which could be attributable to VAA's Exclusionary Conduct are, individually or in the aggregate, "substantial" as required by paragraph 79(1)(*c*) of the Act. The evidence does not allow the Tribunal to conclude that VAA's Exclusionary Conduct has adversely affected or is adversely affecting, price or non-price competition in the Relevant Market, to a degree that is material, or that it is likely to do so in the future.

(4) Conclusion

[812] For the reasons set forth above, the Tribunal concludes that the Commissioner has not demonstrated, on a balance of probabilities, that the requirements of paragraph 79(1)(*c*) are met. In brief, the Tribunal is not satisfied that there is clear and convincing evidence demonstrating, on a balance of probabilities, that "but for" VAA's Exclusionary Conduct, prices for Galley Handling services would likely be materially lower in the Relevant Market, that there would likely be a materially broader range of services in the Relevant Market, or that there would likely be materially more innovation in the Relevant Market.

VIII. CONCLUSION

[813] For all the above reasons, the Commissioner's Application is dismissed. In light of this conclusion, no remedial action will be ordered.

IX. COSTS

[814] At the end of the hearing, the Tribunal encouraged the parties to reach an agreement as to the quantum of costs without knowing the outcome of the case. The Tribunal explained that if no agreement could be reached, the parties could make submissions on costs in due course. The Tribunal reaffirms that it is increasingly favouring this approach. This is because asking the parties to agree on the issue of costs before they know the outcome is more likely to result in a reasonable and expeditious resolution of the question of costs. The Tribunal further reiterates that it will typically favor lump sum awards of costs over formal taxation of bills of costs.

[815] By way of letter dated December 14, 2018, counsel for the Commissioner and for VAA notified the Tribunal that they had reached an agreement with respect to counsel fees as well as a partial agreement with respect to disbursements. According to that agreement, if the Tribunal awarded costs payable by VAA to the Commissioner, VAA would pay $101,000 to the Commissioner for counsel fees, whereas the Commissioner would pay $103,000 to VAA, if costs were payable to VAA. However, the parties were unable to reach an agreement on disbursements, except for travel costs and transcript costs, which they both agreed should be $73,314 and $35,258, respectively. The parties were unable to agree on the balance of the disbursements, and notably on their respective expert fees. They each submitted detailed bills of costs.

[816] As VAA is the successful party in this matter, it is entitled to recover at least some of its costs.

[817] Section 8.1 of the CT Act gives jurisdiction to the Tribunal to award costs of proceedings before it in accordance with the provisions governing costs in the *Federal Courts Rules*, SOR/98-106 ("**FC Rules**"). Accordingly, pursuant to FC Rule 400(1), the Tribunal has "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid." A non-exhaustive list of factors that the Tribunal may consider when exercising its discretion is set out in FC Rule 400(3). It is a fundamental principle that an award of costs represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party (*Apotex Inc v Wellcome Foundation Ltd* (1998), 159 FTR 233 (FCTD), 84 CPR (3d) 303, aff'd (2001), 199 FTR 320 (FCA)).

[818] In *Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc*, 2002 FCA 417 ("***Maple Leaf Meats***"), the FCA described the approximation of costs as a matter of judgment rather than an accounting exercise. An award of costs is not an exercise in exact science. It is only "an estimate of the amount the Court considers appropriate" (*Maple Leaf Meats* at para 8). The costs ordered should not be excessive or punitive, but rather reflect a fair relationship to the actual costs of litigation. The question for the Tribunal is therefore to determine what, in the circumstances, are necessary and reasonable legal costs and disbursements (*Nadeau Ferme Avicole Ltée v Groupe Westco Inc*, 2010 Comp Trib 1 at para 49).

[819] With respect to legal costs, there is agreement between the parties on the amount to be paid to the successful party. However, in this case, the success on the issues in dispute has been divided; the Commissioner has prevailed on the product and geographic market definitions, on paragraph 79(1)(*a*) and on the PCI. A fair amount of time was spent by VAA disputing those issues. In the circumstances, the Tribunal is of the view that the legal costs to be paid to VAA should be reduced, by about a third. This is particularly so given that VAA persisted in spending time on market definition, paragraph 79(1)(*a*) and PCI, notwithstanding the Tribunal's encouragement to move along to the issues in respect of which VAA ultimately proved to be the successful party. The Tribunal thus fixes the Tariff B legal costs to be paid to VAA by the Commissioner at $70,000.

[820] Turning to disbursements, in addition to the travel and transcript costs agreed upon, VAA claims expert fees of $1,834,848 for Dr. Reitman and of $379,228 for Dr. Tretheway, as well as electronic discovery and document management fees of $291,290, for a total exceeding $2.6 million. The Commissioner submits that these disbursement amounts are excessive and should be substantially reduced.

[821] The Tribunal is satisfied that both parties have provided, in their respective bills of costs, detailed information and sufficient support to explain the disbursements incurred and the basis of their various claims. The bills of costs were prepared in accordance with Column III of Tariff B of the FC Rules, and evidence has been provided regarding the billing, payment and justifications of the services provided and expenses incurred. With respect to experts, details regarding the tasks performed by each expert (and their teams), as well as the amount of time spent per task, have been provided. The question is not whether the disbursements at issue were incurred but whether they are reasonable, necessary and justified.

[822] The Tribunal notes that the expert fees claimed by VAA are substantially higher than the fees of the Commissioner's sole expert witness, Dr. Niels, which totalled $1,333,209 for his two

reports. Since Dr. Reitman did not have to construct his own data set to perform his analyses and was essentially responding to Dr. Niels' analysis, the Tribunal agrees with the Commissioner that his total fees should be reduced. Expert-related costs are not automatically recoverable in their entirety, and can be adjusted by the Tribunal when they do not appear reasonable. With respect to the expert fees of Dr. Tretheway, the Tribunal is also of the view that they should be reduced as they include expenses incurred prior to the Application and the Tribunal struck a portion of his report (i.e., question 4) on the ground that it was inadmissible expert evidence.

[823] Turning to the disbursements claimed by VAA for electronic discovery and document management, they essentially relate to the fees charged by a third-party provider. The Tribunal agrees with VAA that it would be unfair to expect a party to comply with the requirements of electronic discovery and document management for an electronic hearing, without allowing for a recovery of the fees incurred for that purpose. The use of an effective document management system is essential to the seamless functioning of electronic hearings before the Tribunal, and it has a fundamental impact at each step of the proceedings (whether it is oral discoveries, motions, preparation of witness statements and expert reports, document production, or the hearing itself). Fees incurred in that respect are disbursements which, in principle, should be recoverable by the successful party.

[824] However, there are nonetheless limits to such disbursements. Only the amounts incurred after the filing of the Application can be properly claimed. In this regard, the e-discovery charges incurred by a party to comply with compulsory production orders under section 11 of the Act as part of the Bureau's prior, underlying investigation should not form part of claimed disbursements, even though many documents produced in that context may end up being directly related to subsequent filings before the Tribunal. In *Commissioner of Competition v Canada Pipe*, 2005 Comp Trib 17 ("***Canada Pipe 2005***"), the Tribunal held that it would be against public policy to order costs against the Commissioner for "the expense of complying with an order mandated by the Act and ratified by a Court of competent jurisdiction" (*Canada Pipe 2005* at para 12). Accordingly, the amount of disbursements claimed by VAA for electronic discovery and document management will need to be reduced to exclude such amounts.

[825] As stated above, the Tribunal favors lump sum awards as it simplifies the assessment process. In fact, there is now "a judicial trend to grant costs on a lump sum basis whenever possible" (*Philip Morris Products SA v Marlboro Canada Ltd*, 2015 FCA 9 at para 4). A lump sum award saves time and trouble for the parties by avoiding precise and unnecessarily complicated calculations. Lump sum awards also align with the objective of promoting the "just, most expeditious and least expensive determination" of proceedings, as provided by FC Rule 3, which echoes the direction found in subsection 9(2) of the CT Act to deal with matters as informally and expeditiously as the circumstances and considerations of fairness permit.

[826] In his submissions on costs, the Commissioner argued that the Tribunal should consider FC Rule 400(3)(h) in making its assessment, and the broad public interest in having proceedings litigated before the Tribunal. Relying on *Commissioner of Competition v Visa Canada Corporation*, 2013 Comp Trib 10 ("***Visa Canada***"), where the Tribunal made no award on costs as there was a broad public interest in bringing the case, the Commissioner submits that there was a similarly broad public interest in bringing the present case as it would clarify the interpretation of section 79 of the Act, its defenses, and its application to entities such as VAA.

The Tribunal disagrees. The Tribunal does not find the "public interest" argument in this case to be as "compelling" as it was in *Visa Canada*, where the matter before it was more novel (*Visa Canada* at paras 405, 407). All cases brought forward by the Commissioner have a public interest dimension and contribute to clarify contentious competition law matters, but that does not mean that the Commissioner can escape costs awards in all cases.

[827] In light of the foregoing, and taking into consideration the conditions of reasonableness and necessity, the Tribunal concludes that $1,850,000 would be an acceptable amount for VAA's disbursements, instead of the total exceeding $2.6 million claimed by VAA. However, as with the legal costs, success on the issues in dispute in this case should be taken into account. The Tribunal is of the view that the disbursements to be paid to VAA should also be reduced by about a third. The Tribunal thus fixes the disbursements to be paid to VAA by the Commissioner at $1,250,000.

[828] The Commissioner will therefore be required to pay to VAA a total lump sum amount of $70,000 in respect of Tariff B legal costs, and of $1,250,000 in respect of disbursements.

X. ORDER

[829] The Application brought by the Commissioner is dismissed.

[830] Within 30 days from the date of this Order, the Commissioner shall pay to VAA an amount of $70,000 in respect of legal costs, and of $1,250,000 in respect of disbursements.

[831] These reasons are confidential. In order to enable the Tribunal to issue a public version of this decision, the Tribunal directs the parties to attempt to reach an agreement regarding the redactions to be made to these reasons in order to protect confidential evidence and information. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on October 31, 2019, setting out their agreement and any areas of disagreement concerning the redaction of the confidential version of the decision. If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from these confidential reasons. Such submissions are to be served and filed by the close of the Registry on October 31, 2019.

DATED at Ottawa, this 17th day of October, 2019.

SIGNED on behalf of the Tribunal by the Panel Members.

(s) Denis Gascon J. (Chairperson)
(s) Paul Crampton C.J.
(s) Dr. Donald McFetridge

Schedule “A” – Relevant provisions of the Act

Abuse of Dominant Position	Abus de position dominante
Definition of *anti-competitive act*	**Définition de *agissement anti-concurrentiel***
78 (1) For the purposes of section 79, ***anti-competitive act***, without restricting the generality of the term, includes any of the following acts:	**78 (1)** Pour l’application de l’article 79, ***agissement anti-concurrentiel*** s’entend notamment des agissements suivants :
(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer’s entry into, or expansion in, a market;	**a)** la compression, par un fournisseur intégré verticalement, de la marge bénéficiaire accessible à un client non intégré qui est en concurrence avec ce fournisseur, dans les cas où cette compression a pour but d’empêcher l’entrée ou la participation accrue du client dans un marché ou encore de faire obstacle à cette entrée ou à cette participation accrue;
(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor’s entry into, or eliminating the competitor from, a market;	**b)** l’acquisition par un fournisseur d’un client qui serait par ailleurs accessible à un concurrent du fournisseur, ou l’acquisition par un client d’un fournisseur qui serait par ailleurs accessible à un concurrent du client, dans le but d’empêcher ce concurrent d’entrer dans un marché, dans le but de faire obstacle à cette entrée ou encore dans le but de l’éliminer d’un marché;
(c) freight equalization on the plant of a competitor for the purpose of impeding or	**c)** la péréquation du fret en utilisant comme base l’établissement d’un

preventing the competitor's entry into, or eliminating the competitor from, a market;

concurrent dans le but d'empêcher son entrée dans un marché ou d'y faire obstacle ou encore de l'éliminer d'un marché;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

d) l'utilisation sélective et temporaire de marques de combat destinées à mettre au pas ou à éliminer un concurrent;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

e) la préemption d'installations ou de ressources rares nécessaires à un concurrent pour l'exploitation d'une entreprise, dans le but de retenir ces installations ou ces ressources hors d'un marché;

(f) buying up of products to prevent the erosion of existing price levels;

f) l'achat de produits dans le but d'empêcher l'érosion des structures de prix existantes;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

g) l'adoption, pour des produits, de normes incompatibles avec les produits fabriqués par une autre personne et destinées à empêcher l'entrée de cette dernière dans un marché ou à l'éliminer d'un marché;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and

h) le fait d'inciter un fournisseur à ne vendre uniquement ou principalement qu'à certains clients, ou à ne pas vendre à un concurrent ou encore le fait d'exiger l'une ou l'autre de ces attitudes de la part de ce fournisseur, afin d'empêcher l'entrée ou la participation accrue d'un concurrent dans un marché;

(i) selling articles at a price

i) le fait de vendre des articles

lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

(j) and (k) [Repealed, 2009, c. 2, s. 427]

[…]

Prohibition where abuse of dominant position

79 (1) Where, on application by the Commissioner, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

Additional or alternative order

à un prix inférieur au coût d'acquisition de ces articles dans le but de discipliner ou d'éliminer un concurrent.

j) et k) [Abrogés, 2009, ch. 2, art. 427]

[…]

Ordonnance d'interdiction dans les cas d'abus de position dominante

79 (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :

a) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;

b) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels;

c) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

Ordonnance supplémentaire ou substitutive

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

(2) Dans les cas où à la suite de la demande visée au paragraphe (1) il conclut qu'une pratique d'agissements anti-concurrentiels a eu ou a pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché et qu'une ordonnance rendue aux termes du paragraphe (1) n'aura vraisemblablement pas pour effet de rétablir la concurrence dans ce marché, le Tribunal peut, en sus ou au lieu de rendre l'ordonnance prévue au paragraphe (1), rendre une ordonnance enjoignant à l'une ou l'autre ou à l'ensemble des personnes visées par la demande d'ordonnance de prendre des mesures raisonnables et nécessaires dans le but d'enrayer les effets de la pratique sur le marché en question et, notamment, de se départir d'éléments d'actif ou d'actions.

Limitation

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

Restriction

(3) Lorsque le Tribunal rend une ordonnance en application du paragraphe (2), il le fait aux conditions qui, à son avis, ne porteront atteinte aux droits de la personne visée par cette ordonnance ou à ceux des autres personnes touchées par cette ordonnance que dans la mesure de ce qui est nécessaire à la réalisation de l'objet de l'ordonnance.

Administrative monetary penalty

Sanction administrative pécuniaire

(3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000.

(3.1) S'il rend une ordonnance en vertu des paragraphes (1) ou (2), le Tribunal peut aussi ordonner à la personne visée de payer, selon les modalités qu'il peut préciser, une sanction administrative pécuniaire maximale de 10 000 000 $ et, pour toute ordonnance subséquente rendue en vertu de l'un de ces paragraphes, de 15 000 000 $.

Aggravating or mitigating factors

Facteurs à prendre en compte

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account any evidence of the following:

(3.2) Pour la détermination du montant de la sanction administrative pécuniaire, il est tenu compte des éléments suivants :

(a) the effect on competition in the relevant market;

a) l'effet sur la concurrence dans le marché pertinent;

(b) the gross revenue from sales affected by the practice;

b) le revenu brut provenant des ventes sur lesquelles la pratique a eu une incidence;

(c) any actual or anticipated profits affected by the practice;

c) les bénéfices réels ou prévus sur lesquels la pratique a eu une incidence;

(d) the financial position of the person against whom the order is made;

d) la situation financière de la personne visée par l'ordonnance;

(e) the history of compliance with this Act by the person against whom the order is made; and

e) le comportement antérieur de la personne visée par l'ordonnance en ce qui a trait au respect de la présente loi;

(f) any other relevant factor.

f) tout autre élément pertinent.

Purpose of order

But de la sanction

(3.3) The purpose of an order made against a person under

(3.3) La sanction prévue au paragraphe (3.1) vise à

subsection (3.1) is to promote practices by that person that are in conformity with the purposes of this section and not to punish that person.

encourager la personne visée par l'ordonnance à adopter des pratiques compatibles avec les objectifs du présent article et non pas à la punir.

Superior competitive performance

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

Efficience économique supérieure

(4) Pour l'application du paragraphe (1), lorsque le Tribunal décide de la question de savoir si une pratique a eu, a ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, il doit évaluer si la pratique résulte du rendement concurrentiel supérieur.

Exception

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

Exception

(5) Pour l'application du présent article, un agissement résultant du seul fait de l'exercice de quelque droit ou de la jouissance de quelque intérêt découlant de la *Loi sur les brevets,* de la *Loi sur les dessins industriels,* de la *Loi sur le droit d'auteur,* de la *Loi sur les marques de commerce,* de la *Loi sur les topographies de circuits intégrés* ou de toute autre loi fédérale relative à la propriété intellectuelle ou industrielle ne constitue pas un agissement anti-concurrentiel.

Limitation period

(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice

Prescription

(6) Une demande ne peut pas être présentée en application du présent article à l'égard d'une pratique d'agissements anti-concurrentiels si la

has ceased.

pratique en question a cessé depuis plus de trois ans.

Where proceedings commenced under section 45, 49, 76, 90.1 or 92

Procédures en vertu des articles 45, 49, 76, 90.1 ou 92

(7) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(7) Aucune demande à l'endroit d'une personne ne peut être présentée au titre du présent article si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux qui ont été allégués au soutien :

(a) proceedings have been commenced against that person under section 45 or 49; or

a) d'une procédure engagée à l'endroit de cette personne en vertu des articles 45 ou 49;

(b) an order against that person is sought by the Commissioner under section 76, 90.1 or 92.

b) d'une ordonnance demandée par le commissaire à l'endroit de cette personne en vertu des articles 76, 90.1 ou 92.

Schedule "B" – List of Exhibits

A-001	Witness Statement of Robin Padgett (dnata Catering Services Ltd.)
CA-002	Witness Statement of Robin Padgett (dnata Catering Services Ltd.) (Confidential - Level A)
CA-003	Witness Statement of Robin Padgett (dnata Catering Services Ltd.) (Confidential - Level B)
A-004	Witness Statement of Rhonda Bishop (Jazz Aviation LP)
CA-005	Witness Statement of Rhonda Bishop (Jazz Aviation LP) (Confidential - Level B)
CR-006	Email from **[CONFIDENTIAL]** dated March 31, 2014 (Confidential - Level B)
CR-007	Email from **[CONFIDENTIAL]** dated May 29, 2014 (Confidential - Level A)
A-008	Witness Statement of Geoffrey Lineham (Optimum Stratégies Inc.)
CA-009	Witness Statement of Geoffrey Lineham (Optimum Stratégies Inc.) (Confidential - Level B)
A-010	Witness Statement of Andrew Yiu (Air Canada)
CA-011	Witness Statement of Andrew Yiu (Air Canada) (Confidential - Level B)
R-012	News release dated August 31, 2017 – Air Canada to Launch New International 787 Dreamliner Routes from Vancouver
R-013	Calin's Column dated October 2017 – Our Love for Vancouver
CR-014	**[CONFIDENTIAL]** (Confidential - Level A)
CA-015	**[CONFIDENTIAL]** (Confidential - Level A)
A-016	Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.)
CA-017	Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.) (Confidential - Level A)
CA-018	Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.) (Confidential - Level B)
A-019	Supplemental Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.)

CA-020	Supplementary Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.) (Confidential - Level A)
CA-021	Supplementary Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.) (Confidential - Level B)
CR-022	Email from Jonathan Stent-Torriani dated March 7, 2015 (Confidential - Level B)
CR-023	Email from Trevor Umlah dated July 9, 2014 **[CONFIDENTIAL]** (Confidential - Level B)
A-024	Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.)
CA-025	Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.) (Confidential - Level A)
CA-026	Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.) (Confidential - Level B)
A-027	Supplemental Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.)
CA-028	Supplementary Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.) (Confidential - Level A)
CA-029	Supplementary Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.) (Confidential - Level B)
CR-030	Letter from Sky Café dated September 5, 2014 (Confidential - Level B)
CR-031	Email from **[CONFIDENTIAL]** dated June 27, 2014 (Confidential - Level B)
CR-032	Letter from **[CONFIDENTIAL]** dated July 14, 2016 (Confidential - Level B)
CR-033	Letter from **[CONFIDENTIAL]** dated April 30, 2015 (Confidential - Level B)
CR-034	Letter from **[CONFIDENTIAL]** dated September 29, 2015 (Confidential - Level B)
A-035	Witness Statement of Barbara Stewart (Air Transat A.T. Inc.)
CA-036	Witness Statement of Barbara Stewart (Air Transat A.T. Inc.) (Confidential - Level B)
A-037	Supplemental Witness Statement of Barbara Stewart (Air Transat A.T. Inc.)
CR-038	Final Canadian RFP Catering Cost Analysis dated July 28 2016 (Confidential - Level A)

A-039	Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.)
CA-040	Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.) (Confidential - Level A)
CA-041	Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.) (Confidential - Level B)
A-042	Supplemental Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.)
CA-043	Supplemental Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.) (Confidential - Level A)
CA-044	Supplemental Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.) (Confidential - Level B)
CA-045	**[CONFIDENTIAL]** dated February 22, 2012 (Confidential - Level A)
CA-046	**[CONFIDENTIAL]** dated February 22, 2012 (Confidential - Level B)
A-047	GG Canada document dated February 22, 2012
CA-048	**[CONFIDENTIAL]** dated January 21, 2014 (Confidential - Level A)
CA-049	**[CONFIDENTIAL]** dated January 21, 2014 (Confidential - Level B)
A-050	GG Strategy Review dated January 21, 2014
CA-051	**[CONFIDENTIAL]** dated July 3, 2014 (Confidential - Level A)
CA-052	**[CONFIDENTIAL]** dated July 3, 2014 (Confidential - Level B)
A-053	GG Executive Review dated July 3, 2014
CA-054	Canada In-Flight Catering Market Size & Share (Confidential - Level A)
CA-055	Canada In-Flight Catering Market Size & Share (Confidential - Level B)
A-056	Canada In-Flight Catering Market Size & Share
CA-057	**[CONFIDENTIAL]** (Confidential - Level A)
CA-058	**[CONFIDENTIAL]** (Confidential - Level B)
A-059	**[CONFIDENTIAL]**
CA-060	**[CONFIDENTIAL]** dated November 21, 2013 (Confidential - Level A)
CA-061	**[CONFIDENTIAL]** dated November 21, 2013 (Confidential - Level B)

A-062 GG document dated November 21, 2013

CA-063 **[CONFIDENTIAL]** dated March 24, 2014 (Confidential - Level A)

CA-064 **[CONFIDENTIAL]** dated March 24, 2014 (Confidential - Level B)

A-065 GG document dated March 24, 2014

CA-066 **[CONFIDENTIAL]** (Confidential - Level A)

CA-067 **[CONFIDENTIAL]** (Confidential - Level B)

A-068 **[CONFIDENTIAL]**

CA-069 **[CONFIDENTIAL]** (Confidential - Level A)

CA-070 **[CONFIDENTIAL]** (Confidential - Level B)

A-071 **[CONFIDENTIAL]**

CA-072 **[CONFIDENTIAL]** dated May 2015 (Confidential - Level A)

CA-073 **[CONFIDENTIAL]** dated May 2015 (Confidential - Level B)

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COUNSEL OF RECORD:

For the applicant:

The Commissioner of Competition

Jonathan Hood
Antonio Di Domenico
Katherine Rydel
Ryan Caron

For the respondent:

Vancouver Airport Authority

Calvin S. Goldman, QC
Michael Koch
Richard Annan
Julie Rosenthal
Ryan Cookson
Sarah Stothart

Federal Court of Appeal Cour d'appel fédérale

Date: 20171201

Docket: A-174-16

Citation: 2017 FCA 236

CORAM: **NADON J.A.**
NEAR J.A.
RENNIE J.A.

BETWEEN:

THE TORONTO REAL ESTATE BOARD

Appellant

and

COMMISSIONER OF COMPETITION

Respondent

and

THE CANADIAN REAL ESTATE ASSOCIATION

Intervener

Heard at Toronto, Ontario, on December 5, 2016.

Judgment delivered at Ottawa, Ontario, on December 1, 2017.

REASONS FOR JUDGMENT BY: NADON J.A.
RENNIE J.A.

CONCURRED IN BY: NEAR J.A.

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REASONS FOR JUDGMENT

NADON and RENNIE JJ.A.

I. Introduction

[1] This is a statutory appeal from two decisions of the Competition Tribunal (the Tribunal) which held that certain information sharing practices of the Toronto Real Estate Board (TREB)

prevented competition substantially in the supply of residential real estate brokerage services in the Greater Toronto Area (GTA): *The Commissioner of Competition v. The Toronto Real Estate Board*, 2016 Comp. Trib. 7 (Tribunal Reasons, TR) and *The Commissioner of Competition v. The Toronto Real Estate Board*, 2016 Comp. Trib. 8 (the Order).

[2] TREB maintains a database of information on current and previously available property listings in the GTA. TREB makes some of this information available to its members via an electronic data feed, which its members can then use to populate their websites. However, some data available in the database is not distributed via the data feed, and can only be viewed and distributed through more traditional channels. The Commissioner of Competition says this disadvantages innovative brokers who would prefer to establish virtual offices, resulting in a substantial prevention or lessening of competition in violation of subsection 79(1) of the *Competition Act*, R.S.C. 1985, c. C-34 (*Competition Act*). TREB says that the restrictions do not have the effect of substantially preventing or lessening competition. Furthermore, TREB claims the restrictions are due to privacy concerns and that its brokers' clients have not consented to such disclosure of their information. TREB also claims a copyright interest in the database it has compiled, and that under subsection 79(5) of the *Competition Act*, the assertion of an intellectual property right cannot be an anti-competitive act.

[3] For the reasons that follow, we would dismiss the appeal.

II. Background and Procedural History

[4] TREB, the appellant, is a not-for-profit corporation incorporated under the laws of Ontario. With approximately 46,000 members, it is Canada's largest real estate board. TREB itself is not licensed to trade in real estate and does not do so.

[5] TREB operates an online system for collecting and distributing real estate information among its members. This "Multiple Listing Service" or MLS system is not accessible to the general public. Part of the MLS system is a database (the MLS database) of information on properties, including, *inter alia*: addresses, list prices, interior and exterior photographs, length of time for sale, whether the listing was withdrawn or expired, etc. The information is entered by TREB's member brokers into the system and appears almost instantly on the MLS database. When inputting information, some fields are mandatory and others are optional. The MLS database contains both current listings and an archive of inactive listings going back to 1986. TREB's members have full access to the database at any time.

[6] Many brokers operate sections of their websites where their clients can log in and view information, called "virtual office websites" or VOWs. TREB's data feed delivers information to brokers to populate these sections of their websites. Importantly, not all information in the MLS database is included in the data feed. Certain data is excluded (the "disputed data"). However, TREB's VOW Policy contains no restriction upon how its members can communicate the same disputed data to their clients through other delivery mechanisms. Consequentially, some information cannot be shared with clients in a VOW, but can be shared with them by other methods, such as in person, by email, or by fax.

[7] In May 2011, the Commissioner first applied to the Tribunal, under subsection 79(1) of the *Competition Act*, for an order prohibiting certain behaviours related to TREB's restrictive distribution of digitized data. The Commissioner alleged that TREB's policies excluded, prevented, or impeded the emergence of innovative business models and service offerings in respect of the supply of residential real estate brokerage services in the GTA.

[8] In April 2013, the Tribunal dismissed the Commissioner's application, finding that the abuse of dominance provisions of the *Competition Act* could not apply to TREB because, as a trade organization, TREB did not compete with its members (*The Commissioner of Competition v. The Toronto Real Estate Board*, 2013 Comp. Trib. 9). However, on appeal in February 2014, this Court set aside the Tribunal's order and referred the matter back for reconsideration, finding that subsection 79(1) of the *Competition Act* could apply to TREB (*Commissioner of Competition v. Toronto Real Estate Board*, 2014 FCA 29, 456 N.R. 373, leave to appeal to S.C.C. refused, 35799 (24 July 2014) (*TREB FCA 1*)).

[9] The matter was reconsidered by a different panel of the Tribunal in the fall of 2015. On April 27, 2016, the Tribunal issued its reasons on the merits and made an order granting, in part, the Commissioner's application (*The Commissioner of Competition v. The Toronto Real Estate Board*, 2016 Comp. Trib. 7). The issue of remedy was the subject of a further hearing and order of the Tribunal on June 3, 2016 (*The Commissioner of Competition v. The Toronto Real Estate Board*, 2016 Comp. Trib. 8). Those two decisions are now on appeal before this Court.

[10] The intervener in this case is the Canadian Real Estate Association (CREA), a national organization representing the real estate industry in Canada. TREB is a member of CREA. CREA owns the MLS trademarks. The MLS system is operated by local boards (in this case, by TREB) under license from CREA.

III. The Tribunal Decision

[11] The Tribunal first addressed the abuse of dominance issue by defining the relevant market to be "the supply of MLS-based residential real estate brokerage services in the GTA" (Tribunal Reasons (TR) at para. 161). The Tribunal then addressed the three part test in subsection 79(1) of the *Competition Act*. For ease of reference, we reproduce the provision here:

Prohibition where abuse of dominant position	**Ordonnance d'interdiction dans les cas d'abus de position dominante**
79 (1) Where, on application by the Commissioner, the Tribunal finds that	**79** (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :
(*a*) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,	*a*) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;
(*b*) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and	*b*) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels;
(*c*) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,	*c*) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.	le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

[12] The Tribunal found that TREB "substantially or completely controls the supply of MLS-based residential real estate brokerage services in the GTA" and therefore the terms of paragraph 79(1)(*a*) were met (TR at para. 162).

[13] With respect to paragraph 79(1)(*b*), the Tribunal found that TREB had engaged in, and continued to engage in a practice of anti-competitive acts (TR at para. 454). TREB took the position that its actions were motivated by concern for the privacy of real estate buyers' and sellers' information, and that this concern constituted a legitimate business justification for the VOW restrictions which had to be balanced against the evidence of anti-competitive intent (TR at paras. 21, 285 - 287, 321).

[14] In this context, the Tribunal found TREB's concern with privacy to be unpersuasive. We will turn to this issue in greater detail later in these reasons; suffice to say at this point that, looking at the record before it, the Tribunal found little evidence that TREB's VOW committee had considered or acted upon privacy concerns before establishing TREB's VOW Policy (TR at paras. 321, 360, 390).

[15] Turning to paragraph 79(1)(*c*), the Tribunal found that the VOW restrictions prevented competition substantially in the market. After describing this branch of the test (TR at paras. 456 - 483), the Tribunal adopted a "but for" approach to this analysis, comparing the real world

with the hypothetical world in which the VOW restrictions did not exist. Thus, in the Tribunal's view, it was the burden of the Commissioner to adduce evidence to prove "a substantial difference between the level of actual or likely competition in the relevant market in the presence of the impugned practice and the level of competition that likely would have prevailed in the absence of that practice" (TR at para. 482).

[16] In describing the applicable test, the Tribunal made the point that the Commissioner could bring either quantitative or qualitative evidence, or both, to meet his burden. Because of its view that "dynamic competition is generally more difficult to measure and to quantify", there may be a greater need for the Commissioner to rely on qualitative evidence. This is particularly so in innovation cases. However, the Tribunal also recognized "that it may be more difficult to meet this burden when the Commissioner relies largely on qualitative evidence" (TR at paras. 471, 470).

[17] After reviewing the parties' submissions on the evidence with respect to a lessening of competition (TR at paras. 484 - 499), the Tribunal noted that "there is a high degree of competition in the Relevant Market, as reflected in considerable ongoing entry and exit, a significant degree of discounting activity with respect to net commissions, and a significant level of ongoing technological and other innovation, including with respect to quality and variety and through Internet-based data-sharing vehicles" (TR at para. 501).

[18] Nonetheless, in addressing the "but for" question, the Tribunal found that the VOW restrictions prevented competition in five ways: by increasing barriers to entry and expansion;

by increasing costs imposed on VOWs; by reducing the range of brokerage services available in the market; by reducing the quality of brokerage service offerings; and by reducing innovation (TR at paras. 505 - 619).

[19] However, the Tribunal found that the Commissioner had failed to prove that the VOW restrictions were preventing competition in three other manners: by reducing downward pressure on broker commission rates; by reducing output; and by maintaining incentives for brokers to steer clients away from inefficient transactions (TR at paras. 620 - 638).

[20] After satisfying itself that the VOW restrictions were preventing competition in five ways, the Tribunal then addressed the substantiality of those anti-competitive effects. Turning first to magnitude and degree, the Tribunal framed the question as whether “full-information VOW brokerages likely would be hired by significantly more clients as a real estate brokerage but for the aggregate impact of the three components of TREB’s anti-competitive acts” as a result of being able to display the disputed data (TR at para. 646).

[21] TREB had argued that without conversion of website viewers into clients, the popularity of a website was irrelevant (TR at paras. 645, 648). However, the Tribunal found that website innovation could also be relevant if it spurred other competitors to compete (TR at para. 649).

[22] After noting that the Commissioner had failed to conduct an empirical assessment with regard to local markets where sold information (the final price at which a house sold) was available through VOWs and other local markets where such information was not available

through VOWs, the Tribunal declined to draw the adverse inference against the Commissioner which TREB argued it should draw. The Tribunal noted that “as a statutory authority, the Commissioner has to be prudent with, and make difficult decisions regarding the allocation of, the limited public funds available for administering and enforcing the Act at any given time” (TR at para. 656).

[23] The Tribunal also considered, in refusing the draw the inference, the fact that the Commissioner’s expert, Dr. Vistnes, had advised the Commissioner that an empirical assessment would be costly, difficult, and of little value. Notwithstanding its refusal to draw the adverse inference sought by TREB, the Tribunal made it clear that the Commissioner continued to bear the burden of proving that the required elements of his application were met which “may well be a more challenging task in the absence of quantitative evidence” (TR at para. 656).

[24] The Tribunal then stated that it was prepared to draw an adverse inference against the Commissioner in regard to the testimony of two of its witnesses, Messrs. Nagel and McMullin, whose brokerages (respectively Redfin Corporation and Viewpoint Realty Services Inc.) conducted business in areas where the disputed data was available and in other areas where such data was not available (Nova Scotia and parts of the United States). Because neither witness presented evidence with regard to these other markets, the Tribunal inferred that the conversion rates of those websites would not be helpful to the Commissioner’s case. However, the Tribunal then noted that it would not give much weight to its inference because of Dr.

Vistnes' opinion that the low conversion rates could be the result of local differences in the relevant markets.

[25] The Tribunal also commented that "even a limited comparison between one local U.S. market where sold information is available and one local U.S. market where such information is not available may have been at least somewhat helpful", adding that the same comment applied to Nova Scotia with respect to pending sold prices. The Tribunal also commented that the absence of such a comparison made its task with regard to the "substantiality" element of paragraph 79(1)(*c*) much more difficult. The Tribunal concluded by saying that the absence of such comparison "resulted in this case being much more of a 'close call,' than it otherwise may have been" (TR at para. 658).

[26] However, the Tribunal highlighted the little weight it gave to the low conversion rates:

> [662] The Tribunal does not accord much significance to the fact that the low conversion rates of firms such as ViewPoint, Redfin and TheRedPin suggest that many consumers are evidently treating the information available on their websites as complements to the information available from the (different) broker they ultimately use to list or purchase their home. The fact remains that the innovative tools, features and other services available on those websites is assisting them to compete, and is forcing traditional brokerages to respond.

In other words, if we understand the Tribunal correctly, it was not prepared to, in effect, give any weight to the fact that the conversion rates of ViewPoint, Redfin, and TheRedPin were not significant. However, later in its reasons, the Tribunal makes the finding that if the disputed data were available to these firms in the GTA, they likely would have been successful in converting "an increasing and significant number of website users into clients". Paragraph 676 reads:

> [676] The Tribunal concludes that being able to obtain sold information from the VOW Data Feed, and to work with that data as they see fit, would likely enable full-information VOWs, including ViewPoint and those such as TheRedPin who would like to become full-information VOWs, to convert an increasing and significant number of website users into clients.

[27] Then, in dealing with the issue of qualitative evidence, the Tribunal made six observations based on the evidence adduced on behalf of the Commissioner:

> [666] First … the Disputed Data is very important, if not critical, in assisting Internet-based brokerages to distinguish themselves from incumbent traditional brokerages. …
>
> [667] Second, home purchasers and sellers value being able to obtain information with respect to sold prices, the conditional sale status of homes in the market, firm “pending sold” information, [withdrawn, expired, suspended or terminated] listings and cooperating broker commissions *prior to* meeting with their broker/agent, or in any event *prior to* finalizing the listing price of their homes or making an offer on a home.
>
> [668] Third, an inability to display and use the Disputed Data to develop innovative products has been preventing, and is likely to continue to prevent, ViewPoint from entering the Relevant Market. This has also prevented Realosophy and TheRedPin from growing as much as they likely would have grown … this also prevented Sam & Andy from expanding within the Relevant Market, and prevented their brokerage customers from doing the same.
>
> [669] Fourth, ViewPoint, Realosophy and TheRedPin are Internet-based innovative brokerages that, in aggregate, likely would have introduced a considerably broader range of brokerage services, increased the quality of some important services (such as CMAs), benefited from lower operating costs and considerably increased the overall level of innovation in the Relevant Market, “but for” the VOW Restrictions. …
>
> [670] Fifth, the VOW Restrictions have erected barriers to the entry and expansion of innovative brokers in the Relevant Market …
>
> …
>
> [672] Sixth, the VOW Restrictions have stifled innovation in the supply of Internet-based real estate brokerage services in the GTA.
>
> (emphasis in original)

[28] The Tribunal then discussed the importance of the disputed data fields to brokers and consumers, finding that sold data, pending and conditional solds, and withdrawn, expired, suspended or terminated listings were valued by home buyers and sellers (TR at paras. 675 - 685). In the Tribunal's opinion, making cooperating broker commissions available would also increase transparency in the market and would allow brokers to distinguish themselves by providing more information (TR at paras. 686 - 690).

[29] The Tribunal then reviewed counterarguments to its above findings. The Tribunal did not find significant that some VOW operators in Nova Scotia, which does not have any VOW restrictions, had abandoned their VOWs (TR at para. 693). Likewise, the Tribunal did not find significant the fact that statistics from the National Association of Realtors in the United States indicated that customers did not value the disputed data fields that highly (TR at para. 694 - 696). The Tribunal noted that in the United States, where sold information was "widely displayed by competitor websites", the National Association of Realtors had started displaying sold information on what appeared to be its official website (TR at para. 700). In addition, the Tribunal was satisfied that the fact that brokers displayed the disputed data when permitted indicated that that information was of value to home buyers; otherwise brokers would not display it (TR at para. 701).

[30] The Tribunal stated its conclusion on the magnitude of the effect of the VOW restrictions on competition in the following way:

> [702] For the reasons set forth above, the Tribunal concludes that the VOW Restrictions have adversely affected non-price competition in the Relevant Market to a degree that is material. Indeed, <u>the Tribunal concludes that the aggregate adverse impact of the VOW Restrictions on non-price competition has</u>

> been substantial, having regard to the considerable negative effect on the range of brokerage services, the negative effect on the quality of service offerings, and the considerable adverse impact on innovation in the Relevant Market. In the absence of an order, this substantial adverse impact is likely to continue. The Tribunal has reached this conclusion despite the fact that, the quantitative evidence on commission rates does not indicate that net commissions for real estate brokerage services were, are or likely would be, materially higher than in the absence of the VOW Restrictions.
>
> (emphasis added)

[31] Then, turning to duration and scope, the Tribunal found that, as the VOW restrictions had been in place since 2011, the duration was substantial. Likewise, as the effects were present throughout the GTA, a substantial part of the market was impacted (TR at paras. 703 - 704).

[32] Thus, the Tribunal found that all three of the subsection 79(1) requirements had been met and that the VOW restrictions were substantially preventing competition for residential real estate brokerage services in the GTA. At paragraphs 705 to 715 of its reasons, the Tribunal summarized its views on the three elements of subsection 79(1).

[33] Turning to copyright, the Tribunal found that TREB did not lead sufficient evidence to demonstrate copyright in the MLS database. Copyright in a database exists where the "selection or arrangement of data" is original (TR at para. 732). The Tribunal found that TREB's evidence did not speak to skill and judgment in compiling the database, but rather illustrated that it was a more mechanical exercise. The Tribunal pointed to many facts including: TREB did not present witnesses on the arrangement of the data; a third party corrects errors in the database; contracts referencing copyright are not evidence that copyright exists; members provide the information which is uploaded "almost instantaneously" to the database; TREB's database is in line with

industry norms across Canada; and creating rules on accuracy and quality of the information does not reflect the originality of the work (TR at para. 737).

[34] In the alternative, the Tribunal found that, even if TREB had copyright in the database, it would not enjoy the protection offered by subsection 79(5) because TREB's conduct amounted to more than the "mere exercise" of its intellectual property rights (TR at paras. 720 - 721, 746 - 758).

IV. Issues

[35] In order to dispose of this appeal, we must determine the three following issues:

1. Did the Tribunal err in finding that TREB had substantially reduced competition within the meaning of subsection 79(1) of the *Competition Act*?
2. Did the Tribunal err in failing to conclude that TREB's privacy concerns or statutory obligations constituted a business justification within the scope of paragraph 79(1)(*b*)?
3. Does subsection 79(5) of the *Competition Act* preclude TREB and CREA from advancing a claim in copyright in the MLS database? If not, did the Tribunal err in its consideration of TREB's claim of copyright?

V. Analysis

A. *Standard of Review*

[36] Before addressing the three issues, a few words on the standard of review are necessary.

[37] There is a statutory right of appeal to this Court from decisions of the Tribunal. Subsection 13(1) of the *Competition Tribunal Act*, R.S.C. 1985 (2nd Supp.), c. 19 (*Competition Tribunal Act*) provides that any decision or order can be appealed "as if it were a judgment of the Federal Court". In *Tervita Corporation v. Commissioner of Competition*, 2013 FCA 28,

[2014] 2 F.C.R. 352 (*Tervita FCA*), our Court held that questions of law arising from decisions of the Tribunal were to be reviewed on the standard of correctness (TR at paras. 53 - 59; see also *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104 at para. 88, [2001] 3 F.C. 185). That determination was upheld by the Supreme Court of Canada in *Tervita Corp. v. Canada (Commissioner of Competition*), 2015 SCC 3, [2015] 1 S.C.R. 161 (*Tervita SCC*).

[38] As to questions of mixed fact and law, the Supreme Court in *Tervita SCC* also upheld this Court's determination in *Tervita FCA* that such questions were to be determined on the standard of reasonableness. With regard to questions of fact, leave of this Court is required (*Competition Tribunal Act*, s. 13(2)). In the present matter, no such leave was sought and consequently we cannot interfere with the Tribunal's findings of fact (see *CarGurus, Inc. v. Trader Corporation*, 2017 FCA 181 at para. 17; *Nadeau Poultry Farm Limited v. Groupe Westco Inc.*, 2011 FCA 188 at para. 47, 419 N.R. 333 (*Nadeau Poultry Farm*)).

B. *Substantial Reduction in Competition*

(1) TREB's and CREA's Submissions

[39] TREB submits that the Tribunal erred in finding that the test under subsection 79(1) of the *Competition Act* was made out. In its view, the Commissioner bore the burden of proving each element of the test and did not discharge that burden on any of the three elements.

[40] TREB asserts that since it does not control the relevant market, paragraph 79(1)(*a*) has not been established.

[41] TREB submits that it did not act with the necessary anti-competitive purpose, therefore the Tribunal erred in finding that paragraph 79(1)(*b*) was made out. In its view, the VOW Policy was meant to allow its members to offer VOWs and thus reach a greater range of potential buyers. The exclusion of some data from the data feed was made for legitimate privacy related reasons.

[42] With respect to paragraph 79(1)(*c*), TREB submits that the Tribunal erred in accepting speculative qualitative evidence. Actual quantitative evidence was available and should have been brought forward by the Commissioner. His failure to do so should have led the Tribunal to make an adverse inference against him. CREA, the intervener, agrees with TREB's submissions on these three points.

[43] CREA further argues that the Tribunal read out, for all intents and purposes, the requirement of 'substantiality' from the subsection 79(1) test. In its view, statements by brokers are insufficient to establish that access to the disputed data would increase competition substantially. While access to the disputed data may help brokers improve their services, this is not equivalent to a competitive benefit. CREA points to other evidence it claims demonstrates that brokers operating with the current VOW data feed are equally or more competitive than those with access to more data. Furthermore, CREA asserts that there is no proven link between broker success and receiving more data.

(2) The Commissioner's Submissions

[44] The Commissioner asserts that TREB's policies regarding the disputed data comprise at least three acts that constitute an anti-competitive practice, as quoted by the Tribunal at paragraph 320 of its reasons:

> i. The exclusion of the Disputed Data from TREB's VOW Data Feed;
>
> ii. Provisions in TREB's VOW Policy and Rules that prohibit Members who want to provide services through a VOW from using the information included in the VOW Data Feed for any purpose other than display on a website; and
>
> iii. Prohibiting TREB's Members from displaying certain information, including the Disputed Data, on their VOWs… This prohibition is reinforced by terms in TREB's Data Feed Agreement that limit the use of the MLS data in the VOW Data Feed to a purpose that is narrower than the corresponding provision in the [authorized user agreement] that applies to Members using the Stratus system...

[45] In other words, the Commissioner argues that it is anti-competitive to prohibit the disputed data from being distributed via the data feed.

[46] The Commissioner further submits that the Tribunal's paragraph 79(1)(*b*) analysis is reasonable, entitled to deference, and supported by the evidence. The Tribunal applied the correct legal test, and its finding regarding TREB's purpose in implementing the VOW restrictions is one of fact, and therefore not reviewable on this appeal. In the alternative, the Commissioner submits that the facts indicate that the Tribunal's finding on this point was reasonable. The Tribunal looked at the evidence as a whole and determined that, while privacy concerns were mentioned at TREB's VOW taskforce meetings, they were not a principal motivating factor. Furthermore, this finding turned on a credibility assessment of the testimony of Mr. Richardson, TREB's CEO, which is entitled to deference.

[47] Regarding paragraph 79(1)(*c*), the Commissioner submits that the Tribunal once again applied the correct legal test. TREB and CREA misstate the law when they say that the Commissioner must provide quantitative evidence to prove a substantial lessening or prevention of competition. In the Commissioner's view, this position is not supported by the case law. The Commissioner differentiates *Tervita SCC*, which found quantification necessary for a merger test under a different section of the *Competition Act*, namely subsection 96(1). Indeed, according to the Commissioner, non-price effects such as service quality, range of products, and innovation are not amenable to quantification. The Commissioner submits that TREB and CREA are *de facto* arguing that he has a legal burden to quantify the substantial lessening or preventing of competition. In addition, the Commissioner says that the Tribunal's refusal to draw an adverse inference against him on this point is entitled to deference.

(3) The Abuse of Dominance Framework

[48] Subsection 79(1), which is reproduced at paragraph 11 above, sets out the three requirements necessary to establish an abuse of dominant position. The Commissioner bears the burden of establishing each of these elements (*Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233 at para. 46, 268 D.L.R. (4th) 193, leave to appeal to S.C.C. refused, 31637 (10 May 2007) (*Canada Pipe*)).The burden of proof with respect to each element is the balance of probabilities (*Canada Pipe* at para. 46; TR at para. 34).

[49] Once the Commissioner establishes each element of subsection 79(1), the person or persons against whom the Commissioner's proceedings are directed, in this case TREB, can avoid sanction if they demonstrate that the impugned practice falls under one of the statutory

exemptions. The only provision relevant to this case is subsection 79(5) of the *Competition Act*, which states that "an act engaged in pursuant only to the exercise of any right or enjoyment of any interest" derived under certain legislation pertaining to intellectual or industrial property, including the *Copyright Act*, R.S.C., 1985, c. C-42 (*Copyright Act*), is not an anti-competitive act.

[50] TREB says, in its written submissions, that it "does not control the relevant market(s)" (TREB's Memorandum of Fact and Law at para. 66). However, this is the extent of its submissions on the issue. As TREB's substantive arguments clearly focus on paragraphs 79(1)(*b*) and (*c*), we continue on to examine in more depth the requirements of those provisions.

(4) Paragraph 79(1)(*b*)

[51] Paragraph 79(1)(*b*) requires that the person or persons "have engaged in or are engaging in a practice of anti-competitive acts". There is no dispute that TREB's VOW policies constitute a practice. An indicative list of anti-competitive acts is provided in the *Competition Act* at section 78. None of those acts are directly relevant to this appeal. However, that list is non-exhaustive.

[52] This Court in *Canada Pipe* found that an anti-competitive act is defined by reference to its purpose. Drawing on the Tribunal's decision in *Director of Investigation and Research v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) (*NutraSweet*), this Court said that the requisite purpose is "an intended predatory, exclusionary or disciplinary negative effect on a competitor" (*Canada Pipe* at paras. 66, 74. See also *NutraSweet* at page 34).

[53] To be more precise, *NutraSweet* pointed out that the "purpose common to all acts [listed in section 78], save that found in paragraph 78(f), is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary" (at page 34). Indeed, paragraph 78(1)(*f*) cannot apply to a competitor, as it reads:

> 78 (1) For the purposes of section 79, *anti-competitive act*, without restricting the generality of the term, includes any of the following acts:
>
> …
>
> (*f*) buying up of products to prevent the erosion of existing price levels;

[54] In *TREB FCA 1*, Sharlow J.A. determined that the 'on the competitor' language from *NutraSweet* and *Canada Pipe* could not mean 'on a competitor of the person accused of anti-competitive practices' (at paras. 19 - 20). On that premise, requiring a predatory, exclusionary, or disciplinary negative effect on a competitor in all cases would render paragraph 78(1)(*f*) meaningless. Paragraph (*f*) reflects a self-serving intent, not a relative one intended to harm a competitor. Yet it has been defined by Parliament to constitute an anti-competitive act.

[55] With this in mind, we believe that the Tribunal applied the correct framework with respect to paragraph 79(1)(*b*). The Tribunal stated that it was looking for a predatory, exclusionary, or disciplinary effect on a competitor (TR at para. 272). Acting on the direction given by *TREB FCA 1*, the Tribunal defined competitor to mean "a person who competes in the relevant market, or who is a potential entrant into that market" and not a "competitor" of TREB (TR at para. 277).

[56] The Tribunal correctly noted that subjective or objective intent could be used to demonstrate the requisite intent (TR at paras. 274, 283; *Canada Pipe* at para. 72). It closely scrutinized the evidence of TREB's subjective intent (TR at paras. 319 - 431). The Tribunal also looked to the "reasonably foreseeable or expected objective effects of the act (from which intention may be deemed…)" (TR at paras. 432 - 451) as instructed by *Canada Pipe* at para. 67 (see also *Tele-Direct (Publications*) *Inc. v. American Business Information, Inc.*, [1998] 2 F.C.R. 22; 154 D.L.R. (4th) 328 (FCA), leave to appeal refused, 26403 (21 May, 1998) (*Tele-Direct*)). The Tribunal conducted a balancing exercise between the exclusionary effects (evidenced by subjective intent) and TREB's alleged legitimate business justifications (TR at paras. 319 - 431; *Canada Pipe* at para. 73).

[57] The application of this test to the facts is a question of mixed law and fact. Ultimately, the Tribunal found that "the evidence of subjective anti-competitive intent and reasonably foreseeable exclusionary effects outweighs the very limited evidence that was adduced in support of the alleged legitimate business justifications that TREB claims underpinned the development and implementation of the VOW Restrictions" (TR at para. 452). This is a very fact-driven analysis. The Tribunal weighed the evidence, heard competing witnesses, and made findings of credibility. We see no error that would make this analysis unreasonable.

(5) Paragraph 79(1)(*c*)

[58] Paragraph 79(1)(*c*) requires that "the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market" (underlining added). The market in question is not contested. The Tribunal defined the market to be "the supply of MLS-

based residential real estate brokerage services in the GTA" (TR at para. 161). We now turn to address the five other elements, as underlined above, in turn.

(a) *The Practice*

[59] The Commissioner's Notice of Application was filed in May 2011, before TREB's current VOW Policy and Rules were in place. In November 2011, TREB enacted its new rules. The Commissioner accordingly amended her Statement of Claim. Nonetheless, the Statement of Claim remains broadly worded and does not specify which particular parts of TREB's rules and policies the Commissioner is impugning.

[60] The alleged anti-competitive practices relate to what TREB does with some of the data from the MLS system and what TREB allows its members to do with this data. This "disputed data" is defined by the Tribunal, at paragraph 14 of its reasons, to include four types of information:

- sold data
- pending sold data
- withdrawn, expired, suspended, or terminated listings ("WESTs")
- offers of commission to the successful home buyer's real estate broker, also called the cooperating broker.

The utility of this data is described in the Tribunal's reasons at paragraphs 675 to 691, which fall within the "Substantiality" section of the reasons.

[61] The parties' submissions and the evidence centred almost entirely on three particular practices, which the Tribunal collectively refers to as the "VOW Restrictions" (TR at para. 14). Those practices were the focus of the Tribunal's reasons and, after separate written and oral submissions on remedy, these restrictions remained the focus of the Tribunal's order. The following chart provides an overview of the restrictions, as listed in the Tribunal's reasons at paragraph 14, and their sources.

Restriction	Source
The exclusion of the disputed data from the VOW Datafeed	Policy articles 17, 15, 24
The prohibition on the display of the disputed data on a VOW	Rule 823; Datafeed Agreement clause 6.3(a)
The prohibition on the use of the VOW Datafeed information for any purpose other than display on a website	Datafeed Agreement clause 6.2(f), (g)

[62] It is worth noting that the following TREB rules and policies are not affected by the Tribunal's order.

Restriction	Source
An individual needs the permission of their broker of record to establish a VOW	Datafeed Agreement clause 6.3(g)
Before viewing listing information on a VOW, a consumer must enter a lawful broker-consumer relationship with the brokerage; this includes agreeing to terms and conditions acknowledging entering into such a relationship and declaring that the consumer has a bona fide interest in the purchase, sale or lease of residential real estate	Rules 805, 809(i), (iii) Policy articles 1, 6, 7(iii)
Any listings other than TREB's MLS listings must be labelled as such and searched separately by consumers	Rules 828, 829

(b) *Temporal Requirement*

[63] The temporal aspect of paragraph 79(1)(*c*) is not in issue. The effect on competition can be past, present, or future (*Canada Pipe* at para. 44) The Tribunal found that the VOW restrictions had anti-competitive effects in the past, present and future (TR at para. 706).

[64] A duration of two years will usually be sufficient to establish an effect (*Tervita FCA* at para. 85). Here, TREB's VOW restrictions came into force in November 2011 and the Tribunal found the anti-competitive effects had been occurring for a substantial period of time (TR at paras. 703, 708).

(c) *Preventing or Lessening*

[65] Paragraph 79(1)(*c*) refers to either a prevention and/or lessening of competition. The Tribunal found a prevention of competition (TR at para. 705). This means that there is no past time that the Tribunal can look at to compare with the present: the Tribunal must look at the present state of competition compared to a hypothetical world in which the VOW restrictions did not exist. This approach is not contested.

(d) *Competition*

[66] Paragraph 79(1)(*c*) looks to the level of competition, as opposed to any effects of the behaviour on competitors (*Canada Pipe* at paras. 68 - 69). A "but for" inquiry is an acceptable method of analysis (*Canada Pipe* at paras. 39 - 40). This is a relative assessment: the current intensity of competition is not relevant in isolation.

[67] Two questions must be asked regarding the nature of the competition element. The first is: competition for what? Here, the relevant competition is over real estate brokerage clients (TR at paras. 645 - 646). It is important to distinguish this competition from other, related, competition: for example, all websites want to attract web traffic in order to compete for advertising dollars.

[68] Second, we must ask: competition between whom? This case is about competition in the "the supply of MLS-based residential real estate brokerage services in the GTA" (TR at para. 161). In order to supply MLS-based services, a broker must be a member of TREB. Therefore, we are really discussing competition between segments of TREB members.

[69] The use of imprecise terminology sometimes makes it difficult to distinguish between competing TREB members. The Tribunal uses the terms "full information VOW-based brokerages" or "full information VOW brokerages" in contrast to "traditional 'bricks-and-mortar' brokerages." The Commissioner uses the terms "genuine VOWs" and "innovative brokers" in contrast to "VOWs." Dr. Vistnes, the Commissioner's expert witness, uses the terms "innovative VOW-based brokers" or "VOW-based brokers" in contrast with "traditional brick-and-mortar brokers."

[70] However, for the purpose of the legal analysis required by paragraph 79(1)(*c*), the current competition between any two groups is not important *per se*. Rather, it is the general competition in the defined market between all participants now (with the VOW restrictions) and in the hypothetical "but for" world (without the VOW restrictions).

(e) *Substantiality*

[71] The final element requiring elaboration is substantiality: the difference between the present and "but for" worlds must be substantial (*Canada Pipe* at para. 36). In its reasons, the Tribunal addressed substantiality in a separate section of its reasons (TR at paras. 640 - 704).

(i) Overview of the Evidence on Paragraph 79(1)(c)

[72] There were eight expert reports in evidence before the Tribunal, four from the initial hearing in 2012 and four from the redetermination hearing in 2015.

[73] Generally, the Tribunal found the evidence of the Commissioner's expert Dr. Vistnes to be credible and persuasive. However, on the particular issue of 79(1)(*c*) the Tribunal found that his evidence had missed the mark, saying that "Dr. Vistnes did not have a good understanding of the legal test for what constitutes a 'substantial' prevention or lessening of competition, as contemplated by paragraph 79(1)(c) of the Act. For this reason, the Tribunal refrained from accepting Dr. Vistnes' evidence on that particular issue" (TR at para. 108).

[74] The Tribunal found Dr. Church, called by TREB, "to be less forthright, objective and helpful than Dr. Vistnes or Dr. Flyer." The Tribunal also found Dr. Church "to be evasive at several points during his cross-examination and to have made unsupported, speculative assertions at various points in his testimony and in his written expert reports" (TR at para. 109). Dr. Church's evidence on the issue of whether the prevention of competition was "substantial" is neither referred to nor mentioned in the Tribunal's reasons.

[75] The Tribunal found Dr. Flyer, called by CREA, to be generally objective and forthcoming. However, it also found that "his testimony often remained general and high-level, and that he did not immerse himself in the details of the Canadian real estate industry and in the specific evidence and matters at issue in this proceeding to the same degree as Dr. Vistnes and Dr. Church" (para. 110) (We note, parenthetically, that given the Tribunal's view of Dr. Church's evidence, the criticism of Dr. Flyer on the basis that his evidence was not as detailed as Dr. Church is somewhat incongruous.) Dr. Flyer focused on the economic impact of the requested remedy on CREA, with considerable attention to the impact on CREA's trademarks. In our view, his reports are of little help in analyzing paragraph 79(1)(*c*).

[76] In addition, there are a total of 23 witness statements from 15 witnesses. The names and the firms of the witnesses whose testimonies (and statements) are most relevant to the Tribunal's determination of substantial prevention of competition are the following:

- William McMullin, Chief Executive Officer of ViewPoint Realty Services Inc. (Viewpoint)
- Shayan Hamidi and Tarik Gidamy, co-founders of TheRedPin.com Realty Inc. (TheRedPin)
- Joel Silver, Managing Director of Trilogy Growth, LP (Trilogy)
- Mark Enchin, Sales Representative of Realty Executives Plus Ltd. (Realty Executives)
- Scott Nagel, Chief Executive Officer of Redfin Corporation (Redfin)
- Sam Prochazka, Chief Executive Officer of Sam & Andy Inc. (Sam & Andy)
- Urmi Desai and John Pasalis, co-founders of Realosophy Realty Inc. (Realosophy)

[77] TREB and CREA do not challenge the admissibility of the statements and testimonies of the lay witnesses on which the Tribunal relies for the findings which form the basis of its conclusion that the anti-competitive effects resulting from the VOW restrictions lead, or are likely to lead, to a substantial prevention of competition in the GTA. Nevertheless, we believe that some guidance with respect to the evidence of lay witnesses in the context of a case like the one now before us might be useful.

[78] Generally, the evidence of lay witnesses is limited to facts of which they are aware (David Paciocco and Lee Stuesser, *The Law of Evidence*, 7th ed. (Toronto: Irwin Law, 2015) at 195; Ron Delisle et al, *Evidence: Principles and Problems*, 11th ed. (Toronto: Thompson Reuters, 2015) at 874). This principle is reflected in Rules 68(2) and 69(2) of the *Competition Tribunal Rules*, SOR/2008-141, which are identical, and read "[u]nless the parties otherwise agree, the witness statements shall include only fact evidence that could be given orally by the witness together with admissible documents as attachments or references to those documents".

[79] However, opinion evidence from lay witnesses is acceptable in limited circumstances: where the witness is in a better position than the trier of fact to form the conclusions; the conclusions are ones that a person of ordinary experience can make; the witnesses have the experiential capacity to make the conclusions; or where giving opinions is a convenient mode of stating facts too subtle or complicated to be narrated as facts (*Graat v. The Queen*, [1982] 2 S.C.R. 819 at 836 - 839, 144 D.L.R. (3d) 267; *Hunt (Litigation guardian of) v. Sutton Group Incentive Realty Inc.* (2002), 60 O.R. (3d) 665 at para. 17, 215 D.L.R. (4th) 193 (Ont. C.A.), quoting with approval Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *The Law of*

Evidence in Canada, 4th ed. (Markham, ON: LexisNexis Canada, 2014) at 12.14. See also Paciocco and Stuesser, *ibid* at 197 - 198 and Delisle et al, *ibid* at 874 - 876).

[80] The question of opinion evidence given by lay witnesses was recently addressed by this Court in *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 400 D.L.R. (4th) 723, where Stratas J.A., writing for this Court, upheld the Federal Court's acceptance of a corporate executive's testimony about what his pharmaceutical company would have done in the "but for" world in circumstances where the witness had actual knowledge of the company's relevant, real world, operations (at paras. 105 - 108, 112, 121).

[81] Nevertheless, we think it is clear that lay witnesses cannot testify on matters beyond *their own conduct* and that of *their businesses* in the "but for" world. Lay witnesses are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the "but for" world, nor do they have the experiential competence. While questions pertaining to how their particular business might have responded to the hypothetical world are permissible provided the requisite evidentiary foundation is established, any witness testimony regarding the impact of the VOW restrictions on competition generally strays into the realm of inappropriate opinion evidence.

(ii) Substantiality Analysis

[82] Before addressing this important issue, it will be helpful to consider what the Supreme Court and this Court have said in regard to the expression "the effect of preventing or lessening competition substantially" found in paragraph 79(1)(*c*) of the *Competition Act* and the test relevant to a determination of substantial lessening or prevention of competition.

[83] First, in *Tervita SCC*, albeit in the context of the merger provisions of the *Competition Act*, the Supreme Court made the following comments at paragraphs 44 to 46 of its reasons:

> [44] Generally, a merger will only be found to meet the "lessen or prevent substantially" standard where it [here, the "it" means the practice at issue] is "likely to create, maintain or enhance the ability of the merged entity to exercise market power, unilaterally or in coordination with other firms". Market power is the ability to "profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition. Or, in other words, market power is "the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable"; where "price" is "generally used as shorthand for all aspects of a firm's actions that have an impact on buyers. If a merger does not have or likely have market power effects, s. 92 will not generally be engaged
>
> (references omitted)
>
> [45] The merger's likely effect on market power is what determines whether its effect on competition is likely to be "substantial". Two key components in assessing substantiality under the "lessening" branch are the degree and duration of the exercise of market power (*Hillsdown* at pp. 328-29). There is no reason why degree and duration should not also be considered under the "prevention" branch.
>
> [46] What constitutes "substantial" will vary from case to case. The Tribunal has not found it useful to apply rigid numerical criteria:
>
> > What will constitute a likely "substantial" lessening will depend on the circumstances of each case... .Various tests have been proposed: a likely 5% price rise sustainable for one year; a 5% price rise sustainable over two years; a small but significant and non-transitory price rise. The Tribunal does not find it useful to apply rigid numerical criteria although these may be useful for enforcement purposes.
>
> (*Hillsdown*, at pp. 328-329)
>
> (emphasis added)

[84] Then, at paragraphs 50 to 51 of *Tervita SCC*, the Supreme Court indicated that the words of paragraph 79(1)(*c*) of the *Competition Act* and those of subsection 92(1) were similar and thus conveyed the same idea:

> [50] *Canada Pipe* was a case involving abuse of dominance under s. 79(1)(*c*) of the Act. The words of s. 79(1)(*c*) – "is having or is likely to have the effect of preventing or lessening competition substantially in a market" – are very close to the words of s. 92(1) – "likely to prevent or lessen" – and convey the same ideas. In *Canada Pipe*, the Federal Court of Appeal employed a "but for" test to conduct the inquiry:
>
>> . . . the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is "substantial"... .
>>
>> The comparative interpretation described above is in my view equivalent to the "but for" test proposed by the appellant. [paras. 37-38]
>
> [51] A similar comparative analysis is conducted under s. 92(1). A merger review, by its nature, requires examining a counterfactual scenario: "... whether the merger will give the merged entity the ability to prevent or lessen competition substantially compared to the pre-merger benchmark or 'but for' world" (Facey and Brown, at p. 205). The "but for" test is the appropriate analytical framework under s. 92.

[85] Lastly, at paragraph 60 of its reasons in *Tervita SCC*, the Supreme Court made the following remarks regarding the "but for" test:

> [60] The concern under the "prevention" branch of s. 92 is that a firm with market power will use a merger to prevent competition that could otherwise arise in a contestable market. The analysis under this branch requires looking to the "but for" market condition to assess the competitive landscape that would likely exist if there was no merger. <u>It is necessary to identify the potential competitor, assess whether but for the merger [here "but for" the anti-competitive practice] that potential competitor is likely to enter the market and determine whether its effect on the market would likely be substantial.</u>
>
> (emphasis added)

[86] In *Canada Pipe*, at paragraphs 36 to 38 and 45 to 46, this Court, in addressing the test required to make a determination under paragraph 79(1)(c), observed that the test is relative in nature. Rather than assessing the absolute level of competition in the market the Tribunal must

assess the level of competition in the presence of the impugned practice and compare this with the level of competition that would exist in the absence of the practice. This difference can occur in the past, present or future and the test will be made out where the difference is substantial. This Court noted that it is the role of the Tribunal to adapt this assessment to the case before it.

[87] At paragraph 46 of *Canada Pipe*, this Court explicitly indicated that it was not dictating the type of evidence required, rather it wrote: "Ultimately, the Commissioner bears the burden of proof for each requisite element, and the Tribunal must be convinced on the balance of probabilities. The evidence required to meet this burden can only be determined by the Tribunal on a case-by-case basis."

[88] It is clear from *Canada Pipe* that what will constitute a "substantial" lessening or prevention of competition depends on the facts of the case and that the Tribunal is not bound to apply a particular test in determining the issue. However, it is clear that in order for the Tribunal to find that a substantial lessening of competition has been established, it must be able, on the evidence before it, to conclude that were it not for the anti-competitive effects of the practice at issue, the market at issue would be substantially more competitive. In other words, in the present matter, would there be a substantial incremental benefit to competition arising from the availability of the disputed data in TREB's VOW data feed?

[89] In the present matter the Tribunal turned its mind to both the meaning of "substantiality" and the appropriate test to be applied. The Tribunal noted, at paragraph 461 of its reasons, that substantiality is an assessment of the exercise of market power. Market power, as the Tribunal

defines it in paragraph 165 of its reasons, is the ability to control either prices or non-price dimensions of competition for a significant time. Non-price dimensions of competition include innovation and quality of service, among others.

[90] At paragraph 480 of its reasons, the Tribunal acknowledges that the test for substantiality is relative in nature. That is, the Tribunal is to compare the level of competition that exists in the actual world with the level of competition that would exist, but for, the impugned practices. The test then, is to assess whether the difference between these two worlds is substantial. The Tribunal indicates that this test will be met where either price is materially higher, or one or more non-price dimension are materially lower than in the absence of the practices.

[91] In making this assessment the Tribunal will have regard to the overall economic conditions of the relevant market. As explained in paragraph 468 of its reasons, this means that the duration of the impact will be considered along with the relative size of impact to determine whether the impact is substantial.

[92] In our view, the Tribunal correctly understood the significance of the word "substantially" and the test which it had to apply in determining whether or not, on the facts of this case, TREB's practice regarding the disputed data was a practice which had the effect of preventing competition substantially in the GTA.

[93] With these comments in mind, we now turn to TREB's and CREA's submissions as to why we should intervene. Their principal submission on substantiality is that it was improper for

the Tribunal to determine whether the anti-competitive effects led to a substantial prevention of competition on the basis of qualitative evidence only. In their view, this led the Tribunal to determine the issue on "speculative opinion evidence unsupported by available empirical evidence" (TREB's Memorandum of Fact and Law at para. 14).

[94] In making this submission, TREB and CREA put forward two arguments. The first is that in *Tervita SCC*, the Supreme Court held that the Commissioner had an obligation to quantify any quantifiable anti-competitive effect and that failure to do so would prevent him from relying on qualitative evidence in respect of effects which could have been quantified. Thus, in the view of TREB and CREA, anti-competitive effects can be considered qualitatively by the Tribunal only if they cannot be quantitatively estimated.

[95] TREB and CREA further say that the Tribunal erred in concluding (TR, 469 - 470) that the aforementioned principle, enunciated by the Supreme Court in *Tervita SCC* at paragraph 124 of its reasons, did not apply to a determination made under section 92 of the *Competition Act* or under subsection 79(1) thereof. In other words, they submit that the Tribunal erred in finding that the Supreme Court's holding in *Tervita SCC,* on which TREB and CREA rely, was limited to determinations under subsection 96(1).

[96] More particularly, TREB and CREA say that the rationale underlying the Supreme Court's statement of principle in *Tervita SCC* not only applies to determinations under subsection 96(1), but also to determinations arising under both section 92 and subsection 79(1).

In support of this view, they rely on that part of paragraph 124 of *Tervita SCC* which we have underlined herein below.

> [124] The Commissioner argues that quantification is not a legal prerequisite to considering anti-competitive effects (R.F., paras. 84 and 88). On the contrary, the Commissioner's legal burden is to quantify the quantifiable anti-competitive effects upon which reliance is placed. Where effects are measurable, they must be estimated. Effects will only be considered qualitatively if they cannot be quantitatively estimated. A failure to quantify quantifiable effects will not result in such effects being considered qualitatively (*Superior Propane IV*, at para. 35). This approach minimizes the degree of subjective judgment necessary in the analysis and enables the Tribunal to make the most objective assessment possible in the circumstances (*Superior Propane IV*, at para. 38). An approach that would permit the Commissioner to meet her burden without at least establishing estimates of the quantifiable anti-competitive effects fails to provide the merging parties with the information they need to know the case they have to meet.
>
> (emphasis added)

[97] TREB's and CREA's second argument is that the Tribunal should have drawn an adverse inference against the Commissioner by reason of his failure to adduce empirical evidence concerning competition on price and dynamic competition in markets (United States and Nova Scotia) where full information VOWs exist and in respect of which it was possible to measure the actual effects on competition. They say that the Commissioner deliberately decided not to perform a quantitative analysis of competition effects in these markets. More particularly, TREB and CREA argue that the Tribunal should have drawn the only inference possible resulting from the Commissioner's failure to adduce quantitative evidence, "namely that there was no substantial prevention or lessening of competition, dynamic or otherwise, that could be demonstrated on a balance of probabilities" (TREB's Memorandum of Fact and Law at para. 77).

[98] TREB and CREA then address the reasons given by the Tribunal for not drawing an adverse inference against the Commissioner, namely that the Commissioner had to be prudent

with regard to the spending of the funds under his authority and because of Dr. Vistnes' advice to the Commissioner that a study of the United States' experience would constitute a difficult and expensive endeavour that would likely not yield useful answers. (TREB and CREA say that Dr. Vistnes' testimony on this point constitutes an off the cuff response to a question posed by the Tribunal during the hearing). TREB and CREA say that the reasons given by the Tribunal for refusing to draw the adverse inference are improper and cannot be right.

[99] In our respectful view, TREB's and CREA's submissions cannot succeed. First in *Tervita SCC*, the Supreme Court did not, contrary to TREB's and CREA's assertion, make any pronouncement pertaining to section 92 of the *Competition Act* regarding the necessity of quantifying effects which could be quantified. To the contrary, at paragraph 166 of its reasons in *Tervita SCC*, the Supreme Court indicated that there was no obligation on the part of the Commissioner to quantify anti-competitive effects under section 92:

> [166] It may seem paradoxical to hold that the Tribunal was correct in finding a likely substantial prevention of competition, only to then conduct the s. 96 balancing test and find zero anti-competitive effects. However, this result merely appears paradoxical in view of the particular facts of this case. Here, as discussed above, the Tribunal was able to consider evidence as to the effect on the market of the emergence of likely competitors, whether acceptable substitutes existed, and so on. Section 93 expressly permits the consideration of these factors in and of themselves. Ordinarily, the Commissioner would also use the evidence bearing on those factors to quantify the net effect of those factors on the economy in the form of deadweight loss. However, the statutory scheme does not bar a finding of likely substantial prevention where there has been a failure to quantify deadweight loss, and thus the Commissioner's failure to do so in this case was not fatal to the s. 92 determination. By contrast, the balancing test under s. 96 does require that quantifiable anti-competitive effects be quantified in order to be considered. As such, the failure to quantify deadweight loss in this case barred consideration, under s. 96, of the quantifiable effects that supported a finding of likely substantial prevention under s. 92. In circumstances where quantifiable effects were in fact quantified, a finding of likely substantial prevention under s. 92 would be accompanied by the consideration of quantified anti-competitive effects under the s. 96 analysis.

(emphasis added)

[100] Although we agree, as a matter of logic, that the Supreme Court's rationale in *Tervita SCC* for requiring that quantifiable effects be quantified could equally be applied to determinations made under both subsection 79(1) and section 92, there can be no doubt that the Supreme Court made it clear, at paragraph 166 cited above, that the principle did not apply to section 92. That being the case, we have no choice but to hold that the principle requiring quantification of quantifiable effects cannot be applied to subsection 79(1). Had it been open to us to decide the issue afresh, we would have held that the principle applied to determinations under subsection 79(1).

[101] Consequently, TREB and CREA cannot succeed on their assertion that the Commissioner, in seeking a determination under subsection 79(1), had a legal obligation to quantify all effects which could be quantified. On the basis of *Tervita SCC*, the Commissioner did not have such an obligation.

[102] We now turn to the Tribunal's refusal to make the adverse inference against the Commissioner which TREB and CREA sought because the Commissioner had failed to provide an empirical assessment "of the incremental effect of sold and other Disputed Data in increasing a full-information VOW operator's ability to generate clients" (TR at para. 653). This submission, in our respectful view, is also without merit.

[103] To begin, we agree with the Commissioner that TREB's and CREA's argument is tantamount to arguing that the Commissioner had a legal burden to adduce quantifiable evidence. As we have just indicated, no such obligation arises under subsection 79(1).

[104] Considering that the Commissioner had no such legal obligation, he, like any other plaintiff, had to decide what evidence he had to put forward to prove his case. As we know, he chose to do so by way of qualitative evidence and in so doing, he took the risk of failing to persuade the Tribunal that the anti-competitive effects of TREB's practice resulted in a substantial prevention of competition. As it turned out, the Tribunal was persuaded by the qualitative evidence adduced by the Commissioner.

[105] We have carefully considered the case law and cannot see any basis to accept TREB's and CREA's proposition that the Tribunal ought to have drawn an adverse inference against the Commissioner for failing to conduct an empirical assessment of markets in the United States and in Nova Scotia, or for that matter in the GTA. That, in our respectful view, would be akin to giving the Tribunal the power to dictate to the Commissioner how he should present his case. There is no authority for such a proposition.

[106] We agree with TREB and CREA in one respect. Had there been a valid basis to draw an adverse inference against the Commissioner, the reasons for refusing to draw the inference given by the Tribunal would clearly not have withstood scrutiny. The fact that the Commissioner has limited funds to spend may be a reality, but it is of no relevance to a determination of whether or not an adverse inference should be made. As to Dr. Vistnes' view with regard to the utility and

cost of producing an empirical assessment, that, in our view, is also an irrelevant consideration. Whether the study would have been useful is a matter which the Tribunal would have had to appreciate and determine. It was clearly not up to Dr. Vistnes to make that determination. In any event, it is doubtful that Dr. Vistnes could provide that opinion to the Tribunal as it does not appear in his expert reports. However, as we are satisfied that there was no basis to draw the inference sought by TREB and CREA, the reasons given by the Tribunal, even though misguided, are of no consequence.

[107] Additionally, it should be remembered that in *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4 at paragraph 73, [2001] 1 S.C.R. 221, the Supreme Court made the following point: "Whether or not an adverse inference is warranted on particular facts is bound up inextricably with the adjudication of the facts" (see also *Benhaim v. St-Germain*, 2016 SCC 48 at para. 52, [2016] 2 S.C.R. 352). Thus, the Tribunal's refusal to draw an inference against the Commissioner is subject to the standard of reasonableness. We see no basis to conclude that the Tribunal's refusal to draw the inference is unreasonable.

[108] TREB and CREA make a further submission regarding the Tribunal's determination that the prevention of competition was substantial. They say that, in any event, it was an error for the Tribunal to rely on evidence which they characterize as speculative qualitative evidence. At paragraph 75 of its Memorandum of Fact and Law, TREB defines quantitative evidence as "empirical evidence of the actual effect of certain impugned acts on competition in an existing real estate market" and defines qualitative evidence as "a reference essentially to opinion and

anecdotal evidence of what might happen in the market if certain acts are permitted or not permitted”.

[109] More particularly (the argument which we now explain is one put forward mainly by CREA), they make four points. First, they say that the Tribunal erred in concluding, on the basis of statements made by brokers to the effect that they needed the disputed data in their VOWs so as to improve their offerings to the public and that their clients, i.e. buyers and sellers, valued the opportunity of accessing the disputed data on their VOWs, that the availability of the disputed data would result in a substantial incremental competition benefit.

[110] In TREB’s and CREA’s view, the Tribunal’s conclusion on substantiality which results from its finding with respect to the anti-competitive effects of TREB’s practice was tantamount to reading out the word “substantial” from the statutory provision. They say that, at best, the aforementioned witness statements constitute evidence of “an effect” on competition but clearly not of a substantial incremental competition benefit arising from the availability of the disputed data on the VOWs.

[111] Second, TREB and CREA say that it was an error on the part of the Tribunal to find, on the basis of the evidence of William McMullin, that Viewpoint was prevented from entering the GTA market because of the unavailability of the disputed data. They say that Mr. McMullin’s evidence on this point, in light of the overall evidence, was not credible adding that, in any event, the Tribunal erred in finding that Viewpoint’s entry into the GTA would have had a substantial competitive effect considering that Viewpoint was less competitive (if one considers

Viewpoint's commission rates and lack of rebates) in terms of price than other brokerages such as Realosophy and TheRedPin.

[112] Third, TREB and CREA say that the Tribunal made a further error in finding that the Commissioner had met his burden of proof on the basis of qualitative benefits asserted by brokers when the evidence showed that brokers operating in the GTA with VOWs fed by TREB's VOW data feed (i.e. without the disputed data) were equally or more competitive than brokers operating on a data feed that included some of the disputed data.

[113] Fourth, TREB and CREA say that the Tribunal also erred in finding that a substantial prevention of competition had been demonstrated by the Commissioner because there was a lack of evidence showing a link between the success of brokerages such as Redfin and Viewpoint and the availability of the disputed data in a VOW. In making this point, TREB and CREA argue that it was clear from the evidence that there was no causal relationship between being able to convert website users into clients and the availability of the disputed data on one's VOWs.

[114] TREB and CREA conclude on this point by saying that the evidence regarding conversion rates was extremely important because the purpose of designing attractive websites was to convert viewers into clients.

[115] TREB and CREA also point out that after finding that the evidence regarding conversion rates did not support the Commissioner's case, the Tribunal downplayed the importance of conversion rates on the basis of Dr. Vistnes' opinion that local differences in the markets under

consideration probably explained why the conversion rates were low. TREB and CREA say that there was no evidence of these local differences before the Tribunal on which Dr. Vistnes could give the opinion that he gave. Dr. Vistnes' opinion, in their view, was entirely speculative.

[116] Finally, TREB and CREA conclude their arguments regarding conversion rates by saying that even though the Tribunal refused to give any weight to the evidence showing low conversion rates, it nonetheless found, at paragraph 676 of its reasons, that if the disputed data was made available on TREB's data feed, web based brokerages would likely be successful in converting "an increasing and significant number of website users into clients".

[117] To place TREB's and CREA's arguments in perspective, it is important to point out that the Tribunal understood the difference in nature between quantitative and qualitative evidence and that it recognized that it was more difficult for the Commissioner to prove his case on the basis of mostly qualitative evidence. The Tribunal indicated that in a case like the one before it, which pertained mostly to dynamic competition, it was inevitable that the Commissioner would have to rely on qualitative evidence in the form of business documents, witness statements, and testimonies, adding, however, that it remained the Commissioner's burden to prove his case on a balance of probabilities (TR at paras. 469 - 471).

[118] On the basis of the qualitative evidence put forward by the Commissioner and in particular on the basis of the witness statements and testimonies of the persons referred to at paragraph 76 of these reasons, namely Messrs. McMullin, Hamidi, Gidamy, Silver, Enchin, Prochazka, Desai, and Pasalis, the Tribunal made findings of a number of anti-competitive

effects caused by the VOW restrictions. In each case, the Tribunal found both that an anti-competitive effect existed and emphasized the relative significance of that effect as follows:

- The prevention of a considerably broader range of broker services in the GTA (TR at para. 583)
- The prevention of an increase in the quality of these services in a significant way (TR at para. 598)
- The prevention of the advent of considerably more innovation (TR at para. 616)
- The significant adverse impact on entry into, and expansion within the relevant market (TR at para. 550)

[119] It was the Tribunal's opinion that "but for" the VOW restrictions these anti-competitive effects would be considerably lower. At paragraph 702 of its reasons, the Tribunal concluded that when considered in the aggregate, these anti-competitive effects on non-price dimensions amounted to a substantial prevention of competition.

[120] In other words, the Tribunal held that the ultimate consequence of the anti-competitive effects found to exist was the maintenance of TREB and its members' collective market power in respect of residential brokerage services in the GTA (TR at para. 709) and that failing an order on its part, that market power would likely continue (TR at para. 712).

[121] In our view, TREB's and CREA's arguments regarding the Tribunal's reliance on qualitative evidence are without merit.

[122] First, it is clear that most of the points which TREB and CREA make on this issue are to the effect that many of the Tribunal's crucial findings are not supported by the evidence. This is

particularly so in regard to their criticism of Mr. McMullin's evidence and in regard to Viewpoint's entry into the GTA. Although we have some misgivings in regard to a number of the findings made by the Tribunal, it must be remembered that these findings result from the Tribunal's assessment of the evidence before it. The same goes with respect to the weight which the Tribunal gave to that evidence. As we have already indicated, TREB and CREA, not having sought leave to challenge questions of fact on this appeal, cannot pursue this line of attack. TREB and CREA, without so saying, are inviting us to reassess the evidence before the Tribunal and to make different findings. We clearly cannot do so. Further, as this Court indicated in *Nadeau Poultry Farm* at paragraph 47, parties cannot "under cover of challenging a question of mixed fact and law, revisit the Tribunal's factual conclusions".

[123] Second, it is also important to repeat that TREB and CREA do not challenge the admissibility of the statements nor of the testimonies given by the lay witnesses upon which the Tribunal relies for its findings.

[124] Third, in our respectful opinion, the underlying premise behind TREB's and CREA's challenge on this point is that qualitative evidence without quantified evidence, which they say was available to the Commissioner, should not be considered nor given any weight. We have already determined that this premise is not well founded.

[125] We agree, however, with TREB and CREA that the evidence pertaining to conversion rates does not support the Commissioner's case. Had the conversion rates been the determinative factor in this appeal, we would have intervened. We cannot see how the Tribunal can say, as it

does at paragraph 676 of its reasons, that if Viewpoint and others could use the disputed data they would be in a position "to convert an increasing and significant number of website users into clients". The Tribunal's findings on conversion rates, which appear at paragraphs 653, 657, 658, and 664 of their reasons, show that the evidence before it did not support the Commissioner's case.

[126] However, as the Commissioner argues, the Tribunal, although recognizing that conversion rates were low, made the point that his application was primarily concerned with dynamic competition and innovation and that, in the absence of quantifiable evidence on point, it had no choice but to determine the matter on the evidence before it, mostly qualitative evidence. More particularly, at paragraph 662 of its reasons, the Tribunal indicated in no uncertain terms that the additional innovation developed by full information VOW brokerages was not only helpful in their attempts to compete but was "forcing traditional brokers to respond" to this new type of competition.

[127] We are therefore satisfied that in relying on qualitative evidence for its findings of anti-competitive effects and its ultimate conclusion on substantiality, the Tribunal made no reviewable error. Consequently, we have not been persuaded, in light of the Tribunal's findings and of the applicable test, that there is any basis for us to interfere with the Tribunal's determination under paragraph 79(1)(*c*) of the *Competition Act*.

[128] We now turn to the second issue raised by this appeal.

C. *Privacy*

[129] TREB sought to justify its restriction on disclosure of the disputed data on the basis that the privacy concerns of vendors and purchasers constituted a business justification sufficient to escape liability under paragraph 79(1)(*b*) of the *Competition Act*. TREB asserted that privacy was integral to its business operations; more specifically, privacy was an aspect of maintaining the reputation and professionalism of its members, central to the interests of purchasers and sellers and to the cooperative nature and efficiency of the MLS system.

[130] TREB also asserted that it was required, as a matter of law, to comply with *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (*PIPEDA*). It contended that this statutory requirement constituted a business justification, separate and apart from any question of the underlying motive TREB may have had for the VOW Policy and its anti-competitive effects. Characterized differently, having concluded that the policy was not motivated by subjective privacy concerns, the Tribunal was nevertheless obligated to continue and also determine, one way or another, whether the policy was mandated by *PIPEDA*. Had the Tribunal considered the consents in light of the requirements of *PIPEDA*, it would have found them lacking, and insufficient to authorize disclosure. This would lead, in TREB's submissions, to the conclusion that the restrictions on disclosure were necessary to comply with the legislation and constitute a business justification.

(1) The Tribunal's Decision

[131] In considering privacy as a business justification under paragraph 79(1)(*b*), the Tribunal found that the "principal motivation in implementing the VOW Restrictions was to insulate its

members from the disruptive competition that [motivated] Internet-based brokerages”. It concluded that there was little evidentiary support for the contention that the restrictions were motivated by privacy concerns of TREB’s clients. The Tribunal also found scant evidence that, in the development of the VOW Policy, the VOW committee had considered, been motivated by, or acted upon privacy considerations (TR at para. 321). The privacy concerns were “an afterthought and continue to be a pretext for TREB’s adoption and maintenance of the VOW Restrictions” (TR at para. 390).

[132] The Tribunal found the business justification argument simply did not mesh with the evidence. At paragraphs 395 to 398 of its reasons, the Tribunal observed that it was “difficult to reconcile” TREB’s privacy arguments with the fact that the disputed data was made available to:

- All 42,500 TREB members via its Stratus system;
- The members of most other Ontario real estate boards through the data sharing program CONNECT;
- Clients of all TREB members and clients of members of most other Ontario real estate boards;
- Some appraisers;
- Third party industry stakeholders including CREA, Altus Group Limited, the CD Howe Institute, and Interactive Mapping Inc. (albeit for confidential use); and
- Customers via email subscription services or regular emails sent by members.

[133] Further, the Tribunal noted that for many months TREB did nothing regarding two brokers who displayed the disputed data in apparent violation of TREB’s policy (TR at paras. 372 - 374). It observed that few clients had reported concerns to TREB about their data being

displayed and distributed online (TR at paras. 386 -387) and that TREB did not produce evidence to support its allegation that including the disputed data in the data feed would push consumers away from using MLS-based services (TR at para. 423).

[134] Additionally, agents were entitled to, and routinely did, distribute detailed seller information, including sold prices, to their own clients without any restriction on further dissemination. Moreover, TREB's own intranet system enables TREB's members to forward by email up to 100 sold listings at a time to anyone (TR at para. 398).

[135] The Tribunal found no evidentiary foundation to support the assertion that the policy was genuinely motivated by a concern about compliance with *PIPEDA*. Although the need to abide by *PIPEDA* was mentioned in the testimony of TREB's Chief Executive Officer, the Tribunal noted the absence of evidence from TREB's Board of Directors, its Chief Privacy Officer or its Chief Information Officer, which would support the conclusion that compliance with *PIPEDA* necessitated the policy (TR at paras. 378 - 379).

[136] The Tribunal noted that while TREB implemented its privacy policy in 2004 and had appointed a Chief Privacy Officer, there was no evidence that the VOW Policy was directed towards compliance. TREB's only contact with the Privacy Commissioner was to ask for an opinion on a different document (a "Questions and Answers" document addressing a number of privacy related topics) in August 2012. These did not include questions related to the disputed data, and, in any event, these communications took place only after the VOW Policy and Rules were set (TR at paras. 375 - 376).

[137] The Tribunal also noted at paragraph 407 of its reasons that Mr. Richardson, the CEO of TREB during the relevant time, operated on the assumption that the wording in the consents in the Listing Agreement was sufficient to permit disclosure.

[138] In argument, TREB pointed to a 2009 decision of the Privacy Commissioner which held that an advertisement which said that a property sold at 99.3% of the list price contravened *PIPEDA* because it allowed the public to calculate the selling price. The Office of the Privacy Commissioner held that the exception for publicly available information did not apply because the information was obtained under the purchase agreement to which the salesperson was not privy and was not actually drawn from the Ontario registry or any source accessible to the public (TR at para. 388).

[139] The Tribunal rejected TREB's assertion that this decision influenced the VOW Policy. It noted that, with two exceptions (the meetings of May 12 and May 20, 2011), privacy concerns were not reflected in the minutes or discussion pertaining to the development of the VOW Policy (see e.g. TR at para. 351). It concluded that privacy considerations were an *ex post facto* attempt to justify the policy.

[140] The Tribunal then considered CREA's argument that consumers were concerned about their property information being disclosed on a public website. The Tribunal concluded that the evidence was very limited and not persuasive (TR at para. 776).

[141] The Tribunal then examined the consent clauses contained in the Listing Agreement and concluded that the consents permitted the disclosure of the data. This point will be expanded upon below.

(2) Burden of Proof

[142] Before turning to the substance of this issue, the parties raise a point concerning the burden of proof.

[143] The Commissioner and TREB agree that TREB is bound by the provisions of *PIPEDA*. However, TREB contends that it was the Commissioner's burden to disprove TREB's assertion that the VOW Policy was required by *PIPEDA*. We do not agree. Neither this contention, nor the law, shifts the legal or evidentiary burden to the Commissioner to disprove the assertion that the policy is necessary as a matter of regulatory compliance.

[144] The normal evidentiary burden applies. The party who asserts must prove: *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para. 30, [2008] 2 S.C.R. 420. TREB has offered no compelling reason as to why this principle should not apply in respect of a business justification under section 79. In consequence, if TREB seeks to establish that regulatory compliance would be compromised, the onus is on it to lead the relevant evidence as part of its evidentiary burden, and to establish the consequential legal conclusions as part of its argument.

(3) A Business Justification was not Established

[145] To begin, we reject the argument that the Tribunal did not consider the possibility that independent of motivation, regulatory compliance with *PIPEDA* could constitute a justification. Having reviewed the law, the Tribunal concluded that the business justification analysis was "subject to the important caveat that legal considerations, such as privacy, may provide a legitimate justification for an impugned practice" (TR at para. 302).

[146] However, earlier in its reasons, the Tribunal wrote that "legal considerations, such as privacy laws, [may] legitimately justify an impugned practice, provided that the evidence supports that the impugned conduct was primarily motivated by such considerations" (TR at para. 294). We appreciate TREB's point that the Tribunal's reasons on this issue are equivocal. In our view, to the extent that the Tribunal required regulatory compliance to be the motivation behind the VOW Policy, it did so in error. If it can be established that a business practice or policy exists as a matter of a statutory or regulatory requirement, whether compliance was the original or seminal motivation for the policy is of no consequence.

[147] This does not, however, eliminate the burden on the corporation to establish a factual and legal nexus between that which the statute or regulation requires and the impugned policy.

[148] In order to establish a business justification within the meaning of paragraph 79(1)(*b*) of the *Competition Act*, a party must establish "a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts": *Canada Pipe* at para. 73. Proof of a

"valid business justification … is not an absolute defence for paragraph 79(1)(b)"; it must provide an explanation why the dominant corporation engaged in the allegedly anti-competitive conduct: *Canada Pipe* at paras. 88 - 91. As this Court explained in *Canada Pipe* at paragraph 87:

> [87] …A business justification for an impugned act is properly relevant only insofar as it is pertinent and probative in relation to the determination required by paragraph 79(1)(*b*), namely the determination as to whether the purpose for which the act was performed was a predatory, exclusionary or disciplinary negative effect on a competitor. … [A] valid business justification can, in appropriate circumstances, overcome the deemed intention arising from the actual or foreseeable negative effects of the conduct on competitors, by demonstrating that such anti-competitive effects are not in fact the overriding purpose of the conduct in question. In this way, a valid business justification essentially provides an alternative explanation as to why the impugned act was performed, which in the right circumstances might be sufficient to counterbalance the evidence of negative effects on competitors or subjective intent in this vein.

[149] In sum, two facts must be established before an impugned practice can shelter behind paragraph 79(1)(*b*). First, there must be a credible efficiency or pro-competitive rationale for the practice. Second, the efficiencies or competitive advantages, whether on price or non-price issues, must accrue to the appellant. Put otherwise, the evidence must demonstrate how the practice generates benefits which allow it to better compete in the relevant market.

[150] The Tribunal assessed the evidence before it according to the correct principles and found it lacking. The Tribunal concluded that TREB was motivated by a desire to maintain control over the disputed data in an effort to forestall new forms of competition, and not by any efficiency, pro-competition, or genuine privacy concerns (TR at paras. 369, 389 - 390). It was fair for the Tribunal to consider that, had regulatory compliance been a concern, there would have been evidence of such communications. It concluded that there was "no evidence" that TREB's

privacy policies received much, if any, consideration during the development of TREB's VOW Policy and Rules.

[151] The evidence, some of which we have summarized earlier, is compelling. As leave to challenge these findings was not sought, the Tribunal's conclusion that there were no pro-competitive business or efficiency justifications for the policy is reasonable and will not be disturbed. This sets the stage for TREB's second and, we believe, principal argument.

(4) Privacy Obligations under *PIPEDA*

[152] TREB submits that the Tribunal erred in failing to engage in a stand-alone assessment of TREB's responsibilities under *PIPEDA* regarding the collection and use of personal information.

[153] In its reasons, the Tribunal considered *PIPEDA* and whether its requirements mandated the policy. In this regard, it looked at the extent to which TREB engaged with the Privacy Commissioner and considered the provisions of *PIPEDA*. It also examined the nature and scope of the consent clause in the Listing Agreement. It proceeded on the understanding that the data was confidential and then considered the scope and effect of the consents governing its use. It concluded that the consents were effective.

[154] In our view, the role of the Tribunal was to interpret the scope of the consents under the ordinary law of contract, as informed by the purpose and objectives of *PIPEDA*. This is what it did, and we find no error in the conclusion reached.

(a) *The Standard of Review*

[155] As a preliminary matter, we consider that in reviewing the consent in the Listing Agreements, the Tribunal was interpreting a standard form contract. As such, the standard of review is correctness.

[156] Generally speaking, contractual interpretation involves questions of mixed law and fact and, thus, is reviewable on a deferential standard: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 50, [2014] 2 S.C.R. 633 (*Sattva*). The interpretation of standard form contracts is an exception to this rule. Their interpretation constitutes a question of law and, thus, is reviewable for correctness: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 46, [2016] 2 S.C.R. 23 (*Ledcor*). Determining the interplay between a statutory provision and a contractual term is also an exception and is reviewable for correctness: *Canada (Office of the Information Commissioner) v. Calian Ltd.*, 2017 FCA 135 at para. 37, 414 D.L.R. (4th) 165 (*Calian*). Statutory rights of appeal do not necessarily convert a reasonableness standard to a correctness one–it depends on the exact language of the legislative provision: *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at para. 31, [2016] 2 S.C.R. 293.

[157] MLS Rules specify that brokers cannot change or delete any part of clause 11 of the Listing Agreement (Rule 340). The *Frequently Asked Privacy Questions* provided by CREA states that "[b]oth current and historical data is essential to the operation of the MLS® system and by placing your listing on the MLS® system you are agreeing to allow this ongoing use of

listing and sales information”. The Listing Agreement is, at least for the purposes of these proceedings, a contract of adhesion or standard form.

(b) *The Consents*

[158] *PIPEDA* requires that individuals consent to the collection, use, and disclosure of their personal information (sch. 1, clause 4.3.1). This consent must be informed (sch. 1, clause 4.3.2). Amendments in 2015 to this principle specified that for consent to be informed, the person must understand the “nature, purpose and consequences of the collection, use or disclosure of the personal information” (s. 6.1).

[159] As noted earlier, the Tribunal proceeded on the basis that the sale price of property is personal information and therefore subject to the terms of *PIPEDA*, which mandates informed consent to the use of personal information.

[160] While the Listing Agreement used by TREB provides consent to some uses of personal information, TREB asserts that had the Tribunal examined it more closely, it would have found that the Listing Agreement did not provide sufficiently specific wording to permit disclosure of personal information in the VOW data feed. Specifically, TREB contends that the consents do not permit the distribution of the data over the internet, and that is qualitatively different from the distribution of the same information by person, fax, or email.

[161] The Listing Agreement contains a clause governing the “Use and Distribution of Information”. TREB focuses on the consent to the collection, use, and disclosure of information

for the purpose of listing and marketing of the Property itself but omits that part of the consent (in the same clause) that says the real estate board may "make such other use of the information as the Brokerage and/or real estate board(s) deem appropriate, in connection with the listing, marketing and selling of real estate during the term of the listing and thereafter." The Commissioner contends that this latter part of the consent (in the same clause) is the pertinent part and that it is sufficient to permit the ongoing use and disclosure of information, even after the listing is no longer active. We agree with the Commissioner's position.

[162] The Tribunal had before it the Listing Agreements used from 2003 to 2015. Although there is data in the MLS database dating back to 1986, Listing Agreements prior to 2003 were not before the Tribunal or this Court. Therefore, this Court expresses no opinion regarding the information obtained prior to 2003 or any information that may have entered the database without being subject to the 2003 to 2015 Listing Agreements.

[163] The Listing Agreement was created by the Ontario Real Estate Association and recommended by TREB to its members (TR at para. 64). In the most recent version before the Court, the relevant section of the Use and Distribution of Information clause reads:

> The Seller acknowledges that the database, within the board's MLS System is the property of the real estate board(s) and can be licensed, resold, or otherwise dealt with by the board(s). The Seller further acknowledges that the real estate board(s) may, during the term of the listing and thereafter, distribute the information in the database, within the board's MLS System to any persons authorized to use such service which may include other brokerages, government departments, appraisers, municipal organizations and others; market the Property, at its option, in any medium, including electronic media; during the term of the listing and thereafter, compile, retain and publish any statistics including historical data within the board's MLS System and retain, reproduce and display photographs, images, graphics, audio and video recordings, virtual tours, drawings, floor plans,

> architectural designs, artistic renderings, surveys and listing descriptions which may be used by board members to conduct comparative analyses; and make such other use of the information as the Brokerage and/or real estate board(s) deem appropriate, in connection with the listing, marketing and selling of real estate during the term of the listing and thereafter.
>
> (emphasis added)

[164] The wording in the Listing Agreements from 2003 onwards is substantially similar to that quoted above. However, the phrase "during the term of the listing and thereafter" (underlined above), first appears in 2012. The Use and Distribution of Information clause in the Listing Agreement is broad and unrestricted. Sellers are informed that their data could be used for several purposes: for distribution in the database to market their house; to compile, retain, and publish statistics; for use as part of comparative market analysis; and any other use in connection with the listing, marketing, and selling of real estate. Nothing in the text implies the data would only be used during the time the listing is active. Indeed, the use of data for historical statistics of selling prices necessitates that the data will be kept. The Tribunal noted that TREB's policies 102 and 103 add that, apart from inaccurate data, "[n]o other changes will be made in the historical data" (TR at para. 401). We note as well that clause 11 of the Listing Agreement allows for the property to be marketed "using any medium, including the internet".

[165] *PIPEDA* only requires new consent where information is used for a new purpose, not where it is distributed via new methods. The introduction of VOWs is not a new purpose–the purpose remains to provide residential real estate services and the Use and Distribution of Information clause contemplates the uses in question. The argument that the consents were insufficient–because they did not contemplate use of the internet in the manner targeted by the VOW Policy–does not accord with the unequivocal language of the consent.

(c) *Conduct of the Parties*

[166] The conduct of the parties may be considered in the interpretation of a contract. Given our conclusion as to the correct interpretation of the consents, it is not necessary to consider the contextual elements or conduct of the parties. However, we choose to do so here because it illuminates and reinforces our conclusion arising from the terms of the contract itself.

[167] In *Sattva*, the Supreme Court of Canada stated that, with some limitations, a contract's factual matrix includes "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable [person]" (*Sattva* at para. 58 citing *Investors Compensation Scheme v. West Bromwich Building Society* (1997), [1997] UKHL 28, [1998] 1 All E.R. 98 at 114). Thus, the conduct of the parties forms part of the factual matrix of the contract and can, subject to some restrictions, inform the interpretation of its terms.

[168] The extent to which the factual matrix, including the parties' conduct, may inform the interpretation is subject to the "overwhelming principle" (formulated in *Sattva*, but characterized as such in *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 55, 411 D.L.R. (4th) 385 (*Teal Cedar*)). There are two elements to the overwhelming principle. The factual matrix cannot be given excessive weight (so as to "overwhelm" the contract); and the factual matrix cannot be interpreted in such isolation from the text of the contract such that a new agreement is effectively created (*Sattva* at para. 57; *Teal Cedar* at paras. 55 - 56, 62).

[169] In *Calian*, this Court observed that "the clear language of a contract must always prevail over the surrounding circumstances" (*Calian* at para. 59). Further, the factual matrix may only be

considered to the extent that it helps determine the "mutual and objective intentions of the parties as expressed in the words of the contract" (*Sattva* at para. 57). Indeed, only evidence revealing "knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting" may inform the interpretation of the contract (*Sattva* at para. 58). For example, the subjective intention of one party cannot be relied upon to interpret the meaning of a contract (*Sattva* at para. 59; *ING Bank N.V. v. Canpotex Shipping Services Ltd.*, 2017 FCA 47 at paras. 112, 121, 277 A.C.W.S. (3d) 281 (*ING Bank*)). Reliance of that sort would offend the parol evidence rule, i.e., that evidence external to the contract that would "add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing" is inadmissible (*Sattva* at para. 59; *ING Bank* at paras. 112, 121).

[170] As far as standard form contracts are concerned, the factual matrix is less relevant (*Ledcor* at paras. 28, 32). This is in keeping with the rationale underlying the correctness standard for standard form contracts: that contracts of this nature are not negotiated, but rather offered on a "take-it-or-leave-it" basis. However, in *Ledcor* Wagner J. observed at paragraph 31 that some surrounding circumstances, such as the purpose of the contract, the nature of the relationship it creates, and the market or industry in which it operates, may be considered:

> [31] I agree that factors such as the purpose of the contract, the nature of the relationship it creates, and the market or industry in which it operates should be considered when interpreting a standard form contract. However, those considerations are generally not "inherently fact specific": *Sattva*, at para. 55. Rather, they will usually be the same for everyone who may be a party to a particular standard form contract. This underscores the need for standard form contracts to be interpreted consistently, a point to which I will return below.

[171] Applying these principles to the facts as found by the Tribunal, there is nothing in the evidence that would suggest that TREB considered that the consents were inadequate or that TREB drew a distinction between the means of communication of information. To the contrary, TREB's conduct, as well as the testimony of its CEO, are only consistent with the conclusion that it considered the consents were sufficiently specific to be compliant with *PIPEDA* in the electronic distribution of the disputed data on a VOW, and that it drew no distinction between the means of distribution.

[172] We note as well that TREB's position that *PIPEDA* mandates the VOW Policy is inconsistent with some of its own evidence. For example, TREB refused a request by a seller to remove the seller's MLS listing information, noting that its policy respected *PIPEDA* requirements (TR at para. 400).

[173] The Tribunal also noted that TREB sought legal advice with respect to whether the consents were adequate to address the privacy issues related to the posting of photographs of the interior of homes, and, consequentially changed the consent to provide express authorization with respect to images. There was no evidence that similar steps were contemplated or taken with respect to the sold or pending sold information. Similarly, TREB sought legal advice with respect to the provision of sold data to members. That advice noted that "a strong argument can be made that the words 'conduct comparative market analyses'" in the consents authorised disclosure of selling price information to prospective clients.

[174] Finally, the Tribunal's view on the scope of consents is consistent with the direction of the Supreme Court of Canada in *Royal Bank of Canada v. Trang*, 2016 SCC 50 at paras. 36 - 42, [2016] 2 S.C.R. 412. There the Court held that a mortgage balance was less sensitive information because the principal, the rate of interest, and due dates were all publicly available under provincial land registry legislation. In this case, the selling price of every home in Ontario is publicly available under the same legislation. When the consents are considered in light of the nature of the privacy interests involved, the Tribunal's conclusion that they were sufficient takes on added strength.

[175] This ground of appeal therefore fails and we now turn to the last issue raised by the appeal.

D. *Copyright in the MLS Database*

[176] TREB and CREA submit that the Tribunal erred in finding that TREB does not have copyright in the database. In our view this ground of appeal fails. In light of the determination that the VOW Policy was anti-competitive, subsection 79(5) of the *Competition Act* precludes reliance on copyright as a defence to an anti-competitive act. This is sufficient to dispose of the appeal in respect of copyright.

[177] While not strictly necessary to do so, we will address CREA's contention that the Tribunal applied the incorrect legal test to determine whether copyright exists. On this point we agree. It is, however, an error of no consequence. The same result is reached on the application of the correct law.

[178] We turn to the Subsection 79(5) issue. Subsection 79(5) of the *Competition Act* provides:

Exception	**Exception**
79 (5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.	**79** (5) Pour l'application du présent article, un agissement résultant du seul fait de l'exercice de quelque droit ou de la jouissance de quelque intérêt découlant de la *Loi sur les brevets*, de la *Loi sur les dessins industriels*, de la *Loi sur le droit d'auteur*, de la *Loi sur les marques de commerce*, de la *Loi sur les topographies de circuits intégrés* ou de toute autre loi fédérale relative à la propriété intellectuelle ou industrielle ne constitue pas un agissement anti-concurrentiel.

[179] Subsection 79(5) seeks to protect the rights granted by Parliament to patent and copyright holders and, at the same time, ensure that the monopoly and exclusivity rights created are not exercised in an anti-competitive manner. The language of subsection 79(5) is unequivocal. It does not state, as is contended, that any assertion of an intellectual property right shields what would otherwise be an anti-competitive act.

[180] Parliament clearly signaled, through the use of the word "only", to insulate intellectual property rights from allegations of anti-competitive conduct in circumstances where the right granted by Parliament, in this case, copyright, is the sole purpose of exercise or use. Put otherwise, anti-competitive behaviour cannot shelter behind a claim of copyright unless the use or protection of the copyright is the sole justification for the practice.

[181] TREB attached conditions to the use of its claimed copyright rights in the disputed data. For the reasons given earlier, we see no error in the Tribunal's findings as to the anti-competitive purpose or effect of the VOW Policy. The Tribunal found that the purpose and effect of those conditions was to insulate members from new entrants and new forms of competition. The purpose, therefore, of any asserted copyright was not "only" to exercise a copyright interest.

[182] While this is sufficient to dispose of this ground of appeal, as noted earlier, we will, for the sake of completeness, address the second alleged error in the Tribunal's analysis of copyright.

[183] Copyright is a creature of statute. The *Copyright Act* provides that copyright exists for "every original literary, dramatic, musical and artistic work" created by Canadians (section 5). This phrase is defined at section 2 to include compilations, which is in turn defined to include works "resulting from the selection or arrangement of data". The classification of the database as a compilation is not contested on appeal.

[184] The meaning of the word "original" in section 5 of the Copyright Act was considered by the Supreme Court in *CCH Canadian Ltd v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 [*CCH*]:

> [16] … For a work to be "original" within the meaning of the Copyright Act, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and

> judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an "original" work.

[185] The point of demarcation between a work of sufficient skill and judgment to warrant a finding of originality and something less than that – a mere mechanical exercise – is not always self-evident. This is particularly so in the case of compilations. It is, however, within the parameters of the legal test, a highly contextual and factual determination.

[186] This is not a new observation. In *Édutile Inc v. Automobile Protection Assn.*, [2000] 4 F.C. 195, 6 C.P.R. (4th) 211, (F.C.A.) the Court acknowledged that "[i]t is not easy in compilation situations to draw a line between what signifies a minimal degree of skill, judgment and labour and what indicates no creative element" (at para. 13). Although decided before *CCH*, the observation remains apposite.

[187] There is, however, guidance in the case law as to the criteria relevant to the determination of whether the threshold of originality is met. In *Red Label Vacations Inc. v. 411 Travel Buys Ltd.*, 2015 FC 18, 473 F.T.R. 38, Manson J. noted that "when an idea can be expressed in only a limited number of ways, then its expression is not protected as the threshold of originality is not met" (at para. 98, citing *Delrina Corp. (cob Carolian Systems) v. Triolet Systems Inc.*, 58 O.R. (3d) 339 at paras. 48–52, 17 C.P.R. (4th) 289, leave to appeal to S.C.C. refused, 29190 (28 November, 2002)).

[188] In *Tele-Direct* the Court found a compilation not to be original in part because it was done in accordance with "commonplace standards of selection in the industry" (paras. 6 - 7). Although *Tele-Direct* predates *CCH*, the proposition that industry standards may be relevant to the originality analysis is a legitimate, residual consideration (see e.g. *Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2011 FC 340 at paras. 34, 39, 65, 77, 182–188, 92 C.P.R. (4th) 6, aff'd 2012 FCA 226 at paras. 37–38, 107 C.P.R. (4th) 1 (*Harmony* FCA); *Geophysical Service Inc. v Encana Corp.*, 2016 ABQB 230 at para. 105, 38 Alta. L.R. (6th) 48 (*Geophysical*)).

[189] Applying the guidance of the Supreme Court in *CCH*, it is important to view adherence to industry standards as, at best, one factor to be considered amongst many. In. *Geophysical*, Eidsvik J. explained there is no steadfast rule that "there is no entitlement to copyright protection … where the selection or arrangement is directed by accepted and common industry practices" (at paras. 100–101):

> … these cases [that considered "common industry practices"] do not stand for such steadfast rules or copyright criteria. Certainly, these considerations were part of the analysis in those cases in deciding whether the production was an original work, but they are not the test. The judge in each case made a factual determination about whether sufficient skill and judgment was brought to the work to merit the "original" finding.

[190] However, if observing industry standards amounts merely to "mechanical amendments", originality will not be found (*Harmony* FCA at para. 37).

[191] In *Distrimedic Inc. v. Dispill Inc.*, 2013 FC 1043, 440 F.T.R. 209, de Montigny J. (as he then was) wrote that "when the content and layout of a form is largely dictated by utility and/or

legislative requirements, it is not to be considered original" (at para. 324). He continued and observed that compilations

> will not be considered to have a sufficient degree of originality when the selection of the elements entering into the work are dictated by function and/or law, and where their arrangement into a tangible form of expression is not original. Only the visual aspect of the work is susceptible to copyright protection, if original (at para. 325).

[192] In this context, TREB and CREA argue that the Tribunal wrongly required proof of creativity and went beyond the appropriate test for originality. After reviewing the MLS database, the Tribunal noted the "absence of a creative element" (TR at para. 732). Further, while the Tribunal cited *CCH* for the correct originality test in paragraph 733, it then relied on *Tele-Direct* to invoke and apply the element of creativity which, post-*CCH*, is not the correct test (*CCH* at para. 25).

[193] We agree with the appellants on this point. However, in view of the Tribunal's findings of fact, applying the correct test, we reach the same result.

[194] The Tribunal considered a number of criteria relevant to the determination of originality (paragraphs 737 - 738 and 740 - 745). Those included the process of data entry and its "almost instantaneous" appearance in the database. It found that "TREB's specific compilation of data from real estate listings amounts to a mechanical exercise" (TR at para. 740). We find, on these facts, that the originality threshold was not met.

[195] In addition, we do not find persuasive the evidence that TREB has put forward relating to the use of the database. How a "work" is used casts little light on the question of originality. In

addition, we agree with the Tribunal's finding that while "TREB's contracts with third parties refer to its copyright, but that does not amount to proving the degree of skill, judgment or labour needed to show originality and to satisfy the copyright requirements" (TR at para. 737).

[196] We would therefore dismiss this ground of appeal.

VI. Conclusion

[197] For the reasons above, we would dismiss the appeal with costs.

"M Nadon"
J.A.

"Donald J. Rennie"
J.A.

"I agree.
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-174-16

(STATUTORY APPEAL FROM A DECISION OF THE COMPETITION TRIBUNAL (2016 COMP. TRIB. 7) DATED APRIL 27, 2016, FILE NUMBER: CT-2011-003, REGISTRY DOCUMENT NUMBER: 385)

STYLE OF CAUSE:	THE TORONTO REAL ESTATE BOARD v. COMMISSIONER OF COMPETITION AND THE CANADIAN REAL ESTATE ASSOCIATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 5, 2016
REASONS FOR JUDGMENT BY:	NADON J.A. RENNIE J.A.
CONCURRED IN BY:	NEAR J.A.
DATED:	DECEMBER 1, 2017

APPEARANCES:

William V. Sasso	FOR THE APPELLANT
Jacqueline Horvat	FOR THE APPELLANT
Carol Hitchman	FOR THE APPELLANT
John F. Rook QC Andrew Little Emrys Davis	FOR THE RESPONDENT
Sandra A. Forbes Michael Finley	FOR THE INTERVENER

SOLICITORS OF RECORD:

Strosberg, Sasso, Sutts LLP Windsor, Ontario	FOR THE APPELLANT
Spark LLP Toronto, Ontario	FOR THE APPELLANT
Gardiner Roberts LLP Toronto, Ontario	FOR THE APPELLANT
Bennett Jones LLP Toronto, Ontario	FOR THE RESPONDENT
Davies, Ward Phillips & Vineberg LLP Toronto, Ontario	FOR THE INTERVENER

Federal Court

Cour fédérale

Date: 20110524
(Amended on May 30, 2011)

Docket: T-1668-10

Citation: 2011 FC 505

BETWEEN:

ASTRAZENECA CANADA INC. AND ASTRAZENECA AKTIEBOLAG

Plaintiffs (Defendants by Counterclaim)

and

APOTEX INC.

Defendant (Plaintiff by Counterclaim)

PUBLIC FURTHER AMENDED REASONS FOR ORDER
(Confidential Reasons for Order issued April 29, 2011)

CRAMPTON, J.

[1] This motion was brought by the Plaintiffs for, among other things, an interlocutory injunction to restrain the Defendant and certain associated individuals from making, constructing, importing, exporting, using, offering to sell or selling to others to be used, Apo-Esomeprazole and/or esomeprazole magnesium pending the trial of this action, which is scheduled to begin in September, 2013.

[2] For the reasons that follow, I find that the Plaintiffs have not demonstrated, on a balance of probabilities, that they are likely to suffer irreparable harm if an interlocutory injunction is not issued. I also find that the Plaintiffs have not demonstrated that the balance of convenience lies in their favour. Accordingly, this motion will be dismissed.

I. **Background**

A. *The Parties and the product at issue*

[3] The within action concerns five patents that are owned by the Plaintiffs, AstraZeneca Aktiebolag ("AstraZeneca") and AstraZeneca Canada Inc. ("AstraZeneca Canada"). Those patents contain claims that cover certain forms of the drug "esomeprazole", which is sold by the Plaintiffs under the brand name NEXIUM, as well as certain processes used to produce that drug.

[4] Specifically, Canadian Patent No. 2, 139, 653 (the '653 Patent), which was issued to AstraZeneca on July 10, 2001 and expires on May 27, 2014, contains claims that cover optically pure esomeprazole magnesium.

[5] Canadian Patent No. 2, 290, 963 (the '963 Patent), which was issued to AstraZeneca on March 28, 2006 and expires on May 25, 2018, contains claims that cover esomeprazole magnesium trihydrate.

[6] Canadian Patent No. 2, 193, 994 (the '994 Patent), which was issued to AstraZeneca on May 3, 2005 and expires on July 3, 2015, contains claims directed to the process of making optically pure esomeprazole.

[7] Canadian Patent No. 2, 226, 184 (the ‘184 Patent), which was issued to AstraZeneca on August 5, 2008 and expires on June 26, 2016, contains claims related to a certain process used to make esomeprazole.

[8] Canadian Patent No. 2, 274, 076 (the ‘076 Patent), which was issued to AstraZeneca on September 30, 2008 and expires on December 16, 2017, also contains claims related to a process used to make esomeprazole.

[9] AstraZeneca and its affiliates (sometimes collectively referred to in these Reasons as “AstraZeneca”) develop and commercialize prescription medicines around the world. Through its subsidiary, AstraZeneca Canada Inc., it is the second largest innovative pharmaceutical company in Canada in terms of dollar sales. As of March 1, 2011, AstraZeneca employed about 987 people across Canada.

[10] AstraZeneca Canada has sold NEXIUM brand tablets containing esomeprazole magnesium trihydrate, in 20 milligram and 40 milligram strengths, since 2001. It purchases those tablets from AstraZeneca.

[11] Esomeprazole belongs to the class of medications known as “proton-pump inhibitors” (“PPIs”), which are used to treat gastric-acid related conditions. The Canadian PPI market is continuing to grow significantly from its current size of approximately 23 million prescriptions. That market also is highly competitive, with approximately seven alternative PPI drugs available, including a new entrant which entered the market in September 2010.

[12] Since its launch in September 2001, annual dollar sales of NEXIUM have risen from approximately $6 million in 2001 to over $281 million in 2010. According to AstraZeneca, NEXIUM was the best-selling PPI in Canada in 2010 and ranked among the top 5 prescription products in Canada by sales. In addition, NEXIUM is the number one "switched to PPI," is recommended by 61% of physicians, is the highest ranking PPI in unaided awareness by patients, is the most self-reported prescribed PPI, and is the number one PPI doctors would select for themselves.

[13] There is currently no generic version of NEXIUM available in Canada.

[14] The Defendant, Apotex Inc., is a privately-owned Ontario company that carries on business as a manufacturer and distributor of a broad range of "generic" pharmaceutical products. Together with its affiliates (collectively, "Apotex"), it has over 5,000 employees in Canada.

B. *Steps taken by Apotex to launch a generic version of esomeprazole*

[15] The within action was launched by the Plaintiffs on October 15, 2010, following seven proceedings that the initiated in late 2007 under the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133, as amended by SOR/98-166 (the "PMNOC Regulations"), to prohibit the issuance of a Notice of Compliance ("NOC") to Apotex for its proposed esomeprazole magnesium tablets. Those proceedings were initiated after Apotex filed seven Notices of Allegation ("NOAs") under the PMNOC Regulations earlier that year.

[16] In addition, on June 8, 2007, Apotex filed a patent application in Canada entitled "Process for the Preparation of Esomeprazole and Salts Thereof." That application refers to a United States Patent that AstraZeneca alleges corresponds to the '994 patent.

[17] After Apotex withdrew a number of its NOAs, AstraZeneca pursued only two of the aforementioned NOC proceedings.

[18] The first of those proceedings (Court File No. T-372-08) involved the '963 Patent. That proceeding was dismissed on consent on May 25, 2010, after AstraZeneca advised the Court that it was no longer asserting that Apotex's allegation of non-infringement of the '963 Patent was not justified, as contemplated by subsection 6(2) of the PMNOC Regulations, and after Apotex agreed that the Court need not make any determinations in respect of its allegations of invalidity of the '963 Patent.

[19] The second NOC proceeding (Court File No. T-371-08) was dismissed by Justice Hughes on June 16, 2010, on the basis that Apotex's allegation of invalidity of the '653 Patent was justified, within the meaning of section 6(2).

[20] The following day, June 17, 2010, Apotex received an NOC for its esomeprazole magnesium tablets. As of that date, Apotex was legally entitled to begin selling its generic esomeprazole tablets ("Apo-Esomeprazole") in Canada.

[21] On July 13, 2010, at AstraZeneca's request, Apotex provided an "on the record" confirmation of its intention to launch its Apo-Esomeprazole product. Then, on July 26, 2010,

Apotex again confirmed to AstraZeneca that it was proceeding with the production of launch quantities of Apo-Esomeprazole.

[22] On February 1, 2011, Apo-Esomeprazole was listed as esomeprazole magnesium trihydrate by the drug formulary in Quebec, where sales of NEXIUM are particularly strong, accounting for approximately 42% of AstraZeneca Canada's total Canadian NEXIUM sales. In addition, on November 25, 2010, Nova Scotia Pharmacare listed Apo-Esomeprazole as a non-insured interchangeable benefit. On February 9, 2011, the New Brunswick Drug Plan also posted a non-benefit interchangeable listing for Apo-Esomeprazole.

[23] On March 7, 2011, Apotex launched Apo-Esomeprazole and announced that it had commercial inventories of that product available in Quebec, New Brunswick and Nova Scotia, where it is listed at 89% of the price of NEXIUM.

II. Preliminary Motions

A. *AstraZeneca's motion to strike*

[24] On April 1, 2011 Apotex filed an affidavit sworn by Dr. Stephen Horne, the Vice President, Research and Development, at Apotex Pharmachem Inc. ("API"). According to Dr. Horne's affidavit (the "Horne Affidavit"), API currently makes esomeprazole magnesium for supply to Apotex Inc., using a process developed in-house (the "API Process").

[25] On April 13, 2011, AstraZeneca filed a motion for an Order to strike the Horne Affidavit in its entirety, or, in the alternative, to strike out paragraphs 17 to 29 of that affidavit. The grounds for that motion were stated to be that the Horne Affidavit: (i) contains evidence which is procedurally

prejudicial to AstraZeneca and/or is clearly irrelevant; and, in the alternative, (ii) does not meet the criteria for evidence adduced by an expert witness, as set forth in Rule 52.2 of the *Federal Courts Rules*, SOR/98-106 (the "Rules"). AstraZeneca's Notice of Motion also relied upon Rule 3, which provides that the Rules "shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits."

[26] In its written submissions, AstraZeneca stated that it would suffer prejudice if the Horne Affidavit were not completely or partially struck from the Court Record, because AstraZeneca did not have an opportunity to contemplate and respond to the information in that affidavit before the evidence on this motion was due. In addition, it stated that the information in the Horne Affidavit was clearly irrelevant because it could not assist the Court to properly construe the claims of the patent, as that is the subject matter for expert opinion. It also submitted that, to the extent that paragraphs 17 to 29 are alleged to be expert opinion, they should be struck for failing to comply with the Code of Conduct for Expert Witnesses, including the requirements that an expert witness: (i) be impartial, independent and objective; and (ii) sign the statutory declaration contemplated by the Code.

[27] I disagree with AstraZeneca's submissions.

[28] With respect to the issue of prejudice, AstraZeneca's Motion for an interlocutory injunction was brought without prior notice on March 11, 2011. The schedule that was subsequently established on consent for the hearing of that Motion required Apotex's evidence to be served by April 1, 2011, the same date upon which the Horne Affidavit was filed. Cross-examinations did not need to be concluded until April 8, 2011, and AstraZeneca had the right to file, on or before April

12, 2011, a Supplemental Motion Record and a Supplemental Memorandum of Fact and Law to address Apotex's evidence and matters which may have arisen on cross-examination.

[29] However, on April 4, 2011, AstraZeneca advised Apotex of its decision not to cross-examine Dr. Horne on his affidavit. It then advised the Court, in a teleconference call on April 15, 2011, that it would not require a postponement of the hearing on its Motion for an interlocutory injunction, to permit it to have additional time to: (i) conduct cross-examinations on either the Horne Affidavit or the supplementary affidavit of Andrew Harrington, discussed below; or (ii) file any additional materials in respect of the Horne Affidavit. In contrast to Apotex, which sought leave to file a supplementary affidavit from one of its experts after receiving new information from AstraZeneca, AstraZeneca sought no such leave to file any response whatsoever to the Horne Affidavit.

[30] Given the foregoing, I am satisfied that it would not be appropriate to grant the Motion to strike on the ground of any prejudice that otherwise might result to AstraZeneca. This is not the type of exceptional situation contemplated by the jurisprudence applicable to motions to strike (see, for example, *Belgravia Investments Ltd. v. Canada*, [2000] F.C.J. No. 1246 (QL), at para. 10; *Temple Marble & Granite Ltd. v. "Mecklenburg I" (The)*, 2002 FCT 1190, at para. 2; and *GlaxoSmithKline Inc. v. Apotex Inc.*, 2003 FC 920, at para. 4). It could not have been a surprise to AstraZeneca that Apotex would adduce evidence regarding the API Process.

[31] As a practical matter, for the reasons explained below, no prejudice will flow to AstraZeneca because the Horne Affidavit has been adduced in support of Apotex's submission that

there is no serious issue to be tried, and I have determined in Part III.C of these Reasons below that there is such a serious issue to be tried.

[32] I am also unable to accept AstraZeneca's claims that the information in the Horne Affidavit is irrelevant and of no assistance to the Court. To the contrary, I found that information to be quite relevant and helpful in better understanding Apotex's position on the issue of whether there is a serious issue to be tried in the within action.

[33] This brings me to the assertion that the Horne Affidavit contains impermissible expert evidence. This assertion is largely based on Dr. Horne's statements, at paragraph 4 of his affidavit, that he was asked to address whether: (i) the API Process uses the same process as claimed in the '994 Patent; (ii) neutral esomeprazole in a solid, crystalline form, as claimed in the '076 Patent, is used or produced in API's Process; and (iii) the optical purity of esomeprazole is increased at any stage during API's process by selectively removing racemic omeprazole, as claimed in the '184 Patent. AstraZeneca attempted to support its position on this issue by noting that the Horne Affidavit states that Dr. Horne is "able to describe API's Processes and to respond to [the above-listed] questions because of [his] education and industrial experience as a medicinal and process chemist … and by reason of [his] role at API and [his] involvement in the research and development of API's Process."

[34] I am satisfied that: (i) the Horne Affidavit does not attempt to provide an expert construction of any of the claims in the patents mentioned in the immediately preceding paragraph above; and (ii) Dr. Horne was not being put forth as an expert. In my view, Dr. Horne simply provided factual information in his affidavit, primarily based on his knowledge of API's processes. To provide that

factual information, he necessarily had to describe his understanding of the patents in question (*R. v. Graat*, [1982] S.C.J. No. 102 (QL), at para. 305, [1982] 2 S.C.R. 819, 144 D.L.R. (3d) 267; D. M. Paciocco and L. Stuesser, *The Law of Evidence* (5th ed. 2008), at pp. 26-31; and Alan W. Bryant, Sydney N. Lederman and Michelle K. Fuerst, Sopinka, Lederman & Bryant: *The Law of Evidence in Canada*, 3rd edition (Toronto: LexisNexis Canada Inc., 2009, at 774-777). In describing his understanding of those patents, he simply and very briefly: (i) quoted the plain language in those patents; and (ii) stated his understanding of what each of those patents claimed. He spent a total of four sentences describing his understanding of the '994 Patent, five sentences describing his understanding of the '076 Patent, and seven short sentences describing his understanding of the '184 Patent. By contrast, he spent nine full paragraphs describing API's Process, which was the clear focus of his affidavit.

[35] As the Vice President of Research and Development at API, Dr. Horne was as well placed as anyone to provide the factual information regarding the API Process that was set forth in his affidavit. The fact that he happened to be an organic chemist by education and to have more than 18 years of experience as a medicinal and process chemist in the pharmaceutical industry did not: (i) disqualify him from being a fact witness; (ii) transform his fact evidence into expert evidence; or (iii) require him to adduce his evidence pursuant to Rule 52.2 of the Rules.

[36] Accordingly, for the reasons set forth above, I dismissed AstraZeneca's Motion to strike the Horne Affidavit at the end of the hearing of that Motion.

B. *Apotex's Motion to file a supplementary affidavit*

[37] On April 15, 2011, Apotex filed a Notice of Motion to seek an Order granting leave to deliver a supplemental affidavit of Mr. Andrew Harrington. Mr. Harrington was one of three experts who swore an affidavit in support of Apotex's response to AstraZeneca's Motion for an interlocutory injunction.

[38] Mr. Harrington is a chartered accountant, a chartered financial analyst and a chartered business valuator. He is currently a Managing Director in the Toronto office of Duff & Phelps Canada Limited ("D&P") and is a member of that firm's Dispute and Legal Management Consulting Practice. D&P is the successor firm to Cole Valuation Partners Limited. According to his initial affidavit, Mr. Harrington has more than ten years of experience in business and intellectual property valuation and has served as an expert witness in the quantification of damages relating to intellectual property and various commercial litigation matters.

[39] The principal focus of Mr. Harrington's initial affidavit was upon claims made in an affidavit sworn on March 11, 2011 by AstraZeneca Canada's President and Chief Executive Officer, Marion McCourt. Ms. McCourt was cross-examined on that affidavit on April 5, 2011. During that cross-examination, she was asked about the business transformation plan that is discussed in her affidavit. Ms. McCourt revealed that a written presentation describing that plan had been prepared and she undertook to provide a copy of that document (the "Transformation Plan") to Apotex. That document ultimately was produced to Apotex on April 10, 2011, after the completion of cross-examinations on all of the affidavits on the Plaintiffs' Motion for an interlocutory injunction. However, it was not until April 12, 2011 that AstraZeneca agreed, after a case conference with my colleague Justice Campbell, to permit Apotex to share a copy of the document

with its experts. Two days later, on April 14, 2011, Mr. Harrington swore the supplemental affidavit that was the subject of Apotex's Motion to file.

[40] In his supplemental affidavit, Mr. Harrington stated, among other things, the following:

> The Transformation Plan also provides previously unavailable information that allows me to calculate the level of profits generated on sales by AstraZeneca Canada even if it loses its Nexium exclusivity. With this new information, I am able to determine that, even without Nexium exclusivity, the profits generated on sales by AstraZeneca Canada will be almost $[*] billion in the period 2011 to 2014.

[41] The reason that the Transformation Plan enabled Mr. Harrington to calculate AstraZeneca Canada's profits was that it provided previously unavailable information with respect to AstraZeneca Canada's costs. With that information, Mr. Harrington was able to provide more robust estimates for AstraZeneca Canada's revenues between 2011 and 2014, and to also provide estimates of AstraZeneca's profits for those years, which he was unable to do on the basis of previously available information.

[42] Based upon the information contained in the Transformation Plan, Mr. Harrington estimated that AstraZeneca Canada's revenues in the period 2011 to 2014 will be approximately $[*] billion, and that, even if AstraZeneca were to lose 80% of its NEXIUM sales over the period May 1, 2011 to May 27, 2014, its total revenues would be approximately $[*] billion.

[43] He further estimated that the contribution margin from AstraZeneca Canada's total sales over that period, assuming a loss of 80% of its NEXIUM sales, would be approximately $[*] billion. After drawing on other information contained in the Transformation Plan to estimate

AstraZeneca Canada's fixed costs for that same period to be approximately $[*] million, he then estimated that AstraZeneca Canada's profits for that period would be approximately $[*] billion. Once again, that estimate was based on the assumption, which Mr. Harrington described as being conservative, that AstraZeneca Canada would permanently lose 80% of its sales of NEXIUM on May 1, 2011. As Mr. Harrington noted, his estimates of AstraZeneca Canada's revenues and profits would obviously be greater if it is able to hold onto more than 20% of the sales of NEXIUM.

[44] AstraZeneca opposed Apotex's Motion for leave to file Mr. Harrington's supplemental affidavit on five grounds.

[45] First, it claimed that the evidence provided in the affidavit was outside the area of Mr. Harrington's expertise. I disagree. A review of Mr. Harrington's *curriculum vitae* demonstrates that he "specializes in the quantification of loss and accounting of profits in intellectual property dispute matters and damages in commercial litigation matters," and that he "has been involved in over 500 valuation, damage quantification, consulting and other advisory engagements in numerous industries."

[46] Second, AstraZeneca claimed that Apotex did not previously consider information pertaining to AstraZeneca Canada's profits to be sufficiently important to request such information prior to, or during, the cross-examination of Ms. McCourt. Accordingly, AstraZeneca asserted that Apotex ought not to be permitted to split its case with evidence based on information that it already had or did not need.

[47] In my view, neither of these objections provides a basis for preventing Apotex from responding to information that previously had not been disclosed. On the particular facts of this case, it would make little sense to permit Apotex to request a document that it learned about during cross-examination, only to then prevent it from responding to relevant new information contained within that document. That information was relevant because it enabled Apotex to better respond to some of the claims made by Ms. McCourt, Dr. Gulati and Dr. Biloski, regarding irreparable harm that the Plaintiffs claim they will suffer if the interlocutory injunction that they have requested is not granted.

[48] Third, AstraZeneca submitted that the information in the supplemental affidavit was unnecessary, redundant or marginally relevant, and of no assistance to the Court. For the reason explained immediately above, I do not accept this submission. On the contrary, I found the information contained in Mr. Harrington's supplementary affidavit to be very relevant and material to my determination of AstraZeneca's motion for an interlocutory injunction.

[49] Fourth, AstraZeneca submitted that the information contained in the supplementary affidavit will cause material prejudice to AstraZeneca Canada.

[50] I agree that AstraZeneca would be prejudiced if leave were granted to Apotex to file the supplementary affidavit. However, that prejudice will be suffered primarily because the evidence in that affidavit, which is based on previously unavailable information contained in the Transformation Plan, undermines claims made by Ms. McCourt, Dr. Gulati and Dr. Biloski. Among other things, those claims include assertions that "the introduction of generic esomeprazole magnesium in Canada … will have an immediate, catastrophic and irreversible impact on AstraZeneca Canada"

and will "imperil the [current] transformation [of AstraZeneca Canada and its] future performance". This context in which the Plaintiffs will suffer prejudice weighs against them in the consideration of their fifth submission, to which I will now turn.

[51] Finally AstraZeneca submitted that it would not be in the interests of justice to permit Apotex to file Mr. Harrington's supplementary affidavit.

[52] Given my assessment of the first four submissions made by the Plaintiffs, I conclude that it would not be in the interests of justice to refuse Apotex leave to file Mr. Harrington's supplementary affidavit, particularly given that: (i) Mr. Harrington was made available to be cross-examined on that affidavit; and (ii) Apotex was unable to cross-examine Ms. McCourt on the Transformation Plan document after its production, because she was allegedly out of the country or otherwise unavailable during the short period of time between the time when Apotex obtained the Transformation Plan and the date of the hearing on AstraZeneca's Motion for an interlocutory injunction. AstraZeneca refused to avail itself of the opportunity to cross-examine Mr. Harrington on his supplementary affidavit and must now face the consequences.

[53] AstraZeneca submitted in the alternative that certain paragraphs in Mr. Harrington's supplementary affidavit be struck. However, during the hearing of this preliminary motion, and after I agreed to strike the last sentence in paragraph 5 of that affidavit, counsel to AstraZeneca abandoned this submission.

III. Analysis

A. *The general legal principles applicable to this Motion*

[54] An applicant for an interlocutory injunction must satisfy the following well-known tri-partite test:

i. There is a serious issue to be tried;

ii. The applicant is likely to suffer irreparable harm if the injunction is not granted; and

iii. The balance of convenience favours the granting of the injunction (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334 and 342, 111 D.L.R (4th) 385 [*RJR-MacDonald*]).

[55] As to the first prong of the test, an applicant's burden is fairly low. The Court simply has to be satisfied that the applicant has raised at least one issue that is serious, in the sense of being "neither vexatious, nor frivolous" (*RJR-MacDonald*, above, at 335 and 337) nor "destined to fail" (*Laperrière v. D.&A. MacLeod Company Ltd.*, 2010 FCA 84, 66 C.B.R. (5th) 96, at para. 11).

[56] The second prong of the test, concerning irreparable harm "refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other" (*RJR-MacDonald*, above, at 341). At this stage of the analysis, the harm in question is harm that will be suffered by the applicant. Any harm that will be suffered by the respondent is considered in assessing the balance of convenience (*RJR-MacDonald*, above, at 341). In addition, the harm

claimed by the parties must be demonstrated to be clear and not speculative (*Bayer HealthCare AG v. Sandoz Canada Inc*., 2007 FC 352, [2007] F.C.J. No. 585 (QL) [*Bayer Healthcare*], at para. 35; *Aventis Pharma S.A. v. Novopharm Ltd.*, 2005 FC 815, 40 C.P.R. (4th) 210 [*Aventis Pharma*], at para. 59; *Abbott Laboratories Ltd. v. Apotex Inc.*, [1998] O.J. No. 2159 (QL) (Ont. Gen. Div.) [*Abbott Laboratories*], at para. 18).

[57] The third prong of the test is "which of the two parties will suffer the greater harm from the granting or refusal of … [the] injunction" (*RJR-MacDonald*, above, at 342). In addition, other factors may be taken into consideration in determining where the balance lies (*RJR-MacDonald*, above, at 342). In this regard, "either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought" (*RJR-MacDonald*, above, at 344 and 348).

A. *General observations*

[58] In the case at bar, each of the parties made certain sweeping statements that I feel compelled to address, in the interest of discouraging similar statements and certain related hyperbole in the future.

[59] With respect to the first prong of the test, the serious issue to be tried, Apotex asserted that because this Court determined Apotex's allegations of invalidity with respect to the '653 Patent to be justified in the NOC proceedings last year, "there is no reasonable basis to continue to presume that the patent is valid". This position ignores the settled law that: (i) determinations in NOC proceedings "do not operate as res judicata" in a subsequent action in which infringement of the same patent that was the subject of the NOC proceedings is alleged; and (ii) "NOC proceedings are

quite different from subsequent infringement or impeachment actions" (*Apotex v. Pfizer Ireland Pharmaceuticals*, 2011 FCA 77, at paras. 23-24; *AstraZeneca Canada Inc. v. Canada (Minister of Health)*, 2006 SCC 49, at para. 42, 52 C.P.R. (4th) 145; *Novartis A.G. v. Apotex Inc.*, 2002 FCA 440, at para. 9; *Janssen-Ortho Inc. v. Novopharm Ltd.*, 2006 FC 1234, at para. 116). In short, the presumption of the validity of a patent that is established by virtue of subsection 43(2) of the *Patent Act*, R.S.C. 1985, c. P-4 [the *Patent Act*] remains, notwithstanding any findings that may have been made in respect of the patent in proceedings under the NOC Regulations.

[60] With respect to the second prong of the tri-partite test, irreparable harm, Apotex suggested that AstraZeneca would not suffer irreparable harm because, "even if no interlocutory injunction is granted, and even if Apotex takes even more of the market for esomeprazole than is estimated by Astra's CEO, Astra will still enjoy almost $[*] billion of profits between now and the end of 2014." To the extent that this statement may be interpreted as advancing the position that an applicant who is making profits, even significant profits, cannot ever be found to suffer irreparable harm, it must be rejected. As counsel to Apotex appropriately conceded during oral argument, the law does not require applicants for interlocutory relief to establish that they are likely to become unprofitable if the injunction they seek is not granted.

[61] Apotex also submitted that "[t]he relief sought by Astra is unprecedented and, if granted, would signal a fundamental change to the regime within which the generic pharmaceutical industry operates." In this regard, it observed "[t]his Court has never granted an interlocutory injunction to restrain a party from selling its product after that party has already suffered under a statutory injunction imposed by the [PMNOC] Regulations." AstraZeneca did not dispute this observation.

[62] To the extent that this submission stands for the proposition that the balance of convenience generally should be found to lie in favour of a respondent generic drug manufacturer in circumstances where it has been prevented from launching its product, for up to 24 months, as a result of a prohibition order preventing the Minister of Health from issuing an NOC to a generic, as contemplated by the PMNOC Regulations, it must be rejected.

[63] The same is true of Apotex's suggestion that the granting of an interlocutory injunction in cases such as the case at bar would somehow be inconsistent with the underlying spirit of the PMNOC Regulations, because such an injunction would prove devastating to "the very business model within which Apotex operates." In cross-examination on his affidavit dated April 1, 2011, Apotex's Chief Executive Officer, Mr. Bernard Sherman, extended this claim by stating, at p. 42 of the Transcript, that if an interlocutory injunction were granted to AstraZeneca in the case at bar, "it would destroy the business model for us in the whole generic industry and render useless the regulations, the whole regulatory regime." In oral argument, counsel to Apotex appropriately acknowledged that the fact that a generic drug manufacturer has acted in accordance with the PMNOC Regulations does not preclude the possibility that a patentee who may have been unsuccessful in proceedings under those Regulations may obtain an interlocutory injunction, if it can satisfy the applicable tri-partite test.

[64] It is settled law that the balance of convenience must be assessed on a case by case basis (*RJR-MacDonald*, above, at 342-343; *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504 (H.L.); *Canadian Javelin Ltd. v. Sparling* (1978), 4 B.L.R. 153, 59 C.P.R. (2d) 146 (F.C.T.D.); affirmed on other grounds (1978), 22 N.R. 465 (F.C.A.)). In this regard, the weight that may be

attributed to any particular consideration also must be assessed on a case by case basis. (*RJR-MacDonald*, above). In case at bar, it is not necessary to devote time to discussing this consideration, as I have found, for the reasons discussed in Part III.E of these Reasons below, that AstraZeneca has not otherwise demonstrated that the balance of convenience lies in its favour. The issue as to whether it would be inconsistent with the underlying spirit of the PMNOC Regulations to enjoin a generic drug manufacturer from launching its product after that manufacturer has already been delayed from launching its products by a statutory injunction under those regulations is best left for another day, when the issue has been more fully argued. The same is true of the issue of how any such inconsistency that may be found to exist may factor into the balance of convenience of analysis.

[65] Finally, in oral argument, AstraZeneca suggested that my assessment of the balance of convenience should also take into account the public interest in patent rights and the promotion of innovation and drug discovery. I agree that this may well be a legitimate consideration to be considered in assessing the overall balance of convenience in appropriate cases. However, it is difficult for the Court to accord material weight to this consideration in the absence of evidentiary support. Where such support is not forthcoming, it cannot be expected that this consideration will be a determinative factor in the assessment of the balance of convenience. Therefore, counsel would be well advised to provide evidentiary support for this type of submission in future cases.

[66] This is particularly so where, as in the case at bar, there is uncontested evidence of a likely and substantial adverse impact on the public interest, in the form of delaying a significant reduction in drug prices, if the requested injunction is granted.

C. *Serious issue to be tried*

[67] Based on the record before me, I am satisfied that there is a serious issue to be tried.

[68] In the within action, AstraZeneca has alleged infringement of claims in five patents, namely, the ‘653 Patent, the ‘963 Patent, the ‘184 Patent, the ‘076 Patent and the ‘994 Patent. Until such time as the presumption of validity set forth in subsection 43(2) of the *Patent Act*, above, is displaced by “evidence to the contrary,” that presumption stands.

[69] Apotex attempted to make much of the fact that the ‘653 Patent and the ‘963 Patent were the subject of prior NOC proceedings that were resolved in its favour. However, as discussed at paragraph 18 above, the proceeding resolving the latter patent was resolved on consent, after AstraZeneca advised that it was no longer asserting that the allegation of non-infringement of the ‘963 Patent was not justified <u>in that application</u>. It is noteworthy that AstraZeneca and Apotex agreed, as part of their resolution in that proceeding, that “the Court need not make any determination on the invalidity allegations” that had been made by Apotex in that proceeding.

[70] With respect to the NOC proceedings concerning the ‘653 Patent, Justice Hughes dismissed AstraZeneca’s application for an order prohibiting the Minister of Health from issuing an NOC to Apotex for esomeprazole magnesium tablets, after he reviewed an extensive evidentiary record, totalling more than 9,000 pages of evidence and argument, much of which was not placed before the Court on this Motion. By the time that proceeding was heard by Justice Hughes, the “overriding issue [was] whether the allegations made by Apotex in its Notice of Allegation that Claim 8 of the ‘653 patent is invalid, are justified within the meaning of section 6(2) of the NOC Regulations”

(*AstraZeneca Canada Inc. v. Apotex Inc.*, 2010 FC 714 at para. 32, 88 C.P.R. (4th) 28 [*AstraZeneca* 2010]). Ultimately, Justice Hughes determined that Apotex's allegation that Claim 8 of the "'653 Patent is invalid for lack of sound prediction and to utility as for obviousness, is justified" (*AstraZeneca* 2010, above, at para. 138).

[71] Having regard to the foregoing, to the jurisprudence discussed at paragraph 59 above, and to the fact that three of AstraZeneca's patents were not the subject of any NOC proceedings, I am not prepared to accord much significance to the above-mentioned NOC proceedings for the purposes of this Motion.

[72] I am satisfied that the issues that have been raised in the within action are not frivolous, vexatious or destined to fail. In my view, those issues are complex and will require a substantial evidentiary record before they can be determined by this Court, particularly having regard to the fact that Apotex conceded in its written submissions that "the esomeprazole magnesium used in Apo-Esomeprazole is made by a process that was designed to avoid" infringing AstraZeneca's patents.

[73] I am also satisfied that Dr. Horne's explanations as to why, in his view, the claims made in the '994 Patent, the '076 Patent and the '184 Patent are not infringed by API's Process and the products produced in that process, are not sufficient to demonstrate that there is no serious issue to be tried in respect of those matters, particularly given that Apotex has not disputed in this Motion that its esomeprazole magnesium tablets are a generic form of NEXIUM, as referenced in its NOC submissions to Health Canada.

[74] As my colleague Justice Snider has observed: "It is clear from the jurisprudence that the hearing of an interlocutory injunction is not the time to finally determine the merits of a claim … Only after a much deeper consideration of all of the evidence that will come forward in the context of a trial should such a determination be made" (*Laboratoires Servier v. Apotex Inc*., 2006 FC 1493 [*Servier*], at para. 25; *Turbo Resources Ltd. v. Petro Canada Inc.* (1989), 24 C.P.R. (3d) 1 at 16, [1989] 2 F.C. 451 (C.A.)). Of course, prior to the fixing of the time and place for the trial in an action, a defendant such as Apotex is free to bring a motion for summary judgment pursuant to Rule 213 of the Rules. However, Apotex did not do so, perhaps because it was aware of the view that the "inherently complex, and technical" nature of patent infringement actions is a factor that would weigh against granting summary judgment (see, for example, *Wenzel Downhole Tools Ltd. and William Wenzell v. National-Oilwell Canada Ltd. et al.*, 2010 FC 966, at para. 38).

[75] The same logic applies to the consideration of the first prong of the tri-partite test in motions for interlocutory relief in drug patent infringement actions. It is this complex and technical nature of such actions that distinguishes them from the other types of actions that were at issue in many of the authorities relied on by Apotex in support of its position that there is no serious issue to be tried in the within action.

D. *Irreparable harm*

[76] AstraZeneca has claimed that "[t]he early introduction of generic esomeprazole magnesium in Canada – more than three years before the '653 Patent expiry [sic] and during a critical period for the business – will have an immediate, catastrophic and irreversible impact on AstraZeneca Canada".

[77] To provide a sense of the importance of NEXIUM in its product portfolio, AstraZeneca adduced evidence of its forecasts that, in the absence of the entry and rapid expansion of a generic rival to NEXIUM, sales of NEXIUM will grow from approximately $281 million in 2010 to $[*] million in 2011, $[*] million in 2012, $[*] million in 2013 and $[*] million to May 2014, when the ‘653 Patent will expire. AstraZeneca did not explain why it did not provide the Court with forecasts for the balance of 2014 and for the period 2015 to 2018, when the ‘184, ‘076, ‘994, ‘963 Patents will all expire. According to Apotex, and as conceded by counsel for AstraZeneca at the hearing, if AstraZeneca prevails with all of its claims in the within action, Apotex will be subject to a permanent injunction until 2018.

[78] AstraZeneca Canada has also forecasted that the importance of NEXIUM in its product portfolio will increase substantially, from accounting for approximately [*]% of its total sales in 2011 to [*]% in 2012 and [*]% [over 40%] in 2013. This significant increase in the importance of NEXIUM to AstraZeneca Canada is in part attributable to the fact that the patent protection for its leading drug product, CRESTOR (rosuvastatin calcium), will expire in 2012. CRESTOR has apparently accounted for approximately 30-40% of AstraZeneca Canada’s total sales since 2008.

[79] In addition to the substantial monetary losses that it claimed it will suffer if the injunction is not granted, AstraZeneca submitted that it will suffer various intangible types of harms that cannot reasonably be quantified, namely, “the immediate loss of employee engagement, customer relationships, talent, innovation and creativity, and reputation.” It further claimed that the harm that it will suffer will extend beyond its NEXIUM business, to include adverse impacts on “all of its products in both the current product portfolio (i.e., products existing in the marketplace) and future

product portfolio (i.e., products yet to enter the market), from the company's pipeline and from externalization."

[80] Virtually all of these types of claims have been consistently considered and rejected in other cases considered by this Court. AstraZeneca has not provided any persuasive evidence or submissions to persuade me to treat its claims any differently. In short, as discussed below, its claims are unsubstantiated and are little more than bald assertions. I therefore find that AstraZeneca has failed to establish that it is likely to suffer any cognizable type of irreparable harm.

(i) *Permanent loss of NEXIUM "market"*

[81] AstraZeneca claimed that if Apotex is not enjoined from continuing to roll-out its generic esomeprazole magnesium in Canada, it will suffer "permanent damage to the NEXIUM market." In this regard, AstraZeneca Canada estimated that it would lose "about [*]% of its NEXIUM sales within three months of genericization and about [*]% within ten months as a result of Apotex's esomeprazole market entry at this time."

[82] AstraZeneca also asserted that "AstraZeneca Canada will cease promotion of NEXIUM if the product is genericized". This is allegedly because "[i]t would be pointless to spend money, time, energy and efforts [*sic*], only to grow sales of generic esomeprazole (since the generic would be the principal beneficiary of such growth)." In response to Apotex's position that protecting the market position of NEXIUM would make sense because AstraZeneca would receive greater damages if it prevails in the within action, AstraZeneca responded that "litigation is inherently unpredictable" and that "[i]t is not reasonable for AstraZeneca Canada to assume that it will succeed in the infringement action and to operate its business on that basis."

[83] AstraZeneca added that an important consequence of ceasing to promote NEXIUM would be that the overall market for the drug will shrink, "resulting in a permanent decrease in the NEXIUM market" by the time the within action is decided, which it forecasted will be almost three years from now.

[84] In support of its claims, AstraZeneca submitted affidavit evidence from Ms. McCourt as well as from two experts, Dr. Ranjay Gulati and Dr. Alan Biloski.

[85] In her affidavit, Ms. McCourt repeated the claims made in AstraZeneca's written submissions and stated that generic products typically are listed on provincial and private formularies at a fraction of the drug innovator's prices. As a result, "once a generic enters the market it is expected that a substantial portion of the innovator's market for that drug will be lost within months." For this reason, "as soon as a generic version of an AstraZeneca product enters the market, AstraZeneca Canada considers that market lost, and the business is restructured accordingly."

[86] Based on her experience with launches of other generic products, Ms. McCourt stated that she expects that "Apotex will quickly flood the market with lower priced generic esomeprazole." She also asserted that "AstraZeneca Canada will cease promotion of NEXIUM if the product is genericized." She added that "the loss of NEXIUM at this time will destabilize and imperil the transformation [of its organization that was recently implemented] and imperil its future performance." This is based on her forecast that, in the absence of Apotex's continued roll-out of

Apo-Esomeprazole, NEXIUM will generate approximately $[*] billion in sales between now and May 2014. This represents “about [*] of the total [forecasted lifetime] sales of NEXIUM.”

[87] Dr. Biloski and Dr. Gulati supported Ms. McCourt’s position that it would not make economic sense to continue promoting NEXIUM once that product has become genericized. In short, they agreed that such action would simply serve to increase sales of the generic product more than to increase sales of NEXIUM. They added that such promotion would utilize resources that could be better spent on more fruitful endeavours. Indeed, Dr. Gulati asserted that “continued promotion of NEXIUM would require significant financial capital which would no longer be available due to the rapid erosion of the revenue stream following NEXIUM genericization.” Dr. Biloski and Dr. Gulati both opined that the harm to AstraZeneca that would likely flow from generic erosion of NEXIUM’s sales would not be reasonably quantifiable. Dr. Gulati explained that this was “because of the multiplicity of exogenous and endogenous factors which necessarily impact a business’ outcomes in its market and sphere of operation.” Likewise, Dr. Biloski supported his conclusion on the basis of “the wide variability in the future commercial outcomes of AstraZeneca Canada’s business if [NEXIUM] were to retain market exclusivity until May 27, 2014 …”.

[88] I do not agree with either: (i) the position that it would not make sense to continue to promote NEXIUM once that product has become genericized; or (ii) the position that the various harms that AstraZeneca has asserted under this heading would not be reasonably quantifiable.

[89] With respect to the promotion of NEXIUM, I find the evidence of Apotex’s experts to be more analytically robust and persuasive.

[90] Dr. Bower appropriately noted that AstraZeneca has not provided any information with respect to the fixed costs involved in promoting NEXIUM. Therefore, he questioned the basis for Dr. Gulati's assertions that such promotion would require "significant financial capital" and that such capital "would no longer be available." In addition, given that AstraZeneca has not provided any information with respect to the profits earned by AstraZeneca Canada, he appropriately questioned how Dr. Gulati could conclude that AstraZeneca Canada would not be able to access the capital in question, whether from its parent company or otherwise. Dr. Bower also properly noted that there is no evidence in the Motion Record to support Dr. Gulati's conclusion that any growth from continued promotion would "taper off quickly."

[91] Dr. Hollis provided various calculations that served to confirm the common sense view that, "the firm that benefits from the promotional efforts will be the firm that is successful in the patent infringement action." Thus, even in the absence of an interlocutory injunction, AstraZeneca would be the only beneficiary of the promotional efforts, assuming that it prevails in the within action, and assuming that it can reasonably quantify and prove its damages. Given that AstraZeneca launched the within action fairly recently, and is continuing to pursue it, it is reasonable to assume that AstraZeneca believes that it will prevail.

[92] I agree with Dr. Hollis' observation that it is not reasonable for a firm that speculatively invests hundreds of millions of dollars in "finding and developing new drugs that may or may not be approved by regulatory authorities", to claim that it would not make good business sense to continue to promote NEXIUM, a proven blockbuster drug, until trial. Based on figures derived from AstraZeneca's own evidence, and assuming a 50% chance of prevailing in the within action, Dr.

Hollis estimated that AstraZeneca's expected revenues over the next three years would be approximately $[*] million if the requested injunction is granted, and $[*] million, which is only 5% less, if the requested injunction is not granted. If AstraZeneca believes that it has a greater chance of prevailing, the difference in the expected values of its revenues, with and without an injunction, would be even less. For example, Dr. Hollis calculated that this difference would be only approximately 1.6%, if the probability of AstraZeneca prevailing in the within action is 80%.

[93] Andrew Harrington agreed with Dr. Hollis' view that, if AstraZeneca Canada does in fact anticipate that it will succeed in the within litigation, "it would be prudent action to continue the full sales and marketing initiative and thereby preserve Nexium's share in the PPI market pending the outcome of the trial in this matter." In his view, this would be "sensible given that, if successful in the litigation, AstraZeneca Canada will have a damages award against Apotex equal to the amount of its lost sales to Apotex." Mr. Harrington acknowledged that there is no certainty that AstraZeneca Canada will in fact prevail in the within action. However, he estimated that, "depending upon which patent or patents AstraZeneca Canada succeeds upon, the benefit to AstraZeneca of maintaining the Nexium® market will be between $[*] billion and over $[*] billion." Although he did not refer to the marketing costs that would be required to continue to promote NEXIUM, his conclusion that "the prospective revenue opportunity benefit to AstraZeneca Canada of continuing to promote Nexium® is very substantial at a relatively low cost" strikes me as being much closer to the mark than the unsubstantiated assertions of Dr. Gulati and Dr. Biloski.

[94] Mr. Harrington also astutely questioned "why any reasonable business person would accept the risk" of Apotex successfully arguing, in the within action, that "the entirety of AstraZeneca Canada's losses were attributable to AstraZeneca Canada's irrational decision to allow the Nexium®

market to collapse." This observation would apply with equal force even if Apotex only succeeded in ultimately establishing that a portion of AstraZeneca Canada's damages were attributable to its decision to stop promoting NEXIUM.

[95] I do not accept AstraZeneca's suggestion that the analyses provided by Dr. Hollis and Mr. Harrington were outside their respective areas of expertise. In my view, Dr. Hollis' analysis was well within the domain of his extensive background and expertise in economics and competition between branded and generic drugs. Similarly, Mr. Harrington's analysis was well within the field of his extensive background and expertise in dispute consulting, business and intellectual property valuation, and the quantification of loss and accounting of profits in intellectual property dispute matters and damages in commercial litigation matters.

[96] Considering the foregoing, and in the absence of additional financial and other evidentiary support from AstraZeneca or its experts, I do not accept that it would make good business sense for AstraZeneca Canada to discontinue promoting NEXIUM if this Motion for an interlocutory injunction is not granted. This is particularly so given that: (i) AstraZeneca's patent protection is likely to last for approximately three more years, if not until 2018, when the last of the patents in the within action expires (*Servier*, above, at para. 71); and (ii) AstraZeneca Canada has not provided any evidence to indicate that the costs associated with continuing to promote NEXIUM would likely exceed the profits that could reasonably be expected to be derived from those promotional efforts.

[97] In my view, if AstraZeneca Canada does cease or reduce its promotional activities in respect of NEXIUM, any harm that it may suffer will flow from its own actions, not the continued roll-out

of Apotex's generic product. Moreover, such harm is likely to be quantifiable and, thus, not irreparable (*Servier*, above, at paras. 48 and 71; *Merck & Co. v. Nu-Pharm Inc*. (2000), 4 C.P.R. (4th) 464, [2000] F.C.J. No 116 (QL) (T.D.) [*Merck & Co*], at paras. 36 to 38; *Bristol-Myers Squibb Co. v. Apotex Inc*., 2001 FCT 1086, 15 C.P.R. (4th) 190 (F.C.T.D.) [*Bristol-Myers*], at para. 29; *Bayer Healthcare*, above, at para. 85; see also, *Aventis Pharma*, above, at paras. 43, 74-77 and 113).

[98] Turning to AstraZeneca's claim that the various other harms asserted under this heading would not be reasonably quantifiable, I acknowledge that, at this point in time, it may be difficult to accurately forecast the harm that AstraZeneca is likely to suffer, at least on a temporary basis, if this Motion is not granted. However, that difficulty is likely to be reduced by the time it is necessary to calculate damages in the within action (*Servier*, above, at para. 52).

[99] In any event, "[t]he jurisprudence is clear that difficulty in precisely calculating damages does not constitute irreparable harm, provided there is some reasonable methodology that could, at the time damages would be assessed, measure those damages" (*Servier,* above, at para. 51; *Aventis Pharma*, above, at para. 61; *Abbott Laboratories*, above, at para. 17).

[100] Moreover, I am satisfied that any such damages are likely to be quantifiable and recoverable (*Servier*, above, at para. 73; *Bayer Healthcare*, above, at para. 64; *Merck & Co*, above, at para. 41; *Abbott Laboratories*, above, at para. 24; *Fournier Pharma Inc. v. Apotex Inc*. (1999), 2 C.P.R. (4th) 351, [1999] F.C.J. No. 1689 (QL) (T.D.) [*Fournier Pharma* 1] at para. 66; *Bristol-Myers*, above, at paras. 21-22; *Pfizer Ireland Pharmaceuticals v. Lilly Icos LLC*, 2003 FC 1278, 29 C.P.R. (4th) 466 at paras. 27-29; *Pfizer Ireland Pharmaceuticals v. Lilly Icos LLC*, 2004 FC 223, 30 C.P.R. (4th) 317, at para. 39; *Aventis Pharma*, above, at paras. 79, 84 and 88).

(ii) *Negative impact on other existing products, customer relationships and employees*

[101] AstraZeneca claimed that, due to the fact that Apotex is launching Apo-Esomeprazole "at a time when major structural changes to the business have just been made, [this will lead to a] downward spiral of intangible harms which could negatively impact on sales of all of AstraZeneca Canada's products in the immediate and longer term." These structural changes were part of the recent implementation of a major business transformation which included the elimination, in December 2010, of [*]% of the total employees of AstraZeneca Canada. This business transformation was effected, at least in part, in anticipation of the loss of patent protection on CRESTOR, in 2012. However, that transformation allegedly did not take into account the possible genericization of NEXIUM. In addition, the employee reductions did not include any sales staff.

[102] AstraZeneca stated that "it is not aware of any major pharmaceutical company that has survived the loss of their top two selling products (which account for 50% or more of their revenue) in such a narrow time frame as faced in the present situation."

[103] In this context, AstraZeneca claimed that "the loss of NEXIUM at this time will destabilize and imperil the transformation of AstraZeneca's future performance." In part, this is allegedly attributable to the fact that additional employee reductions will have to occur, and this will "necessarily have to include the sales force." AstraZeneca claimed that this would "be particularly devastating" and of long duration, "because relationships with and knowledge of customers are built over years" and because most employees have responsibilities that cover more than one product or support the entire organization.

[104] AstraZeneca further claimed that "[t]here is undoubtedly little or no interest on the part of the global business to rescue a poorly performing arm, especially one in a small market such as Canada when there are potentially larger emerging markets that are competing for AstraZeneca's investment." In this regard, Ms. McCourt stated in her affidavit that [*].

[105] Ms. McCourt also stated in her affidavit that the continued roll-out of Apo-Esomeprazole will result, in the near and longer term, in "a real and substantial negative impact to the current portfolio of products in the market today as AstraZeneca Canada will have lost the resources, both financial and human, and competitiveness it presently enjoys."

[106] Dr. Gulati added, in his affidavit, that "[r]esearch has also shown that as businesses downsize and reduce their key customer support personnel, their ability to deliver ancillary value-added service decline [*sic*], which in turn reduces customer satisfaction, loyalty, and repurchase intentions."

[107] With respect to its employees, AstraZeneca claimed that its "recent layoffs and restructuring have likely shaken many employees". However, it anticipates that, "absent further bad news, employees will be able to focus and gain renewed confidence in AstraZeneca's future". That said, the news that Apotex has been permitted to continue to roll-out Apo-Esomeprazole would "create stress perceived by job insecurity" as well as a "loss of employee morale, focus, commitment and energy." If it is not able to "maintain a high level of employee engagement," AstraZeneca claimed that "[k]ey priorities in 2011 and beyond, including product launches, will be derailed if employees are distracted and demoralized, and suffer stress and loss of pride and confidence in the company." In turn, AstraZeneca asserted that "a number of high performing employees, who would not be part

of the downsizing, would leave, preferring not to work in a company that has suffered such a setback," thereby compromising AstraZeneca Canada's competitiveness in the immediate and longer term. AstraZeneca added that if it prevails in the within action, "all of this lost talent would not simply be available to be re-hired and it will not be possible to quickly replace and rebuild the employee base."

[108] In her affidavit, Ms. McCourt reiterated the various claims set forth above and stated that the Transformation Plan that AstraZeneca Canada implemented in the first quarter of this year "assumes and depends on exclusivity for NEXIUM until patent expiry." In other words, that plan did not take account of Apotex's launch of Apo-Esomeprazole, which Apotex had previously confirmed was being pursued. In this latter regard, Ms. McCourt stated that it would be "illogical to conduct business assuming a possible blow at an unknown future time, including directing employees to prepare for such an eventuality. Certainty is needed."

[109] Accordingly, Ms. McCourt claimed that "[t]he significant and rapid loss of NEXIUM revenue means that a significant further reduction of the size and structure of the business will be required over a short period of time. Further reductions will be in the range of [*]%." She added: "I believe that the company will not be able to absorb the further changes at this time without significant harm," particularly given that the company has just implemented an approximately [*]% reduction of the employee base.

[110] Based on his understanding of Ms. McCourt's affidavit, Dr. Gulati stated in his affidavit that "it is entirely reasonable and most likely necessary to expect a further significant downsizing of the company if there is early genericization of NEXIUM." He added that this would be

compounded by additional voluntary departures, especially by persons within the company's sales force, "who will view AstraZeneca Canada – having lost its top two selling drugs in such a short period of time, as a defeated company with no opportunity for growth." In his view, these further employee reductions, over and above those recently implemented, "would be dramatic and catastrophic to AstraZeneca Canada." In short, he stated that these reductions:

> … would likely create a destructive chain reaction within the organization, resulting in loss of employee engagement, commitment and motivation, physical and psychological strain on employees, loss of institutional memory, disruption of relationships between sales representatives and physicians, negative impacts on the climate for creativity, and negative impacts on reputation harming both the survivors and the organization itself, creating an environment of uncertainty for all persons within the company.

[111] After elaborating on the foregoing and drawing upon the findings in a number of recent articles that discuss research into corporate downsizing, Dr. Gulati opined that the alleged harms to AstraZeneca are not reasonably quantifiable in monetary terms, that is to say, quantifiable within a reasonable degree of accuracy.

[112] Dr. Biloski stated in his affidavit that, "further significant cuts will almost certainly be the inevitable result of a commercialization of generic NEXIUM in 2011 and the consequential loss of a significant NEXIUM revenue stream." In addition, he stated that he is "not aware of any major pharmaceutical companies that have been able to survive the loss of their top two selling products (which account for 50% or more of their revenue) in such a narrow time frame – and AstraZeneca Canada will likely be no different."

[113] Furthermore, he opined that, having regard to AstraZeneca's fiduciary obligation towards its shareholders and the likelihood of finding better returns from investments in countries such as China, it is "entirely reasonable that [AstraZeneca] would choose to forego providing a lifeline of financial and other support and allow AstraZeneca Canada to experience a sudden and pronounced decline."

[114] Consistent with Dr. Gulati's view, Dr. Biloski also opined that the impact of the above-described harms on AstraZeneca Canada "[are] not reasonably quantifiable given the wide variability in the future commercial outcomes of AstraZeneca Canada's business if [NEXIUM] were to retain market exclusivity until May 27, 2014 …" .

[115] I have great difficulty believing that AstraZeneca Canada did not account for the likelihood of a loss of significant sales of NEXIUM, when it recently implemented a reduction of approximately [*]% of its workforce, particularly given the facts discussed in the paragraphs immediately below. In any event, I find that AstraZeneca's claimed harms are exaggerated, speculative and unsubstantiated. To the extent that any such harms do materialize between now and the time at which damages are calculated in the within action, I find that they are likely to be reasonably quantifiable and compensable.

[116] As with the claims discussed in Part III.D (i) above, I find the evidence of Apotex's experts to be more analytically robust and persuasive than the evidence of Ms. McCourt, Dr. Biloski and Dr. Gulati. In this context, where I must determine which conflicting evidence to accept for the purposes of assessing whether alleged irreparable harm has been clearly demonstrated, the Business

Judgment Rule, as summarized in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 40, has no application

[117] In his affidavit, Dr. Bower notes that AstraZeneca Canada: (i) has known since late 2007 that Apotex was seeking to obtain an NOC to market its generic esomeprazole product; (ii) is aware that Apotex obtained that NOC in June 2010; and (iii) thought that the risk of Apotex launching its product was so high that it commenced the within action. In these circumstances, he stated: "I find it hard to believe that Astra Canada would undertake a business transformation, commencing in late 2010, the success of which depended upon this launch not occurring."

[118] Similarly, Dr. Hollis stated in his affidavit that he found it surprising that AstraZeneca would have to reduce its workforce by a further [*]% because, in anticipation of the genericization of CRESTOR, a drug which historically delivered over twice as much revenue as NEXIUM, the company recently cut approximately [*] employees. In this regard, Dr. Hollis pointed out that NEXIUM "is chiefly insured under private insurance plans, which have historically not been as aggressive in moving patients from brand name to lower priced generic drugs." He also noted that the Province of Quebec "has a policy of allowing innovative medicines to be fully reimbursed for 15 years following their introduction," such that "for the public plan in Quebec, Astra is likely to retain a healthy share of the market." In addition, he suggested that Apotex's proposed selling price of Apo-Esomeprazole, at 89% of NEXIUM's price, will likely deter some people who might otherwise choose the generic product. In the absence of more specific information about AstraZeneca Canada's financial situation, Dr. Hollis concluded: "It appears that Astra would not be financially constrained and thus would be able to maintain the staff required to continue to promote Nexium to physicians."

[119] Dr. Hollis also responded to Dr. Gulati's suggestion that AstraZeneca Canada would not likely survive the genericization of its top two selling drugs by noting that Pfizer Canada lost its exclusivity on Norvasc and Lipitor in the space of one year. In this regard, Dr. Hollis noted that those two drugs accounted for approximately 63% of Pfizer Canada's revenues in 2008, and that, "despite these losses, [Pfizer Canada] continues to operate."

[120] Dr. Hollis also responded to Dr. Biloski's view that it would be entirely reasonable for AstraZeneca to withhold funding from AstraZeneca Canada if NEXIUM is genericized, as more attractive investment opportunities are available elsewhere in the world. In short, Dr. Hollis stated that this view "seems poorly founded," because if Canadian opportunities are not more attractive than opportunities elsewhere, "they should not be funded in any case, regardless of the potential cash flow from sales of Nexium."

[121] With respect to AstraZeneca Canada's financial resources, as discussed at paragraph 40 above, Mr. Harrington estimated that, even with the genericization of NEXIUM, AstraZeneca Canada's profits would be almost $[*] billion in the period 2011 to 2014. Mr. Harrington also estimated the cost of maintaining [*]% of AstraZeneca Canada's existing workforce to be [*] [less than $50] million, after tax.

[122] On a related point, Dr. Bower also noted, in his affidavit, that Ms. McCourt provided no explanation as to how AstraZeneca Canada concluded that the genericization of NEXIUM would necessitate a further [*]% reduction of its workforce. He also noted that Ms. McCourt did not

provide any information as to the annual cost savings that AstraZeneca Canada would expect to achieve by such a reduction.

[123] Given Ms. McCourt's statement, in her affidavit, that the recent implementation of the Transformation Plan has strengthened AstraZeneca Canada, and has resulted in a "new, more efficient and responsive operating model," Dr. Bower stated that he found "Ms. McCourt's statements as to how she intends to respond to Apotex's market entry for esomeprazole to be all the more perplexing." I endorse Dr. Bower's view.

[124] With respect to Ms. McCourt's statement that reducing AstraZeneca Canada's workforce by a further [*]% would have a devastating and long term impact on the company, and would prevent the company from successfully implementing the ongoing Transformation Plan, Dr. Bower opined that, "[i]t is illogical in the extreme to damage the very asset that would enable Astra Canada to survive and, indeed, thrive in the years to come." With this in mind, Dr. Bower opined that these statements, and the similar statements made in the affidavits of Dr. Biloski and Dr. Gulati, "vastly exaggerate the likely effects of the job cuts."

[125] After reviewing some of the relevant literature on corporate downsizing, Dr. Bower observed: "Thus, the literature states that whether or not the downsizing causes serious long-term harm to the company is largely within the control of its management." He also noted that some of the literature cited by Dr. Gulati reports that the adverse effects of corporate downsizing are "relatively short-lived." In addition, he referred to substantial and successful downsizings that have occurred at Xerox Corporation, Ford Motor Company and IBM.

[126] Dr. Bower then referred to an article, entitled "Death of a Salesman: AstraZeneca Replaced Entire Nexium Salesforce with Telemarketers," which reported upon a recent corporate downsizing that was implemented by AstraZeneca Canada's U.S. affiliate ("AstraZeneca U.S."). That article reported that, in 2009, AstraZeneca U.S. "reduced its salesforce headcount by 430 full-timers, a 50 percent cut," and replaced them with a 300 person call centre and an Internet site. As a result of this initiative, "essentially all detailing of Nexium was eliminated," even though NEXIUM's patent protection in the U.S. apparently will not expire until 2014. Notwithstanding this substantial reduction in its salesforce, the sales and market share of NEXIUM reportedly did not decline in 2009.

[127] Dr. Bower also referred to other articles reporting on other workforce cuts within AstraZeneca's global enterprise. Based on those articles, he concluded that "it would appear that, since 2007, the AstraZeneca group of companies has announced cuts to its workforce totalling 23,550 jobs, which cuts are to be completed by 2013." Based on another source that reported a total pre-downsizing workforce of 65,000, Dr. Bower estimated that the total reported cuts constituted approximately 36% of AstraZeneca's [total worldwide] workforce.

[128] With respect to the recent cuts implemented by AstraZeneca Canada, Mr. Harrington noted that, on page 11 of the Transformation Plan, it is indicated that a key objective was to eliminate "unnecessary layers of management and small spans of control," and to "streamline cross-functional processes."

[129] Having regard to the foregoing, I find it implausible that AstraZeneca did not take Apotex's announced entry into the esomeprazole business into account when it planned and recently implemented a [*]% reduction of its workforce. This is particularly so given that: (i) on July 13, 2010, at AstraZeneca's request, Apotex provided an "on the record" confirmation of its intention to launch Apo-Esomeprazole; (ii) on July 26, 2010, it again confirmed to AstraZeneca that it was proceeding with the production of launch quantities of Apo-Esomeprazole; (iii) AstraZeneca filed the within action on the same day that Ms. McCourt presented the Transformation Plan to Mr. Fante for approval; and (iv) Ms. McCourt acknowledged during the cross-examination on her affidavit that "[a] competent CEO will most deliberately plan for events that are deemed likely to occur."

[130] In any event, given the evidence of Mr. Harrington and Dr. Hollis, I find it implausible that AstraZeneca will not have, or have access to, sufficient resources to maintain its workforce at a level which would avoid the devastating and catastrophic harms that it has claimed will result if Apotex is not enjoined from continuing to roll-out Apo-Esomeprazole.

[131] In addition, I find it implausible that AstraZeneca Canada's employees would react in the manner claimed by Ms. McCourt, particularly given that they have known for approximately 10 months now that Apotex obtained an NOC in respect of Apo-Esomeprazole, a fact that Ms. McCourt acknowledged when she admitted, during cross-examination on her affidavit, that she had sent a press release to AstraZeneca's employees regarding that NOC, soon after its issuance last June.

[132] Moreover, I find it implausible that any of the claimed harms will materialize if Apotex continues its roll-out of Apo-Esomeprazole. Having regard to Mr. Harrington's evidence that if any

of these claimed harms do materialize, they will be "measurable in a reliable and traditional manner," I also find that such harms would be reasonably quantifiable and compensable if they do materialize. I note that these findings are consistent with the jurisprudence with respect to these types of claimed harms (*Fournier Pharma Inc. v. Apotex Inc*. (1999), 1 C.P.R. (4th) 344, [1999] F.C.J. No. 504 (QL) (T.D.) [*Fournier Pharma 2*], at para. 9; *Fournier Pharma 1*, above, at paras. 55 and 75; *Aventis Pharma*, above, at paras. 94-97; *Bayer HealthCare*, above, at paras. 58 and 70-73; *Servier*, above, at paras. 37, 45 and 48; *Wellcome Foundation Ltd. v. Interpharm Inc*. (1992), 41 C.P.R. (3d) 215, [1992] F.C.J. No. 123 (QL) (T.D.)).

(iii) *Negative impact on pipeline products*

[133] AstraZeneca submitted that it "expects [*] new products to be launched in 2011 and 2012, and several more beyond that." As a result of the other harms that it has alleged, it claimed that it would "be going into these (and 2012) product launches wounded and severely disadvantaged." As a result, the "uptake and success" of some of its future products "will therefore be critically diminished." This is alleged to be an "unquantifiable impact which the business will never get back in the product's life cycle." In the case of at least one pipeline product, VIMOVO, which is a combination of NEXIUM and naproxen, the Plaintiffs claimed that the list price of the product "will likely be based on the price of the component drugs, if it is listed at all." As a result, AstraZeneca asserted that "[i]t will be impossible for AstraZeneca Canada to obtain the price, and therefore the revenues, it would have if esomeprazole was not genericized early."

[134] In her affidavit, Ms. McCourt reiterated the foregoing claims and added that, as part of the ongoing business transformation plan, more resources are being shifted to effective launch strategies in relation to the company's pipeline products.

[135] Dr. Biloski supported the above described claims by stating that: (i) losing key provider relationships will make it difficult to change prescribing behaviour of physicians; (ii) losing the most creative employees will deny a company the ability to optimize its promotional programs; and (iii) "the unexpected erosion of a flagship product such as NEXIUM can have a terminal impact on AstraZeneca Canada by foreclosing its ability to revitalize its product line."

[136] As with the claims discussed Part III.D. (i) and (ii) above, I find the claims that have been made in respect of AstraZeneca's pipeline products to be entirely speculative and unsubstantiated. Indeed, I agree with Dr. Bower's view that these claims "vastly exaggerate the likely effects of the job cuts" that Ms. McCourt claimed will have to be made if the requested injunction is not granted. I also agree with Dr. Hollis' opinion that "if pricing of Vimovo on any formulary is compromised by the generic esomeprazole, that would be a relatively easy harm to calculate."

[137] In short, I find that AstraZeneca has not clearly established that it will suffer any irreparable harm in connection with its pipeline products.

(iv) *Negative impact on reputation and future business development opportunities*

[138] AstraZeneca claimed that the "early genericization of NEXIUM, and the consequential harms described above," would result in "a negative reputational impact" in the eyes of "potential business development partners, who would consider AstraZeneca Canada, along with other innovators in Canada, for the development of their products." An example of such a partnership is its marketing alliance with Bristol-Myers Squibb Canada in relation to the sale of ONGLYZA, a diabetes drug.

[139] AstraZeneca claimed that "roughly [*]%" of its future sales will "derive from outside AstraZeneca's laboratories" and that AstraZeneca Canada develops and self funds some of those partnerships with third parties. It asserted that a "[l]oss in revenue will mean that acquisitions and in-licensing will no longer be possible or compromised" and that the likely perception of AstraZeneca Canada as a substantially weakened competitor would adversely impact upon its ability to partner with other companies, who would be "attracted to more financially robust companies." Moreover, it claimed that [*].

[140] In her affidavit, Ms. McCourt essentially repeated these claims.

[141] Dr. Biloski supported these claims by, among other things, opining that "Canadian subsidiaries of multinational pharmaceutical companies such as AstraZeneca Canada have a critical need to supplement the parent company product pipeline with locally sourced license and partnership deals."

[142] Dr. Gulati opined that it would not be possible to quantify the harm to AstraZeneca from this adverse impact on its reputation, because the extent of that impact "will not be known."

[143] I find the claims that have been made by AstraZeneca in respect of the impact of the early genericization of NEXIUM on AstraZeneca Canada's reputation and its future business development opportunities to be entirely speculative, unsubstantiated and exaggerated.

[144] Once again, I find the evidence of Apotex's experts to be more analytically robust and persuasive than that of Ms. McCourt, Dr. Biloski and Dr. Gulati.

[145] I agree with Mr. Harrington that, as a company that will continue to have several hundred million dollars in sales, even assuming a 100% loss of NEXIUM sales, "there is no reason to believe that there would be any significant, if any, losses in business development opportunities." This is particularly so given that, as Dr. Hollis noted: (i) "virtually every [branded drug] company has faced generic entry in spite of patents it believed were valid, and this is simply an expected part of the business;" and (ii) "[g]enerally, [prospective] partners would look to Astra for its expertise in marketing products. This is not put in doubt by the generic sales of esomeprazole." I am also inclined to accept Dr. Hollis' opinion that "it is the reputation of the parent companies that is far more important [to prospective partners] than that of the local subsidiaries."

[146] In addition, as Dr. Bower noted, it is difficult to understand (i) "how the presence of a competing product for Nexium can have any effect on the perception that Astra Canada is a 'high quality company';" and (ii) "how the loss of market exclusivity three years before that loss was expected (and after the drug had already enjoyed exclusivity for ten years) could affect that 'innovation' image."

[147] Dr. Biloski stated, in his affidavit: "In my direct experience, there is no faster way to change the perceptions of a research-based pharmaceutical company than via the unexpected generic erosion of a flagship product." Dr. Hollis characterized this as being an "extraordinary claim." He stated that in his "experience, the fastest way to change the perceptions of any pharmaceutical company is for it to be found that the drugs produced and marketed by the company are dangerous for the people…" He then noted that, "in late April 2010, the U.S. Department of Justice announced that an agreement had been reached with AstraZeneca whereby AstraZeneca had agreed

to pay $520m to resolve allegations that it had marketed the antipsychotic drug Seroquel for off-label uses". I agree with his opinion that the fact that AstraZeneca has "managed to survive, and indeed flourish, in the period after this public announcement, draws into serious question the hypothesis that Astra will not be able to address negative 'perceptions' brought on by Apotex's market entry."

[148] In addition, I find that Dr. Biloski's evidence is undermined by the fact that he acknowledged, in cross-examination on his affidavit, that he did not know whether AstraZeneca Canada would remain "a top three [pharmaceutical] company" in Canada without NEXIUM. Indeed, he conceded that he not know where AstraZeneca Canada would place relative to other pharmaceutical companies in Canada.

[149] In summary, I find that AstraZeneca has not clearly established that it will suffer any irreparable harm in connection with its reputation and future business development opportunities. I note that this finding is consistent with determinations made by this Court in cases such as *Merck & Co.*, above, at para. 34; *Fournier 1*, above, at para. 74; *Bristol-Myers Squibb*, above, at para. 30; *Pfizer Ireland 1*, above, at para. 26; *Pfizer Ireland 2*, above, at para. 41; and *Merck Frosst Canada Inc. v. Canada (Minister of Health)*, [1997] F.C.J. No. 953 (QL) (TD), at para. 12.

(v) *Innovation and creativity*

[150] In its written submissions, AstraZeneca claimed that "as a result of the negative impact on employees and climate just described, there would also be a loss of creativity and innovation." The same bald assertion is made by Ms. McCourt, in her affidavit. A similarly unsubstantiated claim was made by Dr. Biloski, who stated, in his affidavit, that AstraZeneca Canada "is more likely to be

successful with the discovery and/or in-licensing and launch of new products if it continues to enjoy the cash flow from NEXIUM throughout its expected patent life to May 27, 2014."

[151] In my view, Ms. McCourt's claim is somewhat undermined by her inability to identify, during cross examination on her affidavit, the last drug product sold by AstraZeneca in Canada that was actually innovated by AstraZeneca Canada.

[152] In any event, in the absence of any substantiation whatsoever for the claims that have been made under this heading, they are purely speculative and have not been clearly demonstrated to constitute irreparable harm (*Servier*, above, at paras. 37 and 71; *Merck & Co.*, above, at paras. 35-36).

(vi) *General conclusion with respect to irreparable harm*

[153] Given the conclusions I have reached with respect to each of the categories of irreparable harm that AstraZeneca has claimed it is likely to suffer if the injunction that it has requested is not granted, I find that AstraZeneca has not clearly established that it is likely to suffer any such irreparable harm whatsoever.

E. *Balance of convenience*

[154] Given my conclusion immediately above, it is not necessary for me to address the third prong of the tri-partite test for the granting of an interlocutory injunction. Nevertheless, I will do so, in the event that I may have erred in my analysis of one or more of the irreparable harms that AstraZeneca has claimed.

[155] In its oral submissions, AstraZeneca suggested that my assessment of the balance of convenience should take into account the harm to the public interest in patent rights and the promotion of innovation and drug discovery, which would result from a decision not to grant the interlocutory injunction that AstraZeneca has requested in this Motion.

[156] As briefly discussed in Part III.B above, I agree that this may well be a legitimate consideration to be considered in assessing the overall balance of convenience, in appropriate cases. However, in this particular case, this claim is nothing more than a bald assertion. AstraZeneca has provided no evidence whatsoever of any adverse impact that would result from a decision not to grant the requested injunction.

[157] When pressed on this point during the hearing of this Motion, counsel to AstraZeneca was unable to provide any evidence to support the assertion that a refusal to grant this Motion might adversely impact upon innovative activity, whether in Canada or elsewhere. In the particular circumstances of this case, this is not surprising, particularly given that (i) much of the innovative activity in the drug industry is conducted outside Canada, and largely directed towards markets outside Canada; (ii) interlocutory injunctions are permitted in other jurisdictions that are as likely as Canada to be in the minds of drug innovators located abroad; and (iii) AstraZeneca has already had the benefit of approximately 10 years of full patent protection in respect of its production and sale of esomeprazole in Canada.

[158] In its written submissions regarding the balance of convenience prong of the tri-partite test for injunctions, AstraZeneca submitted that the potential loss of jobs is a significant matter of public

interest that should be dealt with in my analysis. In this regard, AstraZeneca baldly asserted that "[t]here will be an obvious negative impact on the approximately [*] workers who will lose their full time employment and benefits if Apotex is not restrained" from continuing to roll-out its Apo-Esomeprazole product. AstraZeneca also submitted that "there will be a significant impact on AstraZeneca's ongoing and future performance," as described in the section of its submissions dealing with the irreparable harm prong of the tri-partite test.

[159] Given my findings that AstraZeneca has not demonstrated that these unsubstantiated harms are likely to materialize, they do not merit material weight in the balancing of convenience assessment in this case.

[160] On the other side of the ledger, Apotex has identified certain harms that I am prepared, on the particular facts of this case, to accept are likely to result if the requested injunction is granted and if Apotex prevails in the within action.

[161] Specifically, if Apotex 's roll-out of Apo-Esomeprazole is suspended until a judgment is rendered in its favour, it claimed that it would either (a) lose the benefit of having launched the first generic competitor to NEXIUM (if its generic rivals, including three of whom are in the process of attempting to obtain their own NOCs, are able to launch their products before that time), or (b) merely be one of a number of generic entrants at that time, (if those rivals are enjoined from launching until that time). In either case, it would lose the ability to command the high price that it would have charged, but for the granting of the injunction.

[162] I am satisfied that it is likely to be particularly difficult to quantify the extent of such losses. In contrast to the situation that AstraZeneca faces, where any sale lost to Apotex will be known and quantifiable, it will be more difficult to ascertain what Apotex's total sales of Apo-Esomeprazole would have been, but for the injunction.

[163] In addition, AstraZeneca has known since Apotex received an NOC in respect of Apo-Esomeprazole, almost ten months ago, that Apotex was legally in a position to launch that product. A few weeks later, at AstraZeneca's request, Apotex provided an "on the record" confirmation of its intention to launch Apo-Esomeprazole. Two weeks after that, on July 26, 2010, Apotex again confirmed to AstraZeneca that it was proceeding with the production of launch quantities of Apo-Esomeprazole. On October 15, 2010, AstraZeneca considered the threat of Apotex's entry to be sufficiently serious that it launched the within action. However, it still did not file this Motion for an interlocutory injunction.

[164] It was not until after Apo-Esomeprazole was listed by Nova Scotia Pharmacare in November 2010, and then in Quebec and New Brunswick in February of this year, that AstraZeneca finally retained Dr. Gulati and Dr. Biloski and then filed this Motion.

[165] In my view, given the foregoing, the significant time, effort and monetary resources that Apotex expended between the time it received an NOC on June 17, 2010 and the time that this Motion was launched on March 11, 2011 are factors to be considered on Apotex's side of the ledger in the balancing of convenience analysis.

[166] Another factor to be considered on Apotex's side of the ledger is the fact that there is uncontested evidence of a likely and substantial adverse impact on the public interest that would result from enjoining Apotex from continuing its roll-out of Apo-Esomeprazole. This adverse impact is the delay of a significant reduction in the price of esomeprazole that would benefit the public. Unlike the harm that AstraZeneca would suffer from the loss of sales of NEXIUM (if the injunction is not granted and it prevails in the within action), and unlike the harm that Apotex would suffer from the deferral of its recoupment of the substantial investment it has made to date in preparing to launch Apo-Esomeprazole (if the injunction is granted and it prevails in the within action), the public will never be compensated for having suffered this harm.

[167] Considering all of the foregoing, I find that AstraZeneca has not demonstrated that the balance of convenience lies in its favour.

IV. Conclusion

[168] Based on my findings that AstraZeneca has not met its burden in respect of the second and third prongs of the tri-partite test applicable to interlocutory injunctions, this Motion will be dismissed.

[169] Given my finding with respect to the tri-partite test, it is not necessary to address the distinct issue that Apotex has raised with respect to delay and *Laches*.

V. Confidentiality

[170] AstraZeneca requested extensive redactions from the public version of these reasons. In addition to confidential financial information, it requested the redaction of (i) various assertions made by Ms. McCourt regarding claimed negative impacts of the early genericization of NEXIUM on AstraZeneca Canada's transformation and future; (ii) certain related information with respect to further downsizing and restructuring that it claimed would be necessary if the requested injunction were not granted, (iii) certain information pertaining to claimed adverse impacts on other products in its portfolio, its ability to retain key employees, its reputation, its ability to attract third parties to enter into potential business development opportunities, and its ability to launch new products; (iv) claims made regarding AstraZeneca Canada's future ability to access funds from its parent company; and (v) claims made regarding the possible list price of VIMOVO.

[171] This Court takes the protection of confidential information very seriously. However, parties cannot expect that requests to maintain the confidentiality of bald, unsubstantiated assertions or speculative will necessarily be granted. Such requests will be considered on a case-by-case basis.

[172] Pursuant to Rule 151 of the Rules, the Court must be satisfied that information in respect of which a request for confidentiality has been made should be kept confidential, notwithstanding the public interest in open and accessible court proceedings.

[173] In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53, the Supreme Court of Canada stated:

A confidentiality order under Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[174] With respect to the first branch of the aforementioned test, the Supreme Court identified, at paras. 54 to 57 of its decision, the following three elements:

i. the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question;

ii. in order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the confidentiality order, the interest must be one which can be expressed in terms of a public interest in maintaining confidentiality; and

iii. the Court must consider not only whether reasonable alternatives to a confidentiality order are available, but must also restrict the order as much as is reasonably possible, while preserving the commercial interest in question.

[175] It follows from the foregoing that the less well grounded are the assertions in the evidence, the less likely it is that the Court will agree to maintain them in confidence. Moreover, even where the Court agrees that information contained in an assertion or claim ought to be maintained in confidence, it is required restrict the scope of redactions from its reasons as much as is reasonably possible, while preserving the commercial interest in question,

[176] With the foregoing principles in mind, I have rejected most of AstraZeneca's extensive requests for redactions, on the basis that they are not "well grounded in the evidence" (*Sierra Club*, above; *Abbott Laboratories Limited v. Canada (Minister of Health)*, 2005 FC 989, at paras. 100 and 102; *Pfizer Canada Inc. v. Novopharm Limited*, 2010 FC 668, at para. 37). This includes AstraZeneca's bald, largely unsubstantiated or speculative assertions with respect to the various adverse impacts that will be associated with the "early genericization" of NEXIUM, including:

i. the "immediate, catastrophic and irreversible impact" that this will have on AstraZeneca Canada, including the other current and pipeline products in its portfolio;

ii. the "destabilization and imperilling" of AstraZeneca Canada's ongoing transformation;

iii. the fact that AstraZeneca's transformation did not take into account the possible genericization of NEXIUM;

iv. additional employee reductions and voluntary departures;

v. its reputation and ability to attract third parties to enter into potential business development opportunities;

vi. the unlikelihood of AstraZeneca accessing funds or other assets from its parent company; and

vii. the possibility that the list price of VIMOVO will be be lower, because it "will likely be based on the price of the component drugs, if it is listed at all".

[177] The unsubstantiated and unpersuasive nature the claims in respect of which AstraZeneca has sought confidentiality protection is such that I am satisfied that any salutary effects that might be associated with maintaining the confidentiality of the claims and related evidence would not outweigh the deleterious effects that would be associated with such action. These deleterious effects include the significant difficulty that the public would have to discern the nature of those claims, why they were rejected and what might be required to establish similar claims in the future. If I were to accept the extensive confidentiality requests that AstraZeneca has made, important parts of these Reasons for Judgment would be difficult, if not impossible, for the public to follow. This includes persons who may consider making such claims in the future.

[178] Notwithstanding the foregoing, I am satisfied that the confidentiality of certain information set forth in the confidential version of these Reasons for Judgment ought to be maintained. This includes (i) specific financial and sales figures; (ii) specific figures with respect to the further reduction in its workforce that AstraZeneca's has asserted is likely to occur if the requested

injunction is not granted; (iii) advice that Ms. McCourt attested to having received from someone in AstraZeneca; (iii) the number of new products that AstraZeneca Canada expects to launch in 2011 and 2012; and (iv) a particular claim that was made regarding AstraZeneca Canada's ability to enter into potential business development opportunities.

"Paul S. Crampton"

Judge

Ottawa, Ontario
May 24, 2011
(Amended on May 30, 2011)

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1668-10
STYLE OF CAUSE:	Astrazeneca Canada Inc. et al v. Apotex Inc.
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 19, 2011
REASONS FOR ORDER:	CRAMPTON J.
DATED:	Confidential Reasons for Order – April 29, 2011 Public Further Amended Reasons for Order – May 24, 2011 (Amended on May 30, 2011)

APPEARANCES:

Gunars Gaikis Yoon Kang	FOR THE PLAINTIFFS (DEFENDANTS BY COUNTERCLAIM)
Andrew Brodkin Julie Rosenthal	FOR THE DEFENDANT (PLAINTIFF BY COUNTERCLAIM)

SOLICITORS OF RECORD:

SMART & BIGGAR Barristers and Solicitors Toronto, Ontario	FOR THE PLAINTIFFS (DEFENDANTS BY COUNTERCLAIM)
GOODMANS LLP Barristers and Solicitors Toronto, Ontario	FOR THE DEFENDANT (PLAINTIFF BY COUNTERCLAIM)

30857

Supreme Court of Canada | Cour suprême du Canada

06 352 001

Her Majesty the Queen

- v. -

Ramnarine Khelawon

- and -

Attorney General of British Columbia and Criminal Lawyers' Association (Ontario) (Ont.) (30857)

CORAM:
The Right Honourable Beverley McLachlin, P.C.
The Honourable Mr. Justice Binnie
The Honourable Mr. Justice LeBel
The Honourable Madam Justice Deschamps
The Honourable Mr. Justice Fish
The Honourable Madam Justice Abella
The Honourable Madam Justice Charron

Appeal heard:
December 16, 2005

Judgment rendered:
December 14, 2006

Reasons for judgment by:
The Honourable Madam Justice Charron

Concurred in by:

The Right Honourable Beverley McLachlin, P.C.
The Honourable Mr. Justice Binnie
The Honourable Mr. Justice LeBel
The Honourable Madam Justice Deschamps
The Honourable Mr. Justice Fish
The Honourable Madam Justice Abella

Counsel at hearing:

For the appellant
John S. McInnes
Eliot Behar

Sa Majesté la Reine

- c. -

Ramnarine Khelawon

- et -

Procureur général de la Colombie-Britannique et Criminal Lawyers' Association (Ontario) (Ont.) (30857)

CORAM :
La très honorable Beverley McLachlin, c.p.
L'honorable juge Binnie
L'honorable juge LeBel
L'honorable juge Deschamps
L'honorable juge Fish
L'honorable juge Abella
L'honorable juge Charron

Appel entendu :
Le 16 décembre 2005

Jugement rendu :
Le 14 décembre 2006

Motifs de jugement :
L'honorable juge Charron

Souscrivent à l'avis de l'honorable juge Charron :
La très honorable Beverley McLachlin, c.p.
L'honorable juge Binnie
L'honorable juge LeBel
L'honorable juge Deschamps
L'honorable juge Fish
L'honorable juge Abella

Avocats à l'audience :

Pour l'appelante
John S. McInnes
Eliot Behar

For the respondent
Timothy E. Breen

For the intervener Attorney General of British Columbia
Alexander Budlovsky

For the intervener Criminal Lawyers' Association (Ontario)
Louis P. Strezos
Joseph Di Luca

Pour l'intimé
Timothy E. Breen

Pour l'intervenant Procureur général de la Colombie-Britannique
Alexander Budlovsky

Pour l'intervenante Criminal Lawyers' Association (Ontario)
Louis P. Strezos
Joseph Di Luca

Citations

Ont. C.A.: (2005), 195 O.A.C. 11, 194 C.C.C. (3d) 161, 26 C.R. (6th) 1, [2005] O.J. No. 723 (QL).

Ont. S.C.J.: *R. v. Khelawon*, October 29, 2001 (Grossi J.).

Références

C.A. Ont. : (2005), 195 O.A.C. 11, 194 C.C.C. (3d) 161, 26 C.R. (6th) 1, [2005] O.J. No. 723 (QL).

C.S.J. Ont. : *R. c. Khelawon*, 29 octobre 2001 (le juge Grossi).

CITATION

Before publication in the S.C.R., this judgment should be cited using the neutral citation: *R. v. Khelawon*, 2006 SCC 57. Once the judgment is published in the S.C.R., the neutral citation should be used as a parallel citation: *R. v. Khelawon*, [2006] x S.C.R. xxx, 2006 SCC 57.

RÉFÉRENCE

Avant la publication de ce jugement dans le R.C.S., il faut utiliser sa référence neutre : *R. c. Khelawon*, 2006 CSC 57. Après sa publication dans le R.C.S., la référence neutre sera utilisée comme référence parallèle : *R. c. Khelawon*, [2006] x R.C.S. xxx, 2006 CSC 57.

r. *v.* khelawon

Her Majesty The Queen *Appellant*

v.

Ramnarine Khelawon *Respondent*

and

Attorney General of British Columbia and Criminal Lawyers' Association (Ontario) *Interveners*

Indexed as: R. *v.* Khelawon

Neutral citation: 2006 SCC 57.

File No.: 30857.

2005: December 16; 2006: December 14.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for ontario

Criminal law — Evidence — Hearsay — Admissibility — Trial judge admitting deceased complainants' hearsay statements to police into evidence — Whether statements admissible under principled exception to hearsay rule — Factors to be

considered in determining whether hearsay statements sufficiently reliable to be admissible.

In1999, C, a cook who worked at a retirement home, found S, a resident of the home, badly injured in his room. His belongings were packed in garbage bags. S told C that the accused, the manager of the home, had beaten him and threatened to kill him if he did not leave the home. C took S to her apartment and cared for him for a few days. She then brought S to a doctor. The doctor testified that he found three fractured ribs and bruises that were consistent with S's allegation of assault but which also could have resulted from a fall. The next day, C took S to the police and S gave a videotaped statement alleging that the accused had assaulted him and threatened to kill him. The statement was not under oath but S answered "yes" when asked if he understood it was important to tell the truth and that he could be charged if he did not tell the truth. Medical records seized from the retirement home described S as angry, aggressive, depressed and paranoid, and revealed that he had been treated for paranoid psychosis and depression. At trial, a psychiatrist who testified at the *voir dire* concluded that S had the capacity to communicate evidence and understood at the time he made his statement to the police that it was important to tell the truth. The defence argued that C influenced S to complain out of spite because the accused previously had terminated C's employment.

The police attended the retirement home where more residents complained that they had been assaulted by the accused. The accused was charged in respect of five complainants but, by the time of the trial, four complainants, including S and D, had died of causes unrelated to the alleged assaults and the fifth was no longer competent to testify. Only one complainant had testified at the preliminary inquiry. The central issue

at trial was whether the complainants' hearsay statements should be received in evidence. The trial judge admitted some of the hearsay based in large part on the striking similarity between the statements. The trial judge ultimately found videotaped statements given by S and D to the police sufficiently credible to found convictions for aggravated assault and uttering a death threat in respect of S, as well as assault causing bodily harm and assault with a weapon in respect of D. The accused was acquitted on the remaining counts. On appeal, a majority of the Court of Appeal excluded all of the hearsay statements and acquitted the accused on all charges. The dissenting judge would have upheld the convictions in respect of S. The Crown appealed as of right from the acquittals in respect of S and was denied leave to appeal from the acquittals in respect of D.

Held: The appeal should be dismissed and the acquittals affirmed.

Hearsay evidence is presumptively inadmissible unless an exception to the hearsay rule applies, primarily because of a general inability to test its reliability. The essential defining features of hearsay are the fact that the out-of-court statement is adduced to prove the truth of its contents and the absence of a contemporaneous opportunity to cross-examine the declarant. Hearsay includes an out-of-court statement made by a witness who testifies in court if the statement is tendered to prove the truth of its contents. In some circumstances, hearsay evidence presents minimal dangers and its exclusion rather than its admission would impede accurate fact finding. Hence over time a number of traditional exceptions to the exclusionary rule were created by the courts. Hearsay evidence that does not fall under a traditional exception may still be admitted under the principled approach if indicia of reliability and necessity are established on a *voir dire*. The reliability requirement is aimed at identifying those cases where the

concerns arising from the inability to test the evidence are sufficiently overcome to justify receiving the evidence as an exception to the general exclusionary rule. The reliability requirement will generally be met by showing (1) that there is no real concern about whether the statement is true or not because of the circumstances in which it came about; or (2) that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested by means other than contemporaneous cross-examination. These two principal ways of satisfying the reliability requirement are not mutually exclusive categories and they assist in identifying the factors that need to be considered on the admissibility inquiry. [2-3] [35] [37] [42] [49] [61-63] [65]

The trial judge acts as a gate-keeper in making the preliminary assessment of the threshold reliability of a hearsay statement and leaves the ultimate determination of its worth to the fact finder. The factors to be considered on the admissibility inquiry cannot be categorized in terms of threshold and ultimate reliability. Rather, all relevant factors should be considered including, in appropriate cases, the presence of supporting or contradictory evidence. Comments to the contrary in previous decisions of this Court, including *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40, should no longer be followed. In determining admissibility, the court should adopt a more functional approach focussed on the particular dangers raised by the hearsay evidence sought to be introduced and on those attributes or circumstances relied upon by the proponent to overcome those dangers. Whether certain factors will go only to ultimate reliability will depend on the context. In each case, the inquiry is limited to determining the evidentiary question of admissibility. Corroborating or conflicting evidence may be considered in the admissibility inquiry in appropriate cases. When the reliability requirement is met on the basis that the trier of fact has a sufficient basis to assess the statement's truth and

accuracy, there is no need for the trial judge to inquire further into the likely truth of the statement. When reliability is dependent on the inherent trustworthiness of the statement, the trial judge must inquire into those factors tending to show that the statement is true or not. [2] [4] [92-93]

In determining the question of threshold reliability, the trial judge must be mindful that hearsay evidence is presumptively inadmissible. The trial judge's function is to guard against the admission of hearsay evidence which is unnecessary or the reliability of which is neither readily apparent from the trustworthiness of its contents nor capable of being meaningfully tested by the ultimate trier of fact. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. In the context of a criminal case, the accused's inability to test the evidence may impact on the fairness of the trial, thereby giving the rule a constitutional dimension. As in all cases, the trial judge has a residual discretion to exclude admissible hearsay evidence where its prejudicial effect is out of proportion to its probative value. [2-3]

R. v. Khan, [1990] 2 S.C.R. 531, and *R. v. Smith*, [1992] 2 S.C.R. 915, are examples where the reliability requirement was met because the circumstances in which hearsay statements came about provided sufficient comfort in their truth and accuracy. *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, and *R. v. Hawkins*, [1996] 3 S.C.R. 1043, provide examples where threshold reliability was based on the presence of adequate substitutes for traditional safeguards relied upon to test the evidence. Similarly, in *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764, the striking similarities between the complainant's prior inconsistent out-of-court statement and the accused's independent statement were so

compelling that the very high reliability of the complainant's statement rendered its substantive admission necessary. [67-68] [73] [82] [86] [88]

S's videotaped statement to the police was inadmissible. Although S's death before trial made his hearsay statement necessary, the statement was not sufficiently reliable to overcome the dangers it presented. The circumstances in which it came about did not provide reasonable assurances of inherent reliability. A number of serious issues arise including: whether S was mentally competent; whether he understood the consequences of making his statement; whether he was influenced by C; whether his statement was motivated by dissatisfaction about the management of the home; and, whether his injuries were caused by a fall. S's unavailability for cross-examination posed significant limitations on the accused's ability to test the evidence and on the trier of fact's ability to properly assess its worth. While the presence of a striking similarity between statements from different complainants could well provide sufficient cogency to warrant the admission of hearsay evidence in an appropriate case, the statements made by the other complainants in this case posed even greater difficulties and could not be substantively admitted to assist in assessing the reliability of S's allegations. The admission of the evidence risked impairing the fairness of the trial. Furthermore, S's evidence could have been taken before his death in the presence of a commissioner and the accused or his counsel thereby preserving both the evidence and the rights of the accused. [7] [108]

Cases Cited

Modified: *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40; **explained**: *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Hawkins*, [1996] 3 S.C.R. 1043; **discussed:** *R. v. C. (B.)* (1993), 12 O.R. (3d) 608; *Idaho v. Wright*, 497 U.S. 805 (1990); **referred to:** *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. O'Brien*, [1978] 1 S.C.R. 591; *R. v. Mapara*, [2005] 1 S.C.R. 358, 2005 SCC 23; *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505; *R. v. Rose*, [1998] 3 S.C.R. 262; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Wilcox* (2001), 152 C.C.C. (3d) 157, 2001 NSCA 45; *R. v. Czibulka* (2004), 189 C.C.C. (3d) 199.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 7.

Canada Evidence Act, R.S.C. 1985, c. C-5, s. 16.

Criminal Code, R.S.C. 1985, c. C-46, ss. 709-714.

Authors Cited

Paciocco, David M. "The Hearsay Exceptions: A Game of 'Rock, Paper, Scissors'", in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence*. Toronto: Irwin Law, 2004, 17.

Wigmore, John Henry. *Evidence in Trials at Common Law*, vol. III, 2nd ed. Boston: Little, Brown, and Company, 1923.

APPEAL from a judgment of the Ontario Court of Appeal (Rosenberg, Armstrong and Blair JJ.A.) (2005), 195 O.A.C. 11, 194 C.C.C. (3d) 161, 26 C.R. (6th) 1, [2005] O.J. No. 723 (QL), setting aside the accused's convictions. Appeal dismissed.

John S. McInnes and *Eliott Behar*, for the appellant.

Timothy E. Breen, for the respondent.

Alexander Budlovsky, for the intervener the Attorney General of British Columbia.

Louis P. Strezos and *Joseph Di Luca*, for the intervener the Criminal Lawyers' Association (Ontario).

Solicitor for the appellant: Ministry of the Attorney General of Ontario, Toronto.

Solicitors for the respondent: Fleming, Breen, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Ministry of the Attorney General of British Columbia, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Louis P. Strezos and Associate, and Di Luca Barristers, Toronto.

SUPREME COURT OF CANADA

HER MAJESTY THE QUEEN

- v. -

RAMNARINE KHELAWON

- and -

ATTORNEY GENERAL OF BRITISH COLUMBIA and CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

CORAM: The Chief Justice and Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

CHARRON J. —

1. Overview

1 This appeal turns on the admissibility of hearsay statements under the principled case-by-case exception to the hearsay rule based on necessity and reliability. In particular, guidance is sought on what factors should be considered in determining whether a hearsay statement is sufficiently reliable to be admissible. This Court's decision in *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40, has generally been interpreted as standing for the proposition that circumstances "extrinsic" to the taking of the statement go to ultimate reliability only and cannot be considered by the trial

judge in ruling on its admissibility. The decision has generated much judicial commentary and academic criticism on various grounds, including the difficulty of defining what constitutes an "extrinsic" circumstance and the apparent inconsistency between this holding in *Starr* and the Court's consideration of a semen stain on the declarant's clothing in *R. v. Khan*, [1990] 2 S.C.R. 531, the declarant's motive to lie in *R. v. Smith*, [1992] 2 S.C.R. 915, and most relevant to this case, the striking similarities between statements in *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764.

2 As a general principle, all relevant evidence is admissible. The rule excluding hearsay is a well-established exception to this general principle. While no single rationale underlies its historical development, the central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity. The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts. Hence, the rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function. However, the extent to which hearsay evidence will present difficulties in assessing its worth obviously varies with the context. In some circumstances, the evidence presents minimal dangers and its *exclusion*, rather than its admission, would impede accurate fact finding. Hence, over time a number of exceptions to the rule were created by the courts. Just as traditional exceptions to the exclusionary rule were largely crafted around those circumstances where the dangers of receiving the evidence were sufficiently alleviated, so too must be founded the overarching principled exception to hearsay. When it is necessary to resort to evidence

in this form, a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. The trial judge acts as a gate-keeper in making this preliminary assessment of the "threshold reliability" of the hearsay statement and leaves the ultimate determination of its worth to the fact finder.

3 The distinction between threshold and ultimate reliability reflects the important difference between admission and reliance. Admissibility is determined by the trial judge based on the governing rules of evidence. Whether the evidence is relied upon to decide the issues in the case is a matter reserved for the ultimate trier of fact to decide in the context of the entirety of the evidence. The failure to respect this distinction would not only result in the undue prolongation of admissibility hearings, it would distort the fact-finding process. In determining the question of threshold reliability, the trial judge must be mindful that hearsay evidence is presumptively *inadmissible*. The trial judge's function is to guard against the admission of hearsay evidence which is unnecessary in the context of the issue to be decided, or the reliability of which is neither readily apparent from the trustworthiness of its contents, nor capable of being meaningfully tested by the ultimate trier of fact. In the context of a criminal case, the accused's inability to test the evidence may impact on the fairness of the trial, thereby giving the rule a constitutional dimension. Concerns over trial fairness not only permeate the decision on admissibility, but also inform the residual discretion of the trial judge to exclude the evidence even if necessity and reliability can be shown. As in all cases, the trial judge has the discretion to exclude

admissible evidence where its prejudicial effect is out of proportion to its probative value.

4 As I will explain, I have concluded that the factors to be considered on the admissibility inquiry cannot be categorized in terms of threshold and ultimate reliability. Comments to the contrary in previous decisions of this Court should no longer be followed. Rather, all relevant factors should be considered including, in appropriate cases, the presence of supporting or contradictory evidence. In each case, the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility.

5 In May 1999, five elderly residents of a retirement home told various people that they were assaulted by the manager of the home, the respondent, Ramnarine Khelawon. At the time of trial, approximately two and a half years later, four of the complainants had died of causes unrelated to the assaults, and the fifth was no longer competent to testify. Only one of the complainants had testified at the preliminary inquiry. The central issue at trial was whether the hearsay statements provided by the complainants had sufficient threshold reliability to be received in evidence. Grossi J. held that the hearsay statements from each of the complainants were sufficiently reliable to be admitted in evidence, based in large part on the "striking" similarity between them. He ultimately found Mr. Khelawon guilty of the offences in respect of two of the complainants, Mr. Skupien and Mr. Dinino, and acquitted him on the remaining counts. Mr. Khelawon was sentenced to two and a half years of imprisonment for the offences relating to Mr. Skupien and an additional two years for the offences related to Mr. Dinino.

6 On appeal to the Court of Appeal for Ontario, Rosenberg J.A. (Armstrong J.A. concurring) excluded all statements and acquitted Mr. Khelawon. Blair J.A., in dissent, would have upheld the convictions in respect of Mr. Skupien only. The Crown appeals to this Court as of right, seeking to restore the convictions relating to Mr. Skupien. The Crown also sought but was denied leave in respect of the charges relating to Mr. Dinino.

7 In my view, Mr. Skupien's videotaped statement to the police was inadmissible. Although Mr. Skupien's death before the commencement of the trial made it necessary to resort to his evidence in this form, the statement was not sufficiently reliable to overcome the dangers it presented. The circumstances in which it came about did not provide reasonable assurances of inherent reliability. To the contrary, they gave rise to a number of serious issues including: whether Mr. Skupien was mentally competent, whether he understood the consequences of making his statement, whether he was influenced in making the allegations by a disgruntled employee who had been fired by Mr. Khelawon, whether his statement was motivated by a general dissatisfaction about the management of the home, and whether his injuries were caused by a fall rather than the assault. In these circumstances, Mr. Skupien's unavailability for cross-examination posed significant limitations on the accused's ability to test the evidence and, in turn, on the trier of fact's ability to properly assess its worth. The statements made by other complainants posed even greater difficulties and could not be substantively admitted to assist in assessing the reliability of Mr. Skupien's allegations. In all the circumstances, particularly given that the Crown's case against Mr. Khelawon was founded on the hearsay statement, the admission of the evidence risked impairing the fairness of the trial and should not have

been permitted. As Rosenberg J.A. aptly noted, the admission of the evidence under the principled approach to the hearsay rule is not the only way the evidence of witnesses who may not be available for trial may be preserved. Sections 709 to 714 of the *Criminal Code*, R.S.C. 1985, c. C-46, expressly contemplate this eventuality and provide a procedure for the taking of the evidence before a commissioner in the presence of the accused or his counsel thereby preserving both the evidence and the rights of the accused.

8 For reasons that follow, I would therefore dismiss the appeal and affirm the acquittals.

2. Background

9 Mr. Khelawon was charged with aggravated assault on Teofil Skupien and threatening to cause him death. He was also charged with aggravated assault and assault with a weapon on Atillio Dinino, and assault causing bodily harm on three other complainants. The offences were alleged to have occurred during the month of May 1999 and, at the time, all the complainants were residents at the Bloor West Village Retirement Home. Mr. Khelawon was the manager of the retirement home and his mother was the owner. As indicated earlier, none of the complainants was available to testify at trial. Hence, the central issue concerned the admissibility of their hearsay statements made to various people. There were 10 statements in total, four of which consisted of videotaped statements made to the police. The trial, held before Grossi J. without a jury, proceeded essentially as a *voir dire* into the admissibility of the evidence, with counsel agreeing that it would not be necessary to repeat the

evidence about any statements later ruled admissible. None of the statements fit within any traditional exception to the hearsay rule. Their admissibility, rather, was contingent upon the Crown meeting the twin requirements of necessity and reliability under the principled approach to the hearsay rule, as established in *Khan*, *Smith* and, later, *Starr*.

10 The charges concerning Mr. Skupien are the only matters before this Court. I will therefore summarize the evidence concerning Mr. Skupien's statements in more detail. I will also describe the circumstances surrounding the taking of the statements from the other complainants to the extent that it is relevant to dispose of this appeal. The Crown sought to introduce three statements made by Mr. Skupien: the first to an employee of the retirement home, the second to the doctor who treated him for his injuries, and the third to the police. Only the latter was admitted at trial. I will describe each statement in turn.

2.1 *Mr. Skupien's Statement to Ms. Stangrat*

11 Mr. Skupien was 81 years old and, at the time of the events in question, he had lived at the Bloor West Village Retirement Home for four years. Mr. Skupien's initial complaint was made to one of the employees at the retirement home, Joanna Stangrat. Ms. Stangrat, also known under several other names, was a cook who had been working at the retirement home for a few months. She had come to know Mr. Skupien because he would often visit the kitchen and would sometimes walk her to the subway at the end of her shifts. Ms. Stangrat played a prominent role in the case concerning Mr. Skupien. In part, it was the theory of the defence at trial that she had

influenced Mr. Skupien and the other complainants in making their complaints out of spite because Mr. Khelawon had given her a notice of termination a few weeks earlier.

12 On May 8, 1999, Ms. Stangrat noticed that Mr. Skupien did not come to breakfast. She went to check on him in his room and found him lying on his bed. His face was red and there was blood around his mouth. When she got closer to him she saw bruising on his eye and nose. His eyes were swollen. When Mr. Skupien saw her, he asked her to come in and close the door. He appeared to be in shock and very shaky. Ms. Stangrat noticed two full green garbage bags on the floor. She closed the door and asked him what had happened and what was in the green garbage bags. Mr. Skupien told her what had happened the previous evening. He also showed her bruises on his upper left chest area.

13 Mr. Skupien told Ms. Stangrat that he had to leave before twelve o'clock that day because "Tony", the name Mr. Khelawon went by, would come back and kill him. Mr. Skupien described to Ms. Stangrat how Mr. Khelawon had come into his room in anger at about 8:00 p.m. the previous evening, and had punched him repeatedly in the face and ribs. After beating him up, Mr. Khelawon had packed the clothes into the green garbage bags and left them on the floor. Ms. Stangrat asked Mr. Skupien why Mr. Khelawon would attack him in this way. He told her that Tony was angry because Mr. Skupien had been going to the kitchen when he had no reason to go there. When the assault ended, Mr. Khelawon threatened Mr. Skupien that either he moved out of the home by twelve noon the next day or he would return and kill him. Mr. Skupien asked her what he should do. Ms. Stangrat told him she would phone her

daughter to come and get him and that he should stay in his room until she was finished her duties for the day.

14 Ms. Stangrat arranged for Mr. Skupien to stay at her daughter's home later that day, and then to her apartment. Mr. Skupien was in pain but he was scared and did not want to see a doctor at that time. Ms. Stangrat kept Mr. Skupien at her apartment where she and a friend of hers alternated caring for him. A few days later, Mr. Skupien agreed to go to the doctor. Ms. Stangrat and her friend took him to see Dr. Pietraszek.

2.2 *Mr. Skupien's Statement to the Treating Physician*

15 On May 12, 1999, Dr. Pietraszek examined Mr. Skupien. He found visible bruising to Mr. Skupien's face as well as bruises to his back and on the left side of his chest and noted that Mr. Skupien appeared to be in pain while breathing. X-rays revealed that he had suffered fractures to three ribs. Dr. Pietraszek testified that Mr. Skupien told him he had been hit in the face and body with something that was either a cane or a pipe. He denied any suggestion that Ms. Stangrat had related the story but acknowledged that she was present and may have helped him in describing what had happened. Dr. Pietraszek considered that the injuries were consistent with Mr. Skupien's account of how they were caused. He also testified that the injuries could have resulted from a fall.

2.3 *Mr. Skupien's Videotaped Statement to the Police*

16 The following day, on May 13, 1999, Ms. Stangrat took Mr. Skupien to the police. Detective Karpow took his complaint. He observed bruising to the left side of Skupien's face, in the eye area. He arranged for Mr. Skupien to give a videotaped statement. Both Detective Karpow and Cst. John Birrell were present. The statement was not given under oath; however, Mr. Skupien was asked if he understood that it was very important that he tell the truth and that if he did not tell the truth "[he] could be charged with that". Mr. Skupien answered "Yes" to both questions. After a few other preliminary questions, he was asked what his complaint was. Mr. Skupien described how, on May 7, 1999, Tony came to his room and said: "enough is enough". He then began beating him by slapping and punching him in the face, the ribs and all over, telling him not to go into the kitchen. He said that if he did not leave, he would come by 12 o'clock the next day and shoot him. Mr. Skupien then went on at some length to make several complaints about the general management of the retirement home until Detective Karpow brought him back to the matter at hand by asking him further questions about the incident and the events that followed. Mr. Skupien was generally responsive to the officer's questions.

17 After the interview was completed, Mr. Khelawon was arrested.

2.4 *Further Investigation*

18 Ms. Stangrat gave the police a list of other people that she thought they should speak to at the retirement home. The next day, on May 14, 1999, several police

officers attended the home to seek these people out. Because there were no markings on the doors, the police had to search through the residence, speaking to residents and nursing staff. When some of the people were located, they were found to be "unresponsive" and no meaningful interviews could be conducted with them. Others, however, were able and willing to speak. The police would identify themselves as police, then ask the residents how things were going at the home and if anything had happened to them that they wanted to talk about. The police arranged to take videotaped statements from those who wanted to speak to them. These included three of the other complainants, Mr. Dinino, Ms. Poliszak and Mr. Grocholska. The fourth complainant, Mr. Peiszterer, could not communicate with the police; however, his son provided a videotaped statement.

2.5 *Medical Records*

19 On May 15, 1999, Det. Karpow attended at the retirement home and met with Dr. Michalski, a physician who attended regularly at the home to see the residents. On May 18, 1999, the police returned to the home and seized the medical records and a journal containing nursing notes.

20 Documentation from Mr. Skupien's file revealed that he had been living in an apartment before suffering a stroke in February 1995. He was transferred to the retirement home in April 1995. A report dated April 13, 1995 noted his condition after the stroke. He suffered occasional periods of confusion, could not go outside on his own, needed help with meal preparation and banking, and had to be reminded to take his medication, but was able to perform all self-care tasks.

21 Dr. Michalski's file noted frequent contact with Mr. Skupien during his stay at the retirement home. From time to time, he was described as "depressed", "aggressive", "angry", and "paranoid". A diagnosis of paranoid psychoses was made in June 1998 and medication was prescribed. In July 1998, "some improvement in paranoia" was noted. In August 1998, he was described as "angry, hostile" and his dosage was increased. In August 1998, he was described as "confused". The possibility of dementia was first noted. In September 1998, he was diagnosed with "depression" and prescribed medication. In September 1998, improvement with the depression was noted, and although apparently "eliminated" in January 1999, depression was again noted in February 1999. The notes also reflect a number of complaints of fatigue, weakness and dizziness.

2.6 *Expert Evidence on the Voir Dire*

22 Dr. Susan Lieff, a geriatric psychiatrist, was qualified to provide opinion evidence on the *voir dire* with respect to Mr. Skupien's capacity to understand the importance of telling the truth and communicate evidence. She also provided an opinion with respect to Mr. Dinino. Her opinion was based solely on her review of the videotaped interviews and medical records. With regard to Mr. Skupien, Dr. Lieff testified that the videotape did not reveal any impaired judgment, delusions or hallucinations, or intellectual pathology. He seemed to comprehend what was asked and responded appropriately. In Dr. Lieff's view, Mr. Skupien's affirmative answer "Yes", when advised of the need to be truthful, reflected a clear understanding. Dr. Lieff did not consult with Dr. Michalski but took issue with his diagnosis of "dementia". In her opinion, the symptoms observed by Dr. Michalski were more

likely side-effects of the anti-psychotic medication he was taking at the time. Dr. Lieff concluded that Mr. Skupien understood that it was important to tell the truth and that he had the capacity to communicate evidence.

3. Trial Judge's Ruling on Admissibility

23 As a preliminary issue, the trial judge ruled that the four complainants who had given videotaped statements were competent at the time within the meaning of s. 16 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, which he interpreted as requiring that "witnesses must know the importance of telling the truth and must be able to communicate the evidence". In support of this finding, the trial judge relied on his own viewing of the videotapes and on Dr. Lieff's opinion evidence. (The mental capacity of the hearsay declarant is a relevant factor on an inquiry into the statement's admissibility as it may impact on the reliability of the hearsay statement; however, it is important to note that s. 16 has no application here. Section 16 sets out the threshold competency requirement for receiving the testimony of a witness *in court*. The threshold is a low one and the witness's testimony, if received, is then subject to cross-examination in the usual way, including on any relevant matter concerning the witness's mental state. The inquiry into the admissibility of a hearsay statement may require more extensive probing into the declarant's mental competency at the time of making the statement when there is no opportunity to cross-examine the declarant.)

24 After determining the s. 16 issue, the trial judge considered the necessity criterion. Although certain questions were raised at trial as to whether this criterion

was met with respect to some of the complainants' statements, none of the issues concerned Mr. Skupien and hence need not be reviewed here.

25 Finally, the trial judge turned to the question of threshold reliability. He determined that all videotaped statements to the police met the reliability requirement. In support of this finding, he noted that there was "nothing untoward in the police procedure in taking the statements" and, although three of the complainants' statements were taken at the retirement home, rather than at the police station, he found that the "circumstances of taking the statements [were] as formal and solemn as could be expected in the situation". He noted that there was "no animosity directed at the accused" by the complainants in their statements other than voicing their complaint. The complainants "appeared forthright", they were "not evasive", and they did not "attempt to overstate their injuries". There were no "exceedingly leading" questions and, to the extent that there was leading, it went to weight rather than admissibility. All the statements were contemporaneous or made shortly after the events that they described. They knew their assailant well and there was no realistic alternative suspect. Further, both Mr. Skupien and Mr. Dinino had corroborating injuries.

26 The crux of the trial judge's ruling, however, appears to have been his application of the decision of this Court in *U. (F.J.)* in which the complainant's out-of-court statement was admitted on the ground of its"striking similarity" with the accused's statement concerning the same events. Throughout his reasons, the trial judge made repeated references to the similarity between the statements and concluded that "the cumulative combination of similar points renders the overall similarity between the statements sufficiently distinctive to reject coincidence as a likely

explanation". While he found that the oral statements were also "sufficiently similar to fit the principle in *R. v. U. (F.J.)*", he held, citing para. 217 in *Starr* as authority, that "to admit them would be oath-helping in that I have the video statements".

27 In the trial judge's view, the only real hearsay danger raised by the admission of the statements was the absence of cross-examination but, citing *Smith* as authority, he concluded that reliable evidence should not be excluded for this reason alone. The public interest in "the elderly receiving good care" allowed him "to take video statements together to bolster the complainants' credibility". He therefore ruled the videotaped statements admissible and the oral statements inadmissible.

28 At the conclusion of the trial, Grossi J. ultimately found only two of the videotaped statements sufficiently credible to found a conviction, those of Mr. Dinino and Mr. Skupien. Since this appeal concerns the admissibility ruling only, it is not necessary to review the reasons for conviction. It is common ground between the parties that if Mr. Skupien's statements are inadmissible, the convictions must be set aside and the appeal dismissed.

4. Court of Appeal for Ontario (2005), 195 O.A.C. 11

29 Mr. Khelawon appealed his convictions on the ground that the trial judge erred in admitting the videotaped statements. The Court of Appeal was unanimous in finding that Mr. Dinino's statement was not sufficiently reliable to warrant admission. A majority of the court found that Mr. Skupien's statement was also inadmissible due to its unreliability.

30 All three justices interpreted the trial judge's reasons as holding that without the similarity among the statements of the various complainants, none met the requirement of reliability and would therefore have been inadmissible (Rosenberg J.A., at para. 90; Blair J.A., at para. 29). The court therefore focussed on this aspect of the evidence and, indeed, the source of the disagreement between the majority and the dissent was whether the similarity of the statements was a permissible consideration in assessing reliability under the principled approach.

31 Rosenberg J.A., writing for the majority, held that the principle from *U. (F.J.)* could be applied only where the statements relate to the same event, and in most cases would be applied only where the declarant is available for cross-examination (para. 114). Here, the statements related to different incidents. Although a trier of fact might conclude, using similar fact reasoning, that the same person committed all of the crimes, this is an issue going to ultimate reliability, not threshold reliability (para. 115). Only the latter is relevant in determining admissibility. In addition, Rosenberg J.A. held that the comparator statements must also be substantively admissible, because the final decision as to the likelihood of coincidence or collusion rests with the trier of fact (para. 128), and it would be odd for the trier of fact to be assessing ultimate reliability without access to "the very piece of evidence that convinced the trial judge that the statement was reliable" (para. 130). Grossi J.'s decision, therefore, was an impermissible expansion of the principle in *U. (F.J.)*. Rosenberg J.A. also held, at para. 92, that such an expansion was inconsistent with the statement of Iacobucci J. in *Starr*, at para. 217, that "corroborating . . . evidence" should not be considered in determining threshold reliability.

32 In dissent, Blair J.A. held that the central notion underpinning the *U. (F.J.)* "exception" was that absent collusion, prior knowledge, or improper influence, "striking similarities between statements belie coincidence and therefore bolster the reliability of the statement under consideration" (para. 44). While he held that the absence of cross-examination remained a factor to be weighed in assessing threshold reliability, he was of the view that its absence, in and of itself, was not an impediment to the principled application of the *U. (F.J.)* exception. He also found that the exception could apply where the statements related to different events, stating that, for the purpose of finding threshold reliability, he could see no "logical difference" between statements concerning the same accused "doing the same thing on the same occasion" and "the same accused doing the same thing on different occasions" (para. 48), drawing on the rationale for similar-fact reasoning, since both involve admitting evidence on the basis of the "improbability of coincidence" (para. 49). Finally, he found that a finding that the comparator statements are not substantively admissible should not exclude them from the reliability analysis, pointing out that otherwise reliable statements could be held inadmissible for a variety of reasons, including a finding that they were not necessary (para. 53).

33 On the basis of these conclusions, Blair J.A. held that the trial judge had not erred in considering the similarity among the statements in determining their threshold reliability. He then went on to apply "the *U. (F.J.)* exception" to the statements at issue on appeal, and held that although the videotaped statement of Mr. Dinino was inadmissible, the videotaped statement of Mr. Skupien was.

5. Rule Against Hearsay

5.1 *General Exclusionary Rule*

34 The basic rule of evidence is that all relevant evidence is admissible. There are a number of exceptions to this basic rule. One of the main exceptions is the rule against hearsay: absent an exception, hearsay evidence is *not* admissible. Hearsay evidence is not excluded because it is irrelevant — there is no need for a special rule to exclude irrelevant evidence. Rather, as we shall see, it is the difficulty of testing hearsay evidence that underlies the exclusionary rule and, generally, the alleviation of this difficulty that forms the basis of the exceptions to the rule. Although hearsay evidence includes communications expressed by conduct, I will generally refer to hearsay statements only.

5.2 *Definition of Hearsay*

35 At the outset, it is important to determine what is and what is not hearsay. The difficulties in defining hearsay encountered by courts and learned authors have been canvassed before and need not be repeated here: see *R. v. Abbey*, [1982] 2 S.C.R. 24, at pp. 40-41, *per* Dickson J. It is sufficient to note, as this Court did in *Starr*, at para. 159, that the more recent definitions of hearsay are focussed on the central concern underlying the hearsay rule: the difficulty of testing the reliability of the declarant's assertion. See, for example, *R. v. O'Brien*, [1978] 1 S.C.R. 591, at pp. 593-94. Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of

fact, and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence. Because hearsay evidence comes in a different form, it raises particular concerns. The general exclusionary rule is a recognition of the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination. The fear is that untested hearsay evidence may be afforded more weight than it deserves. The essential defining features of hearsay are therefore the following: (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant. I will deal with each defining feature in turn.

5.2.1 Statements Adduced for Their Truth

36 The purpose for which the out-of-court statement is tendered matters in defining what constitutes hearsay because it is only when the evidence is tendered to prove the truth of its contents that the need to test its reliability arises. Consider the following example. At an accused's trial on a charge for impaired driving, a police officer testifies that he stopped the accused's car because he received information from an unidentified caller that the car was driven by a person who had just left a local tavern in a "very drunk" condition. If the statement about the inebriated condition of the driver is introduced for the sole purpose of establishing the police officer's grounds for stopping the vehicle, it does not matter whether the unidentified caller's statement was accurate, exaggerated, or even false. Even if the statement is totally unfounded, that fact does not take away from the officer's explanation of his actions. If, on the other hand, the statement is tendered as proof that the accused was in fact impaired, the

trier of fact's inability to test the reliability of the statement raises real concerns. Hence, only in the latter circumstance is the evidence about the caller's statement defined as hearsay and subject to the general exclusionary rule.

5.2.2 Absence of Contemporaneous Cross-Examination

37 The previous example, namely where the witness tells the court what A told him, is the more obvious form of hearsay evidence. A is not before the court to be seen, heard and cross-examined. However, the traditional law of hearsay also extends to out-of-court statements made by the witness who does testify in court when that out-of-court statement is tendered to prove the truth of its contents. This extended definition of hearsay has been adopted in Canada: *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at pp. 763-64; *Starr*, at para. 158. It is important to understand the rationale for treating a witness's out-of-court statements as hearsay.

38 When the witness repeats or adopts an earlier out-of-court statement, in court, under oath or solemn affirmation, of course no hearsay issue arises. The statement itself is not evidence, the testimony is the evidence and it can be tested in the usual way by observing the witness and subjecting him or her to cross-examination. The hearsay issue does arise, however, when the witness does not repeat or adopt the information contained in the out-of-court statement and the statement itself is tendered for the truth of its contents. Consider the following example to illustrate the concerns raised by this evidence.

39 In an out-of-court statement, W identifies the accused as her assailant. At the trial of the accused on a charge of assault, W testifies that the accused is *not* her assailant. The Crown seeks to tender the out-of-court statement as proof of the fact that the accused did assault W. In these circumstances, the trier of fact is asked to accept the out-of-court statement over the sworn testimony of the witness. Given the usual premium placed on the value of in-court testimonial evidence, a serious issue arises as to whether it is at all necessary to introduce the statement. In addition, the reliability of that statement becomes crucial. How trustworthy is it? In what circumstances did W make that statement? Was it made casually to friends at a social function, or rather, to the police as a formal complaint? Was W aware of the potential consequences of making that statement, did she intend that it be acted upon? Did she have a motive to lie? In what condition was W at the time she made the statement? Many more questions can come to mind on matters that relate to the reliability of that out-of-court statement. When the trier of fact is asked to consider the out-of-court statement as proof that the accused in fact assaulted W, assessing its reliability may prove to be difficult.

40 Concerns over the reliability of the statement also arise where W does not recant the out-of-court statement but testifies that she has no memory of making the statement, or worse still, no memory of the assault itself. The trier of fact does not see or hear the witness making the statement and, because there is no opportunity to cross-examine the witness *contemporaneously* with the making of the statement, there may be limited opportunity for a meaningful testing of its truth. In addition, an issue may arise as to whether the prior statement is fully and accurately reproduced.

41 Hence, although the underlying rationale for the general exclusionary rule may not be as obvious when the declarant is available to testify, it is the same — the difficulty of testing the reliability of the out-of-court statement. The difficulty of assessing W's out-of-court statement is the reason why it falls within the definition of hearsay and is subject to the general exclusionary rule. As one may readily appreciate, however, the degree of difficulty may be substantially alleviated in cases where the declarant is available for cross-examination on the earlier statement, particularly where an accurate record of the statement can be tendered in evidence. I will come back to that point later. My point here is simply to explain why, by definition, hearsay extends to out-of-court statements tendered for their truth even when the declarant is before the court.

5.3 *Hearsay Exceptions: A Principled Approach*

42 It has long been recognized that a rigid application of the exclusionary rule would result in the unwarranted loss of much valuable evidence. The hearsay statement, because of the way in which it came about, may be inherently reliable, or there may be sufficient means of testing it despite its hearsay form. Hence, a number of common law exceptions were gradually created. A rigid application of these exceptions, in turn, proved problematic leading to the needless exclusion of evidence in some cases, or its unwarranted admission in others. Wigmore urged greater flexibility in the application of the rule based on the two guiding principles that underlie the traditional common law exceptions: necessity and reliability (*Wigmore on Evidence* (2nd ed. 1923), vol. III, § 1420, at p. 153). This Court first accepted this approach in *Khan* and later recognized its primacy in *Starr*. The governing framework,

based on *Starr*, was recently summarized in *R. v. Mapara*, [2005] 1 S.C.R. 358, 2005 SCC 23, at para. 15:

> (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
>
> (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
>
> (c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
>
> (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

43 In this case, we are concerned with the admission of evidence under item (d). In particular, the courts below were divided over two main questions: (1) what factors must be considered in deciding whether the evidence is sufficiently reliable to be admitted; and (2) whether the "exception" recognized by this Court in *U. (F.J.)* can be extended to the facts of this case. I will comment first on the second question.

44 In my view, the discussion over whether the "*U. (F.J.)* exception" applies here exemplifies the concern expressed in *U. (F.J.)* itself, that the "new approach to hearsay does not itself become a rigid pigeon-holing analysis" (para. 35). In *U. (F.J.)*, there was a similar debate over whether the "*B. (K.G.)* exception" to the rule against the substantive admission of prior inconsistent statements extended to circumstances where the reliability of the complainant's statement was based, not so much on the

circumstances in which it came about as was the case in *B. (K.G.)*, but on its striking similarity to a statement made by the accused. Lamer C.J. explained how his decision in *B. (K.G.)* was an application of the principled approach to hearsay, and how "[i]n addition . . . a threshold of reliability can sometimes be established, in cases where the witness is available for cross-examination, by a striking similarity between two statements" (para. 40). He concluded his analysis by anticipating that yet other situations may arise. He stated the following (at para. 45):

> I anticipate that instances of statements so strikingly similar as to bolster their reliability will be rare. In keeping with our principled and flexible approach to hearsay, other situations may arise where prior inconsistent statements will be judged substantively admissible, bearing in mind that cross-examination alone provides significant indications of reliability. It is not necessary in this case to decide if cross-examination alone provides an adequate assurance of threshold reliability to allow substantive admission of prior inconsistent statements.

45 As I will discuss later, both *B. (K.G.)* and *U. (F.J.)* highlight the particular concerns raised in cases of prior inconsistent statements. However, following Lamer C.J.'s own words of caution against "rigid pigeon-holing analysis", it is my view that neither *B. (K.G.)* nor *U. (F.J.)* should be interpreted as creating categorical exceptions to the rule against hearsay based on fixed criteria. The majority judgment in *B. (K.G.)* itself leaves room for appropriate substitutes for the criteria it sets out. Further, to interpret these cases as creating new categories of exceptions would not be in keeping with the flexible case-by-case principled approach. We would simply be replacing the traditional set of exceptions with a new and (for the time being) less ossified one. Rather, these cases provide guidance — not fixed categories — on the application of

the principled case-by-case approach by identifying the relevant concerns and the factors to be considered in determining admissibility.

46 I will review *B. (K.G.)* and *U. (F.J.)* in this light as well as some other relevant decisions from this Court. Since the issues raised on this appeal relate to the assessment of reliability, my analysis will be focussed on that criterion. However, as I will explain, necessity and reliability should not be considered in isolation. One criterion may impact on the other. For example, as we shall see, in some cases the need for the evidence may, in large part, be based on the fact that the hearsay statement is highly reliable and the fact-finding process would be distorted without it. However, before I discuss the factors relating to reliability, I want to say a word on the overarching principle of trial fairness.

5.4 *Constitutional Dimension: Trial Fairness*

47 Prior to admitting hearsay statements under the principled exception to the hearsay rule, the trial judge must determine on a *voir dire* that necessity and reliability have been established. The onus is on the person who seeks to adduce the evidence to establish these criteria on a balance of probabilities. In a criminal context, the inquiry may take on a constitutional dimension, because difficulties in testing the evidence, or conversely the inability to present reliable evidence, may impact on an accused's ability to make full answer and defence, a right protected by s. 7 of the *Canadian Charter of Rights and Freedoms*: *Dersch v. Canada (Attorney General),*

[1990] 2 S.C.R. 1505. The right to make full answer and defence in turn is linked to another principle of fundamental justice, the right to a fair trial: *R. v. Rose*, [1998] 3 S.C.R. 262. The concern over trial fairness is one of the paramount reasons for rationalizing the traditional hearsay exceptions in accordance with the principled approach. As stated by Iacobucci J. in *Starr*, at para. 200, in respect of Crown evidence: "It would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception."

48 As indicated earlier, our adversary system is based on the assumption that sources of untrustworthiness or inaccuracy can best be brought to light under the test of cross-examination. It is mainly because of the inability to put hearsay evidence to that test, that it is presumptively inadmissible. However, the constitutional right guaranteed under s. 7 of the *Charter* is not the right to confront or cross-examine adverse witnesses in itself. The adversarial trial process, which includes cross-examination, is but the means to achieve the end. Trial fairness, as a principle of fundamental justice, is the end that must be achieved. Trial fairness embraces more than the rights of the accused. While it undoubtedly includes the right to make full answer and defence, the fairness of the trial must also be assessed in the light of broader societal concerns: see *R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 69-76. In the context of an admissibility inquiry, society's interest in having the trial process arrive at the truth is one such concern.

49 The broader spectrum of interests encompassed in trial fairness is reflected in the twin principles of necessity and reliability. The criterion of necessity is founded on society's interest in getting at the truth. Because it is not always possible to meet the optimal test of contemporaneous cross-examination, rather than simply losing the value of the evidence, it becomes necessary in the interests of justice to consider whether it should nonetheless be admitted in its hearsay form. The criterion of reliability is about ensuring the integrity of the trial process. The evidence, although needed, is not admissible unless it is sufficiently reliable to overcome the dangers arising from the difficulty of testing it. As we shall see, the reliability requirement will generally be met on the basis of two different grounds, neither of which excludes consideration of the other. In some cases, because of the circumstances in which it came about, the contents of the hearsay statement may be so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process. In other cases, the evidence may not be so cogent but the circumstances will allow for sufficient testing of evidence by means other than contemporaneous cross-examination. In these circumstances, the admission of the evidence will rarely undermine trial fairness. However, because trial fairness may encompass factors beyond the strict inquiry into necessity and reliability, even if the two criteria are met, the trial judge has the discretion to exclude hearsay evidence where its probative value is outweighed by its prejudicial effect.

6. The Admissibility Inquiry

6.1 *Distinction Between Threshold and Ultimate Reliability: A Source of Confusion*

50 As stated earlier, the trial judge only decides whether hearsay evidence is admissible. Whether the hearsay statement will or will not be ultimately relied upon in deciding the issues in the case is a matter for the trier of fact to determine at the conclusion of the trial based on a consideration of the statement in the context of the entirety of the evidence. It is important that the trier of fact's domain not be encroached upon at the admissibility stage. If the trial is before a judge and jury, it is crucial that questions of ultimate reliability be left for the jury — in a criminal trial, it is constitutionally imperative. If the judge sits without a jury, it is equally important that he or she not prejudge the ultimate reliability of the evidence before having heard all of the evidence in the case. Hence, a distinction must be made between "ultimate reliability" and "threshold reliability". Only the latter is inquired into on the admissibility *voir dire*.

51 The distinction between threshold and ultimate reliability has been made in a number of cases (see, for example, *B. (K.G.)* and *R. v. Hawkins*, [1996] 3 S.C.R. 1043), but we are mainly concerned here with the elaboration of this principle in *Starr*. In particular, the following excerpt from the Court's analysis has been the subject of much of the discussion and commentary (at paras. 215 and 217):

> In this connection, it is important when examining the reliability of a statement under the principled approach to distinguish between threshold and ultimate reliability. Only the former is relevant to admissibility: see *Hawkins*, *supra*, at p. 1084. Again, it is not appropriate in the circumstances of this appeal to provide an exhaustive catalogue of the factors that may influence threshold reliability. However, our jurisprudence does provide some guidance on this subject. Threshold reliability is concerned not with whether the statement is true or not; that is a question of ultimate reliability. Instead, it is concerned with whether or not the circumstances surrounding the statement itself provide *circumstantial* guarantees of trustworthiness. This could be because the declarant had no motive to lie (see *Khan*, *supra*; *Smith*, *supra*), or because there were safeguards in place such that a lie could be discovered (see *Hawkins*, *supra*; *U. (F.J.)*, *supra*; *B. (K.G.)*, *supra*).
>
> . . .
>
> At the stage of hearsay admissibility the trial judge should not consider the declarant's general reputation for truthfulness, nor any prior or subsequent statements, consistent or not. These factors do not concern the circumstances of the statement itself. Similarly, I would not consider the presence of corroborating or conflicting evidence. On this point, I agree with the Ontario Court of Appeal's decision in *R. v. C. (B.)*(1993), 12 O.R. (3d) 608; see also *Idaho v. Wright*, 497 U.S. 805 (1990). In summary, under the principled approach a court must not invade the province of the trier of fact and condition admissibility of hearsay on whether the evidence is ultimately reliable. However, it will need to examine whether the circumstances in which the statement was made lend sufficient credibility to allow a finding of threshold reliability. [Underlining added.]

52 The Court's statement that "threshold reliability is concerned not with whether the statement is true or not" has created some uncertainty. While it is clear that the trial judge does not determine whether the statement will ultimately be relied upon as true, it is not so clear that in every case threshold reliability is *not* concerned with whether the statement is true or not. Indeed, in *U. (F.J.)*, the rationale for admitting the complainant's hearsay statement was based on the fact that "the only

likely explanation" for its striking similarity with the independent statement of the accused was that "they were both telling the truth" (para. 40).

53 Further, it is not easy to discern what is or is not a circumstance "surrounding the statement itself". For example, in *Smith*, the fact that the deceased may have had a motive to lie was considered by the Court in determining threshold admissibility. As both Rosenberg J.A. and Blair J.A. point out in their respective reasons, "in determining whether the declarant had a motive to lie, the judge will necessarily be driven to consider factors outside the statement itself or the immediately surrounding circumstances" (para. 97).

54 Much of the confusion in this area of the law has arisen from this attempt to categorically label some factors as going only to ultimate reliability. The bar against considering "corroborating or conflicting evidence", because it is only relevant to the question of ultimate reliability, is a further example. Quite clearly, the corroborative nature of the semen stain in *Khan* played an important part in establishing the threshold reliability of the child's hearsay statement in that case.

55 This part of the analysis in *Starr* therefore requires clarification and, in some respects, reconsideration. I will explain how the relevant factors to be considered on an admissibility inquiry cannot invariably be categorized as relating either to threshold or ultimate reliability. Rather, the relevance of any particular factor will depend on the particular dangers arising from the hearsay nature of the statement and

the available means, if any, of overcoming them. I will then return to the impugned passage in *Starr*, dealing more specifically with the question of supporting evidence since that reference appears to have raised the most controversy.

6.2 *Identifying the Relevant Factors: A Functional Approach*

6.2.1 Recognizing Hearsay

56 The first matter to determine before embarking on a hearsay admissibility inquiry, of course, is whether the proposed evidence is hearsay. This may seem to be a rather obvious matter, but it is an important first step. Misguided objections to the admissibility of an out-of-court statement based on a misunderstanding of what constitutes hearsay are not uncommon. As discussed earlier, not all out-of-court statements will constitute hearsay. Recall the defining features of hearsay. An out-of-court statement will be hearsay when: (1) it is adduced to prove the truth of its contents *and* (2) there is no opportunity for a contemporaneous cross-examination of the declarant.

57 Putting one's mind to the defining features of hearsay at the outset serves to better focus the admissibility inquiry. As we have seen, the first identifying feature of hearsay calls for an inquiry into the purpose for which it is adduced. Only when the evidence is being tendered for its truth will it constitute hearsay. The fact that the out-of-court statement is adduced for its *truth* should be considered in the context of

the issues in the case so that the court may better assess the potential impact of introducing the evidence in its hearsay form.

58 Second, by putting one's mind, at the outset, to the second defining feature of hearsay — the absence of an opportunity for contemporaneous cross-examination of the declarant, the admissibility inquiry is immediately focussed on the dangers of admitting hearsay evidence. Iacobucci J. in *Starr* identified the inability to test the evidence as the "central concern" underlying the hearsay rule. Lamer C.J. in *U. (F.J.)* expressed the same view but put it more directly by stating: "Hearsay is inadmissible as evidence because its reliability cannot be tested" (para. 22).

6.2.2 Presumptive Inadmissibility of Hearsay Evidence

59 Once the proposed evidence is identified as hearsay, it is presumptively *inadmissible*. I stress the nature of the hearsay rule as a general exclusionary rule because the increased flexibility introduced in the Canadian law of evidence in the past few decades has sometimes tended to blur the distinction between admissibility and weight. Modifications have been made to a number of rules, including the rule against hearsay, to bring them up to date and to ensure that they facilitate rather than impede the goals of truth seeking, judicial efficiency and fairness in the adversarial process. However, the traditional rules of evidence reflect considerable wisdom and judicial experience. The modern approach has built upon their underlying rationale, not discarded it. In *Starr* itself, where this Court recognized the primacy of the principled

approach to hearsay exceptions, the presumptive exclusion of hearsay evidence was reaffirmed in strong terms. Iacobucci J. stated as follows (at para. 199):

> By excluding evidence that might produce unfair verdicts, and by ensuring that litigants will generally have the opportunity to confront adverse witnesses, the hearsay rule serves as a cornerstone of a fair justice system.

6.2.3 Traditional Exceptions

60 The Court in *Starr* also reaffirmed the continuing relevance of the traditional exceptions to the hearsay rule. More recently, this Court in *Mapara* reiterated the continued application of the traditional exceptions in setting out the governing analytical framework, as noted in para. 42 above. Therefore, if the trial judge determines that the evidence falls within one of the traditional common law exceptions, this finding is conclusive and the evidence is ruled admissible, unless, in a rare case, the exception itself is challenged as described in both those decisions.

6.2.4 Principled Approach: Overcoming the Hearsay Dangers

61 Since the central underlying concern is the inability to test hearsay evidence, it follows that under the principled approach the reliability requirement is aimed at identifying those cases where this difficulty is sufficiently overcome to justify receiving the evidence as an exception to the general exclusionary rule. As some courts and commentators have expressly noted, the reliability requirement is usually

met in two different ways: see, for example, *R. v. Wilcox* (2001), 152 C.C.C. (3d) 157, 2001 NSCA 45; *R. v. Czibulka* (2004), 189 C.C.C. (3d) 199 (Ont. C.A.); D. M. Paciocco, "The Hearsay Exceptions: A Game of 'Rock, Paper, Scissors'", in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence* (2004), 17, at p. 29.

62 One way is to show that there is no real concern about whether the statement is true or not because of the circumstances in which it came about. Common sense dictates that if we can put sufficient trust in the truth and accuracy of the statement, it should be considered by the fact finder regardless of its hearsay form. Wigmore explained it this way:

> There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a sceptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured. [§ 1420, p. 154]

63 Another way of fulfilling the reliability requirement is to show that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested. Recall that the optimal way of testing evidence adopted by our adversarial system is to have the declarant state the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination. This preferred method is not just a vestige of past traditions. It remains a tried and true method, particularly when credibility issues

must be resolved. It is one thing for a person to make a damaging statement about another in a context where it may not really matter. It is quite another for that person to repeat the statement in the course of formal proceedings where he or she must commit to its truth and accuracy, be observed and heard, and be called upon to explain or defend it. The latter situation, in addition to providing an accurate record of what was actually said by the witness, gives us a much higher degree of comfort in the statement's trustworthiness. However, in some cases it is not possible to put the evidence to the optimal test, but the circumstances are such that the trier of fact will nonetheless be able to sufficiently test its truth and accuracy. Again, common sense tells us that we should not lose the benefit of the evidence when there are adequate substitutes for testing the evidence.

64 These two principal ways of satisfying the reliability requirement can also be discerned in respect of the traditional exceptions to the hearsay rule. Iacobucci J. notes this distinction in *Starr*, stating as follows:

> For example, testimony in former proceedings is admitted, at least in part, because many of the traditional dangers associated with hearsay are not present. As pointed out in Sopinka, Lederman and Bryant, *supra*, at pp. 278-79:
>
> > . . . a statement which was earlier made under oath, subjected to cross-examination and admitted as testimony at a former proceeding is received in a subsequent trial *because the dangers underlying hearsay evidence are absent.*
>
> Other exceptions are based not on negating traditional hearsay dangers, but on the fact that the statement provides circumstantial guarantees of reliability. This approach is embodied in recognized exceptions such as

dying declarations, spontaneous utterances, and statements against pecuniary interest. [Emphasis in original; para. 212.]

65 Some of the traditional exceptions stand on a different footing, such as admissions from parties (confessions in the criminal context) and co-conspirators' statements: see *Mapara*, at para. 21. In those cases, concerns about reliability are based on considerations other than the party's inability to test the accuracy of his or her own statement or that of his or her co-conspirators. Hence, the criteria for admissibility are not established in the same way. However, in cases where the exclusionary rule is based on the usual hearsay dangers, this distinction between the two principal ways of satisfying the reliability requirement, although not by any means one that creates mutually exclusive categories, may assist in identifying what factors need to be considered on the admissibility inquiry.

66 *Khan* is an example where the reliability requirement was met because the circumstances in which the statement came about provided sufficient comfort in its truth and accuracy. Similarly in *Smith*, the focus of the admissibility inquiry was also on those circumstances that tended to show that the statement was true. On the other hand, the admissibility of the hearsay statement in *B. (K.G.)* and *Hawkins* was based on the presence of adequate substitutes for testing the evidence. As we shall see, the availability of the declarant for cross-examination goes a long way to satisfying the requirement for adequate substitutes. In *U. (F.J.)*, the Court considered both those circumstances tending to show that the statement was true and the presence of adequate substitutes for testing the evidence. *U. (F.J.)* underscores the heightened concern over

reliability in the case of prior inconsistent statements where the trier of fact is invited to accept an out-of-court statement over the sworn testimony from the same declarant. I will briefly review how the analysis of the Court in each of those cases was focussed on overcoming the particular hearsay dangers raised by the evidence.

6.2.4.1 *R. v. Khan, [1990] 2 S.C.R. 531*

67 As stated earlier, *Khan* is an example where the reliability requirement was met because the circumstances in which the statement came about provided sufficient comfort in its truth and accuracy. The facts are well known. *Khan* involved a sexual assault on a very young child by her doctor. The child was incompetent to testify. The child's statements to her mother about the incident were inadmissible under any of the traditional hearsay exceptions. However, the child's statement had several characteristics that suggested the statement was true. Those characteristics answered many of the concerns that one would expect would be inquired into in testing the evidence, had it been available for presentation in open court in the usual way. McLachlin J., in the following oft-quoted statement, summarized them in this way:

> I conclude that the mother's statement in the case at bar should have been received. It was necessary, the child's viva voce evidence having been rejected. It was also reliable. The child had no motive to falsify her story, which emerged naturally and without prompting. Moreover, the fact that she could not be expected to have knowledge of such sexual acts imbues her statement with its own peculiar stamp of reliability. Finally, her statement was corroborated by real evidence. [p. 548]

The facts also revealed that the statement was made almost immediately after the event. That feature removed any concern about inaccurate memory. The fact that the child had no reason to lie alleviated the concern about sincerity. Because the statement was made naturally and without prompting, there was no real danger that it came about because of the mother's influence. Most importantly, as stated in the above excerpt, the event described was one that would ordinarily be outside the experience of a child of her age giving it a "peculiar stamp of reliability". Finally, the statement was confirmed by a semen stain on the child's clothing. These characteristics each went to the truth and accuracy of the statement and, taken together, amply justified its admission. The criterion of reliability was met. There is nothing controversial about the factors considered in *Khan*, except for the supportive evidence of the semen stain. I will come back to that point later.

6.2.4.2 *R. v. Smith, [1992] 2 S.C.R. 915*

68 In *Smith*, this Court's inquiry into the circumstantial guarantees of reliability was also focussed on those circumstances that tended to show that the statement was true.

69 Smith was charged with the murder of K. The Crown's evidence included the testimony of K's mother about four telephone calls K made to her on the night of the murder. Defence counsel did not object to this evidence. Smith was convicted at trial. The Court of Appeal allowed the appeal and ordered a new trial on the ground

that the phone calls were hearsay, and only the first two were admissible for the purpose of establishing K's state of mind. In refusing to apply the curative proviso, the Court of Appeal found that the hearsay had been used to place Smith with K at the time of her death, thereby "buttressing certain identification evidence of questionable reliability" (pp. 922-23). The Crown appealed to this Court.

70 After ruling that the state of mind, or "present intentions" exception did not apply to the phone calls, Lamer C.J. went on to elaborate on and then apply the approach outlined in *Khan*. After quoting extensively from Wigmore on the underlying rationale for the hearsay rule and its exceptions, he elaborated on the reliability prong of the principled analysis and stated as follows (at p. 933):

> If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be "reliable", i.e., a circumstantial guarantee of trustworthiness is established. [Emphasis added.]

71 In determining whether the phone calls were reliable, Lamer C.J. held that the first two were, but the third was not (the fourth was not in issue on appeal to this Court). With respect to the first two, there was no reason to doubt K's veracity — "[s]he had no known reason to lie" — and the traditional dangers associated with hearsay — perception, memory and credibility — "were not present to any significant degree" (p. 935). As we can see, the Court looked at factors that would likely have been inquired into during the course of cross-examination if the declarant had been available to testify and found that these usual concerns were largely alleviated because

of the way in which the statements came about. Hence, the Court concluded that the absence of the ability to cross-examine K should go to the weight given to this evidence, not its admissibility.

72 With respect to the third phone call, however, Lamer C.J. held that "the conditions under which the statement was made do not . . . provide that circumstantial guarantee of trustworthiness that would justify its admission without the possibility of cross-examination" (p. 935). First, he held that she may have been mistaken about Smith returning to the hotel, or about his purpose in returning (p. 936). Second, he held that she might have lied to prevent her mother from sending another man to pick her up. With respect to this second possibility, Lamer C.J. held that the fact that K had been travelling under an assumed name with a credit card which she knew was either stolen or forged demonstrated that she was "at least capable of deceit" (p. 936). Again, the Court looked at factors that would likely have been inquired into during the course of cross-examination if the declarant had been available to testify and concluded that these "hypotheses" showed that the circumstances of the statement were not such as to "justify the admission of its contents" since it was impossible to say that the evidence was unlikely to change under cross-examination (p. 937). It is important to note that the Court did not go on to determine whether, on its view of the evidence, the declarant was mistaken or whether she had lied — those would be matters for the ultimate trier of fact to decide. On the admissibility inquiry, it sufficed that the circumstances in which the statement was made gave rise to these issues to bar its admission.

6.2.4.3 *R. v. B. (K.G.), [1993] 1 S.C.R. 740*

73 *B. (K.G.)* provides an example where threshold reliability was essentially based on the presence of adequate substitutes for the traditional safeguards relied upon to test the evidence.

74 The issue in *B. (K.G.)* was the substantive admissibility of prior inconsistent statements made by three of B's friends, in which they told the police that B was responsible for stabbing and killing the victim in the course of a fight. The three recanted their statements at trial. (They subsequently plead guilty to perjury.) The Crown sought to admit the prior statements to police for the truth of their contents. Although the trial judge had no doubt the recantations were false, he followed the traditional common law ("orthodox") rule that the statements could be used only to impeach the witnesses. In light of the doubtfulness of the other identification evidence, the trial judge acquitted B.

75 The issue before this Court was whether the orthodox rule in respect of prior inconsistent statements should be maintained. In reviewing its history, Lamer C.J. noted that, although the prohibition on hearsay was not always recognized as the basis for the rule, similar "dangers" were cited as reasons against admission, namely absence of an oath or affirmation, inability of the trier of fact to assess demeanour, and lack of contemporaneous cross-examination (pp. 763-64). After reviewing the academic criticism, the views of law reform commissioners, legislative

changes in Canada and elsewhere, and developments in the law of hearsay, Lamer C.J. concluded that it was the province and duty of the Court to formulate a new rule (p. 777). He held that "evidence of prior inconsistent statements of a witness other than an accused should be substantively admissible on a principled basis, following this Court's decisions in *Khan* and *Smith*" with the requirements of reliability and necessity "adapted and refined in this particular context, given the particular problems raised by the nature of such statements" (p. 783).

76 The most important contextual factor in *B. (K.G.)* is the availability of the declarant. Unlike the situation in *Khan* or *Smith*, the trier of fact is in a much better position to assess the reliability of the evidence because the declarant is available to be cross-examined on his or her prior inconsistent statement. The admissibility inquiry into threshold reliability, therefore, is not so focussed on the question whether there is reason to believe the statement is true, as it is on the question whether the trier of fact will be in a position to rationally evaluate the evidence. The search is for adequate substitutes for the process that would have been available had the evidence been presented in the usual way, namely through the witness, under oath or affirmation, and subject to the scrutiny of contemporaneous cross-examination.

77 Since the declarant testifies in court, under oath or affirmation, and is available for cross-examination, the question becomes why there is any remaining concern over the reliability of the prior statement. As I have indicated earlier, necessity and reliability should not be considered in isolation. One criterion may have an impact on the other. The situation in *B. (K.G.)* is one example. As noted by

Lamer C.J., "[p]rior inconsistent statements present vexing problems for the necessity criterion" (p. 796). Indeed, the declarant is available as a witness. Why should not the usual rule apply and the recanting witness's sworn testimony alone go to the truth of the matter? After all, is that not the optimal test on reliability — that the witness come forth to be seen and heard, swear or affirm to tell the truth in the formal context of court proceedings, and be subjected to cross-examination? If a witness recants a prior statement and denies its truth, the default position is to conclude that the trial process has worked as intended — untruthful or inaccurate information will have been weeded out. There must be good reason to present the prior inconsistent statement as substantive proof over the sworn testimony given in court.

78 As we know, the Court ultimately ruled in *B. (K.G.)*, and the principle is now well established, that necessity is not to be equated with the unavailability of the witness. The necessity criterion is given a flexible definition. In some cases, such as in *B. (K.G.)* where a witness recants an earlier statement, necessity is based on the unavailability of the *testimony*, not the witness. Notwithstanding the fact that the necessity criterion can be met on varied bases, the context giving rise to the need for the evidence in its hearsay form may well impact on the *degree* of reliability required to justify its admission. As stated by Lamer C.J. in *B. (K.G.)*, where the hearsay evidence is a prior inconsistent statement, reliability is a "key concern" (at pp. 786-87):

> The reliability concern is sharpened in the case of prior inconsistent statements because the trier of fact is asked to choose between two statements from the same witness, as opposed to other forms of hearsay in which only one account from the declarant is tendered. In other words, the focus of the inquiry in the case of prior inconsistent statements is on the

> comparative reliability of the prior statement and the testimony offered at trial, and so additional indicia and guarantees of reliability to those outlined in *Khan* and *Smith* must be secured in order to bring the prior statement to a comparable standard of reliability before such statements are admitted as substantive evidence.

79 Lamer C.J. went on to describe the general attributes of in-court testimony that provide the usual safeguards for reliability. He reviewed at some length the compelling reasons to prefer statements made under oath or affirmation, the value of seeing and hearing the witness in assessing credibility, the importance of having an accurate record of what was actually said, and the value of contemporaneous cross-examination. In considering what would constitute an adequate substitute in respect of the prior inconsistent statement, he concluded (at pp. 795-96) that there will be "sufficient circumstantial guarantees of reliability" to render such statements substantively admissible where

> (i) the statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath or affirmation, (ii) the statement is videotaped in its entirety, and (iii) the opposing party . . . has a full opportunity to cross-examine the witness respecting the statement . . . Alternatively, other circumstantial guarantees of reliability may suffice to render such statements substantively admissible, provided that the judge is satisfied that the circumstances provide adequate assurances of reliability in place of those which the hearsay rule traditionally requires.

80 To say that a statement is sufficiently reliable because it is made under oath, in person, and the maker is cross-examined is somewhat of a misnomer. A lot of courtroom testimony proves to be totally unreliable. However, therein lies the safeguard — in the *process* that has uncovered its untrustworthiness. Hence, the

presence of adequate substitutes for that process establishes a threshold of reliability and makes it safe to admit the evidence.

81 Lamer C.J. also added an important proviso, to which I will return later, on the trial judge's discretion to refuse to allow the jury to make substantive use of the statement, even where the criteria outlined above are satisfied when there is any concern that the statement may be the product of some form of investigatory misconduct (p. 801). Here, although the statements were videotaped, and the witnesses were cross-examined, the statements were not made under oath. Whether there was a sufficient substitute to warrant substantive admission was sent back to be determined by the trial judge (p. 805). The appeal was allowed and a new trial ordered. Cory J. (L'Heureux-Dubé J. concurring) agreed with the result but for different reasons that, for the purpose of our analysis, need not be reviewed here.

6.2.4.4 *R. v. U. (F.J.), [1995] 3 S.C.R. 764*

82 *U. (F.J.)* brought back to the Court the issue of admissibility of prior inconsistent statements. In an interview with police, the complainant, J.U., told the interviewing officer that the accused, her father, was having sex with her "almost every day" (para. 4). She gave considerable details about the sexual activity and also described two physical assaults. The interviewing police officer later testified that he had attempted to tape the interview, but that the tape recorder had malfunctioned. He subsequently prepared a summary, based partly on notes and partly on his memory.

83 Immediately after interviewing J.U., the same officer interviewed the accused. Again, the interview was not taped. The accused admitted to having sex with J.U. "many times", describing similar sexual acts and the two physical assaults that J.U. had described (para. 5). At trial, J.U. recanted the allegations of sexual abuse. She claimed to have lied at the behest of her grandmother. The accused denied having told police that he had engaged in sexual activity with J.U.

84 The focus of the discussion before this Court was whether the "rule" in *B. (K.G.)* applied to this case. Although the criteria in *B. (K.G.)* were based on the principled approach in *Khan* and *Smith*, it was not clear whether *B. (K.G.)* established a distinct "rule" for admitting prior inconsistent statements. Lamer C.J. sought to clarify the relationship between these cases, stating as follows (at para. 35):

> *Khan* and *Smith* establish that hearsay evidence will be substantively admissible when it is necessary and sufficiently reliable. Those cases also state that both necessity and reliability must be interpreted flexibly, taking account of the circumstances of the case and ensuring that our new approach to hearsay does not itself become a rigid pigeon-holing analysis. My decision in *B. (K.G.)* is an application of those principles to a particular branch of the hearsay rule, the rule against the substantive admission of prior inconsistent statements. The primary distinction between *B. (K.G.)*, on the one hand, and *Khan* and *Smith*, on the other, is that in *B. (K.G.)* the declarant is available for cross-examination. This fact alone goes part of the way to ensuring that the reliability criterion for admissibility is met. The case at bar differs from *B. (K.G.)* only in terms of available indicia of reliability. Necessity is met here in the same way it was met in *B. (K.G.)*: the prior statement is necessary because evidence of the same quality cannot be obtained at trial. For that reason, assessing the reliability of the prior inconsistent statement at issue here is determinative.

85 Lamer C.J. went on to determine how the indicia of reliability could be founded on different criteria than those set out in *B. (K.G.)*. The complainant's statement to the police was not made under oath. Nor was it videotaped. Most importantly, however, the declarant was available for cross-examination, thereby significantly alleviating the usual dangers arising from the introduction of hearsay evidence. Yet, the same concerns about the reliability of the prior inconsistent statement arose in this case. The complainant had recanted her earlier allegations. In the usual course of the trial process, this should be the end of the matter. Consider, for example, if the complainant had made the earlier allegations about being sexually assaulted by her father to some girlfriends in the context of playing a game of "Truth or Dare" where each player was being encouraged to outdo the previous one by saying or doing something outrageous. It would be difficult to find justification for introducing her casual statement as substantive proof over her sworn testimony that the events never happened. Hence, the focus must turn on the reliability of the prior inconsistent statement.

86 In *B. (K.G.)*, the Court held that a prior inconsistent statement is sufficiently reliable for substantive admission if it is made in circumstances comparable to the giving of in-court testimony. In *U. (F.J.)*, the reliability requirement was met rather by showing that there was no real concern about whether the complainant was speaking the truth in her statement to the police. The striking similarities between her statement and the independent statement made by her father were so compelling that the only likely explanation was that they were both telling the truth. Again here, the criteria of

necessity and reliability intersect. In the interest of seeking the truth, the very high reliability of the statement rendered its substantive admission necessary.

87 Again here, Lamer C.J. added the following proviso (at para. 49):

> I would also highlight here the proviso I specified in *B. (K.G.)* that the trial judge must be satisfied on the balance of probabilities that the statement was not the product of coercion of any form, whether involving threats, promises, excessively leading questions by the investigator or other person in a position of authority, or other forms of investigatory misconduct.

6.2.4.5 *R. v. Hawkins, [1996] 3 S.C.R. 1043*

88 This Court's decision in *Hawkins* was concerned mainly with the issue of spousal incompetency. However, it is also instructive on the application of the principled approach to the hearsay rule. My remarks here are confined to the latter aspect of the case. It exemplifies how, in some circumstances, the reliability requirement may be established solely by the presence of adequate substitutes for the safeguards traditionally relied upon to test trial testimony. As we shall see, again here, the opportunity to cross-examine the declarant was a crucial factor. Because there were sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement, the Court concluded that the trial judge erred in excluding the statement based on its perceived lack of probative value.

89 Hawkins, a police officer, was charged with obstructing justice and corruptly accepting money. His then girlfriend, G, testified at his preliminary inquiry. After testifying the first time, G brought an application to testify again and recanted much of what she had said, with explanations. By the time of the trial, Hawkins and G were married and therefore G was incompetent to testify under s. 4 of the *Canada Evidence Act.* After ruling that the common law rule of spousal incompetency applied, and that G's testimony at the preliminary inquiry could not be read in at trial under s. 715 of the *Criminal Code,* the trial judge held that the evidence was not admissible under the principled approach because it was not sufficiently reliable. Hawkins was acquitted. The verdict was overturned by majority decision of the Court of Appeal for Ontario. On further appeal to this Court, the appeal was dismissed but for different reasons. This Court refused to modify the common law rule of spousal incompetency as it was invited to do. The Court agreed with the trial judge that the common law rule applied, and the testimony could not be read in under s. 715. However, a majority of the Court held that the preliminary inquiry testimony could be read in at trial under the principled approach to the admission of hearsay. The three dissenting judges held that this violated the policy underlying s. 4 and should not be permitted.

90 After determining that the necessity criterion was met, Lamer C.J. and Iacobucci J. (Gonthier and Cory JJ. concurring) addressed reliability. In the circumstances of this case, it could hardly be said that the complainant's testimony was inherently trustworthy. She had given contradictory versions, all under oath. Rather, the Court looked for the presence of a satisfactory basis for evaluating the truth of the statement, stating as follows, at para. 75:

> The criterion of reliability is concerned with threshold reliability, not ultimate reliability. The function of the trial judge is limited to determining whether the particular hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. More specifically, the judge must identify the specific hearsay dangers raised by the statement, and then determine whether the facts surrounding the utterance of the statement offer sufficient circumstantial guarantees of trustworthiness to compensate for those dangers. The ultimate reliability of the statement, and the weight to be attached to it, remain determinations for the trier of fact. [Emphasis added.]

91 The Court held that, generally, a witness's testimony before a preliminary inquiry will satisfy the test for threshold reliability, since the fact that it was given under oath and subject to contemporaneous cross-examination in a hearing involving the same parties and mainly the same issues will provide sufficient guarantees of its trustworthiness (para. 76). In addition, the accuracy of the statement is certified by a written transcript which is signed by the judge, and the party against whom the hearsay evidence is tendered has the power to call the declarant as a witness. The inability of the trier of fact to observe demeanour was found to be "more than compensated by the circumstantial guarantees of trustworthiness inherent in the adversarial, adjudicative process of a preliminary inquiry" (para. 77). The fact that the early common law was prepared to admit former testimony under certain circumstances indicated an implicit acceptance of its reliability notwithstanding the lack of the declarant's presence (para. 78). Therefore, Lamer C.J. and Iacobucci J. concluded (at para. 79):

> For these reasons, we find that a witness's recorded testimony before a preliminary inquiry bears sufficient hallmarks of trustworthiness to permit the trier of fact to make substantive use of such statements at trial. The surrounding circumstances of such testimony, particularly the presence of

> an oath or affirmation and the opportunity for contemporaneous cross-examination, more than adequately compensate for the trier of fact's inability to observe the demeanour of the witness in court. The absence of the witness at trial goes to the weight of such testimony, not to its admissibility.

Applying this reasoning to the statement at issue, it was found to be reliable (para. 80).

92 Lamer C.J. and Iacobucci J. added that the trial judge had erred in considering the internal contradictions contained in the testimony because these considerations properly related to the ultimate assessment of the actual probative value of the testimony, a matter for the trier of fact. Although some of the analysis on this last point is couched in terms of categorizing factors as relevant to either threshold or ultimate reliability, an approach which should no longer be adopted, the Court's conclusion on this point exemplifies where the line should be drawn on an inquiry into threshold reliability. When the reliability requirement is met on the basis that the trier of fact has a sufficient basis to assess the statement's truth and accuracy, there is no need to inquire further into the likely truth of the statement. That question becomes one that is entirely left to the ultimate trier of fact and the trial judge is exceeding his or her role by inquiring into the likely truth of the statement. When reliability is dependent on the inherent trustworthiness of the statement, the trial judge must inquire into those factors tending to show that the statement is true or not — recall *U. (F.J.)*.

6.3 *Revisiting paras. 215 and 217 in Starr*

93 As I trust it has become apparent from the preceding discussion, whether certain factors will go only to ultimate reliability will depend on the context. Hence, some of the comments at paras. 215 and 217 in *Starr* should no longer be followed. Relevant factors should not be categorized in terms of threshold and ultimate reliability. Rather, the court should adopt a more functional approach as discussed above and focus on the particular dangers raised by the hearsay evidence sought to be introduced and on those attributes or circumstances relied upon by the proponent to overcome those dangers. In addition, the trial judge must remain mindful of the limited role that he or she plays in determining admissibility — it is crucial to the integrity of the fact-finding process that the question of ultimate reliability not be pre-determined on the admissibility *voir dire*.

94 I want to say a few words on one factor identified in *Starr*, namely "the presence of corroborating or conflicting evidence" since it is that comment that appears to have raised the most controversy. I repeat it here for convenience:

> Similarly, I would not consider the presence of corroborating or conflicting evidence. On this point, I agree with the Ontario Court of Appeal's decision in *R. v. C. (B.)* (1993), 12 O.R. (3d) 608; see also *Idaho v. Wright*, 497 U.S. 805 (1990). [para. 217]

95 I will briefly review the two cases relied upon in support of this statement. The first does not really provide assistance on this question and the second, in my respectful view, should not be followed.

96 In *R. v. C.(B.)* (1993), 12 O.R. (3d) 608 (C.A.), the trial judge, in convicting the accused, had used a co-accused's statement as evidence in support of the complainant's testimony. The Court of Appeal held that this constituted an error. While a statement made by a co-accused was admissible for its truth against the co-accused, it remained hearsay as against the accused. The co-accused had recanted his statement at trial. His statement was not shown to be reliable so as to be admitted as an exception to the hearsay rule against the accused. Therefore, this case is of no assistance on the question of whether supporting evidence should be considered or not in determining hearsay admissibility. It simply reaffirms the well-established rule that an accused's statement is only admissible against its maker, not the co-accused.

97 *Idaho v. Wright*, 497 U.S. 805 (1990), is more on point. In that case, five of the nine justices of the United States Supreme Court were not persuaded that "evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of trustworthiness'" (p. 822). In the majority's view, the use of corroborating evidence for that purpose "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility" (p. 823). By way of

example, the majority observed that a statement made under duress may happen to be true, but evidence tending to corroborate the truth of the statement would be no substitute for cross-examination of the declarant at trial. The majority also raised the concern, arising mostly in child sexual abuse cases, that a jury may rely on the partial corroboration provided by medical evidence to mistakenly infer the trustworthiness of the entire allegation.

98 In his dissenting opinion, Kennedy J., with whom the remaining three justices concurred, strongly disagreed with the position of the majority on the potential use of supporting or conflicting evidence. In my view, his reasons echo much of the criticism that has been voiced about this Court's position in *Starr*. He said the following:

> I see no constitutional justification for this decision to prescind corroborating evidence from consideration of the question whether a child's statements are reliable. It is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence. In the context of child abuse, for example, if part of the child's hearsay statement is that the assailant tied her wrists or had a scar on his lower abdomen, and there is physical evidence or testimony to corroborate the child's statement, evidence which the child could not have fabricated, we are more likely to believe that what the child says is true. Conversely, one can imagine a situation in which a child makes a statement which is spontaneous or is otherwise made under circumstances indicating that it is reliable, but which also contains undisputed factual inaccuracies so great that the credibility of the child's statements is substantially undermined. Under the Court's analysis, the statement would satisfy the requirements of the Confrontation Clause despite substantial doubt about its reliability. [pp. 828-29]

99 Kennedy J. also strongly disagreed with the majority's view that only circumstances surrounding the making of the statement should be considered:

> The [majority] does not offer any justification for barring the consideration of corroborating evidence, other than the suggestion that corroborating evidence does not bolster the "inherent trustworthiness" of the statements. But for purposes of determining the reliability of the statements, I can discern no difference between the factors that the Court believes indicate "inherent trustworthiness" and those, like corroborating evidence, that apparently do not. Even the factors endorsed by the Court will involve consideration of the very evidence the Court purports to exclude from the reliability analysis. The Court notes that one test of reliability is whether the child "use[d] . . . terminology unexpected of a child of similar age." But making this determination requires consideration of the child's vocabulary skills and past opportunity, or lack thereof, to learn the terminology at issue. And, when all of the extrinsic circumstances of a case are considered, it may be shown that use of a particular word or vocabulary in fact supports the inference of prolonged contact with the defendant, who was known to use the vocabulary in question. As a further example, the Court notes that motive to fabricate is an index of reliability. But if the suspect charges that a third person concocted a false case against him and coached the child, surely it is relevant to show that the third person had no contact with the child or no opportunity to suggest false testimony. Given the contradictions inherent in the Court's test when measured against its own examples, I expect its holding will soon prove to be as unworkable as it is illogical.
>
> The short of the matter is that both the circumstances existing at the time the child makes the statements and the existence of corroborating evidence indicate, to a greater or lesser degree, whether the statements are reliable. If the Court means to suggest that the circumstances surrounding the making of a statement are the best indicators of reliability, I doubt this is so in every instance. And, if it were true in a particular case, that does not warrant ignoring other indicators of reliability such as corroborating evidence, absent some other reason for excluding it. If anything, I should think that corroborating evidence in the form of testimony or physical evidence, apart from the narrow circumstances in which the statement was made, would be a preferred means of determining a statement's reliability for purposes of the Confrontation Clause, for the simple reason that, unlike other indicators of trustworthiness, corroborating evidence can be addressed by the defendant and assessed by the trial court in an objective and critical way. [References omitted; pp. 833-34.]

100 In my view, the opinion of Kennedy J. better reflects the Canadian experience on this question. It has proven difficult and at times counterintuitive to limit the inquiry to the circumstances surrounding the making of the statement. This Court

itself has not always followed this restrictive approach. Further, I do not find the majority's concern over the "bootstrapping" nature of corroborating evidence convincing. On this point, I agree with Professor Paciocco who commented on the reasoning of the majority in *Idaho v. Wright* as follows (at p. 36):

> The final rationale offered is that it would involve "bootstrapping" to admit evidence simply because it is shown by other evidence to be reliable. In fact, the "bootstrapping" label is usually reserved to circular arguments in which a questionable piece of evidence "picks itself up by its own bootstraps" to fit within an exception. For example, a party claims it can rely on a hearsay statement because the statement was made under such pressure or involvement that the prospect of concoction can fairly be disregarded, but then relies on the contents of the hearsay statement to prove the existence of that pressure or involvement: *Ratten v. The Queen*, [1972] A.C. 378. Or, a party claims it can rely on the truth of the contents of a statement because it was a statement made by an opposing party litigant, but then relies on the contents of the statement to prove it was made by an opposing party litigant: see *R. v. Evans*, [1991] 1 S.C.R. 869. Looking to *other* evidence to confirm the reliability of evidence, the thing *Idaho v. Wright* purports to prevent, is the very antithesis of "bootstrapping".

7. Application to this Case

101 Mr. Skupien's statements to the cook, Ms. Stangrat, to the doctor and to the police constituted hearsay. The Crown sought to introduce the statements for the truth of their contents. In the context of this trial, the evidence was very important — indeed the two charges against Mr. Khelawon in respect of this complainant were entirely based on the truthfulness of the allegations contained in his statements.

102 Mr. Skupien's hearsay statements were presumptively inadmissible. None of the traditional hearsay exceptions could assist the Crown in proving its case. The evidence could only be admitted under the principled exception to the hearsay rule.

103 Mr. Skupien's death before the trial made it necessary for the Crown to resort to Mr. Skupien's evidence in its hearsay form. It was conceded throughout that the necessity requirement had been met. The case therefore turned on whether the evidence was sufficiently reliable to warrant admission.

104 Since Mr. Skupien had died before the trial, he was no longer available to be seen, heard and cross-examined in court. There was no opportunity for contemporaneous cross-examination. Nor had there been an opportunity for cross-examination at any other hearing. Although Mr. Skupien was elderly and frail at the time he made the allegations, there is no evidence that the Crown attempted to preserve his evidence by application under ss. 709 to 714 of the *Criminal Code*. He did not testify at the preliminary hearing. The record does not disclose if he had died by that time. In making these comments, I don't question the fact that it was necessary for the Crown to resort to Mr. Skupien's evidence in hearsay form. Necessity is conceded. However, in an appropriate case, the court in deciding the question of necessity may well question whether the proponent of the evidence made all reasonable efforts to secure the evidence of the declarant in a manner that also preserves the rights of the other party. That issue is not raised here.

105 The fact remains however that the absence of any opportunity to cross-examine Mr. Skupien has a bearing on the question of reliability. The central concern arising from the hearsay nature of the evidence is the inability to test his allegations in the usual way. The evidence is not admissible unless there is a sufficient substitute basis for testing the evidence or the contents of the statement are sufficiently trustworthy.

106 Obviously, there was no case to be made here on the presence of adequate substitutes for testing the evidence. This is not a *Hawkins* situation where the difficulties presented by the unavailability of the declarant were easily overcome by the availability of the preliminary hearing transcript where there had been an opportunity to cross-examine the complainant in a hearing that dealt with essentially the same issues. Nor is this a *B. (K.G.)* situation where the presence of an oath and a video were coupled with the availability of the declarant at trial. There are no adequate substitutes here for testing the evidence. There is the police video — nothing more. The principled exception to the hearsay rule does not provide a vehicle for founding a conviction on the basis of a police statement, videotaped or otherwise, without more. In order to meet the reliability requirement in this case, the Crown could only rely on the inherent trustworthiness of the statement.

107 In my respectful view, there was no case to be made on that basis either. This was not a situation as in *Khan* where the cogency of the evidence was such that, in the words of Wigmore, it would be "pedantic to insist on a test whose chief object is already secured" (§ 1420, at p. 154). To the contrary, much as in the case of the third

statement ruled inadmissible in *Smith*, the circumstances raised a number of serious issues such that it would be impossible to say that the evidence was unlikely to change under cross-examination. Mr. Skupien was elderly and frail. His mental capacity was at issue — the medical records contained repeated diagnoses of paranoia and dementia. There was also the possibility that his injuries were caused by a fall rather than an assault — the medical records revealed a number of complaints of fatigue, weakness and dizziness and the examining physician, Dr. Pietraszek, testified that the injuries could have resulted from a fall (A.R., vol. 2, at p. 259). The evidence of the garbage bags filled with Mr. Skupien's possessions provided little assistance in assessing the likely truth of his statement — he could have filled those bags himself. Ms. Stangrat's obvious motive to discredit Mr. Khelawon presented further difficulties. The initial allegations were made to her — Dr. Pietraszek acknowledged in his evidence that when he saw Mr. Skupien, Ms. Stangrat was present and may have helped him by giving some indication of what happened. The extent to which Mr. Skupien may have been influenced in making his statement by this disgruntled employee was a live issue. Mr. Skupien had issues of his own with the way the retirement home was managed. This is apparent from his rambling complaints on the police video itself. The absence of an oath and the simple "yes" in answer to the police officer's question as to whether he understood that it was important to tell the truth do not give much insight on whether he truly understood the consequences for Mr. Khelawon of making his statement. In these circumstances, Mr. Skupien's unavailability for cross-examination posed significant limitations on the accused's ability to test the evidence and, in turn, on the trier of fact's ability to properly assess its worth.

108 As indicated earlier, the crux of the trial judge's finding that the evidence was sufficiently trustworthy was based on the "striking similarities" between the statements of the five complainants. As Rosenberg J.A., I too would not reject the possibility that the presence of a striking similarity between statements from different complainants could well provide sufficient cogency to warrant the admission of hearsay evidence in an appropriate case. However, the statements made by the other complainants in this case posed even greater difficulties and could not be substantively admitted to assist in assessing the reliability of Mr. Skupien's allegations. For example, the videotaped interview with Mr. Dinino which formed the basis of the second conviction against Mr. Khelawon was nine minutes in length. It was preceded by a 30-minute interview with the police. The police officer had no notes of the initial interview. Cst Pietroniro acknowledged that it "was very difficult" to get Mr. Dinino to answer questions and that much of the videotape is inaudible. Cst Pietroniro would generally put to Mr. Dinino what he thought Mr. Dinino was saying and Mr. Dinino would respond "yes" or "yeah". Cst Pietroniro agreed that he was making an educated guess as to what Mr. Dinino was saying and that there were some things said by Mr. Dinino that he did not understand. Quite apart from these difficulties, it is also far from clear on the record on precisely what features the trial judge based his finding that there was a "striking similarity" between the various statements. However, I do not find it necessary to elaborate on this point. The admissibility of the other statements is no longer in issue. The Court of Appeal unanimously ruled them inadmissible.

109 I conclude that the evidence did not meet the reliability requirement. The majority of the Court of Appeal was correct to rule it inadmissible.

8. Conclusion

110 For these reasons, I would dismiss the appeal.

r. *c.* khelawon

Sa Majesté la Reine *Appelante*

c.

Ramnarine Khelawon *Intimé*

et

Procureur général de la Colombie-Britannique et Criminal Lawyers' Association (Ontario) *Intervenants*

Répertorié : R. *c.* Khelawon

Référence neutre : 2006 CSC 57.

N° du greffe : 30857.

2005 : 16 décembre; 2006 : 14 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella et Charron.

en appel de la cour d'appel de l'ontario

Droit criminel — Preuve — Ouï-dire — Admissibilité — Juge du procès admettant en preuve les déclarations relatées que des plaignants décédés avaient faites à la police — Ces déclarations étaient-elles admissibles en vertu de l'exception raisonnée à la règle du ouï-dire? — Facteurs à considérer pour décider si des déclarations relatées sont suffisamment fiables pour être admissibles.

En 1999, C, une cuisinière dans une maison de retraite, a trouvé S, un résident de cet établissement, blessé grièvement dans sa chambre. Ses effets personnels étaient entassés dans des sacs à ordure. S a raconté à C que l'accusé, directeur de l'établissement, l'avait battu et avait menacé de le tuer s'il ne quittait pas la maison de retraite. C a conduit S à son appartement et s'est occupée de lui pendant quelques jours. Elle a ensuite conduit S chez un médecin. Ce dernier a témoigné qu'il avait décelé trois côtes fracturées et des ecchymoses qui pouvaient avoir résulté de l'agression alléguée par S, mais aussi d'une chute. Le lendemain, C a conduit S au poste de police, où S a fait une déclaration enregistrée sur bande vidéo, dans laquelle il alléguait que l'accusé l'avait agressé et avait menacé de le tuer. Cette déclaration n'a pas été faite sous serment, mais S a répondu « oui » lorsqu'on lui a demandé s'il comprenait qu'il était important de dire la vérité et que des accusations pourraient être portées contre lui s'il mentait. Les dossiers médicaux saisis à la maison de retraite décrivaient S comme étant « en colère », « agressif », « dépressif » et « paranoïaque », en plus de révéler qu'il avait été traité pour une psychose paranoïaque et une dépression. Au procès, une psychiatre ayant témoigné lors du voir-dire a conclu que S avait la capacité de communiquer les faits dans son témoignage et qu'il comprenait l'importance de dire la vérité au moment où il a fait sa déclaration à la police. La défense a prétendu que C avait amené S à porter plainte pour se venger de l'accusé qui avait mis fin à son emploi auparavant.

Des policiers se sont rendus à la maison de retraite où d'autres résidents se sont plaints d'avoir été agressés par l'accusé. Ce dernier a fait l'objet d'accusations à l'égard de cinq plaignants, mais, au moment du procès, quatre plaignants, dont S et D, étaient décédés de causes non liées aux agressions alléguées, et le cinquième n'était plus habile à témoigner. Un seul plaignant avait témoigné à l'enquête préliminaire. La principale question en litige était de savoir s'il y avait lieur d'admettre en preuve les déclarations relatées des plaignants. Le juge du procès a admis une partie de la preuve par ouï-dire en raison, dans une large mesure, de la similitude frappante des déclarations. En fin de compte, il a estimé que les déclarations enregistrées sur bande vidéo que S et D avaient faites à la police étaient suffisamment crédibles pour justifier des déclarations de culpabilité de voies de fait graves et de menaces de mort à l'endroit de S, ainsi que d'agression ayant causé des lésions corporelles et d'agression armée à l'endroit de D. L'accusé a été acquitté quant aux autres chefs. En appel, la Cour d'appel à la majorité a exclu toutes les déclarations relatées et a acquitté l'accusé relativement à toutes les accusations. Le juge dissident aurait maintenu les déclarations de culpabilité relatives à S. Le ministère public a formé un pourvoi de plein droit contre les acquittements relatifs à S et s'est vu refuser l'autorisation d'appeler à l'égard de ceux relatifs à D.

Arrêt : Le pourvoi est rejeté et les acquittements sont confirmés.

La preuve par ouï-dire est présumée inadmissible à moins qu'une exception à la règle du ouï-dire ne s'applique, essentiellement en raison de l'incapacité générale d'en vérifier la fiabilité. Les caractéristiques déterminantes essentielles du ouï-dire sont le fait que la déclaration extrajudiciaire soit présentée pour établir la véracité de son contenu et l'impossibilité de contre-interroger le déclarant au moment précis où il fait cette déclaration. Le ouï-dire inclut une déclaration extrajudiciaire d'un témoin qui

dépose en cour lorsque cette déclaration est présentée pour établir la véracité de son contenu. Dans certains cas, la preuve par ouï-dire présente des dangers minimes et son exclusion au lieu de son admission gênerait la constatation exacte des faits. C'est ainsi que les tribunaux ont établi, au fil du temps, un certain nombre d'exceptions traditionnelles à la règle d'exclusion. La preuve par ouï-dire qui ne relève pas d'une exception traditionnelle peut tout de même être admissible suivant la méthode d'analyse raisonnée, si l'existence d'indices de fiabilité et de nécessité est établie lors d'un voir-dire. L'exigence de fiabilité vise à déterminer les cas où les préoccupations découlant de l'impossibilité de vérifier la preuve sont suffisamment surmontées pour justifier l'admission de cette preuve à titre d'exception à la règle d'exclusion générale. En général, il est possible de satisfaire à l'exigence de fiabilité en démontrant (1) qu'il n'y a pas de préoccupation réelle quant au caractère véridique ou non de la déclaration, vu les circonstances dans lesquelles elle a été faite, ou (2) que le fait que la déclaration soit relatée ne suscite aucune préoccupation réelle étant donné que, dans les circonstances, sa véracité et son exactitude peuvent néanmoins être suffisamment vérifiées autrement qu'au moyen d'un contre-interrogatoire effectué au moment précis où elle est faite. Ces deux principales façons de satisfaire à l'exigence de fiabilité ne constituent pas des catégories mutuellement exclusives et peuvent aider à reconnaître les facteurs à considérer pour déterminer l'admissibilité. [2-3] [35] [37] [42] [49] [61-63] [65]

Le juge du procès joue le rôle de gardien en effectuant cette appréciation préliminaire du seuil de fiabilité d'une déclaration relatée et laisse au juge des faits le soin d'en déterminer en fin de compte la valeur. Les facteurs à considérer lors de l'examen de l'admissibilité ne sauraient être rangés dans des catégories de seuil de fiabilité et de fiabilité en dernière analyse. Plus exactement, tous les facteurs pertinents

devraient être considérés, y compris, dans les cas appropriés, la présence d'éléments de preuve à l'appui ou contradictoires. Les observations contraires formulées dans la jurisprudence de notre Cour, dont l'arrêt *R. c. Starr*, [2000] 2 R.C.S. 144, 2000 CSC 40, ne devraient plus être suivies. Pour se prononcer sur l'admissibilité, le tribunal devrait adopter une approche plus fonctionnelle axée sur les dangers particuliers que comporte la preuve par ouï-dire qu'on cherche à présenter, de même que sur les caractéristiques ou circonstances que la partie qui veut présenter la preuve invoque pour écarter ces dangers. La question de savoir si certains facteurs toucheront uniquement la fiabilité en dernière analyse dépendra du contexte. Dans chaque cas, l'examen ne porte que sur la question de l'admissibilité en matière de preuve. Lors de l'examen de l'admissibilité, il est possible, dans les cas appropriés, de prendre en considération une preuve corroborante ou contradictoire. Dans le cas où l'exigence de fiabilité est remplie parce que le juge des faits dispose d'une base suffisante pour apprécier la véracité et l'exactitude de la déclaration, il n'est pas nécessaire que le juge du procès vérifie davantage si la déclaration est susceptible d'être véridique. Lorsque la fiabilité dépend de la fiabilité inhérente de la déclaration, le juge du procès doit examiner les facteurs tendant à démontrer que la déclaration est véridique ou non. [2] [4] [92-93]

En tranchant la question du seuil de fiabilité, le juge du procès doit être conscient que la preuve par ouï-dire est présumée inadmissible. Son rôle est de prévenir l'admission d'une preuve par ouï-dire qui n'est pas nécessaire ou dont la fiabilité ne ressort pas clairement de la véracité de son contenu ou ne peut, en dernière analyse, être vérifiée utilement par le juge des faits. Si la partie qui veut présenter la preuve ne peut satisfaire au double critère de la nécessité et de la fiabilité, la règle d'exclusion générale l'emporte. Dans une affaire criminelle, l'incapacité de l'accusé de vérifier la preuve risque de compromettre l'équité du procès, d'où la dimension constitutionnelle de la

règle. Comme dans tout litige, le juge du procès a le pouvoir discrétionnaire résiduel d'exclure une preuve admissible lorsque son effet préjudiciable est disproportionné par rapport à sa valeur probante. [2-3]

Les arrêts *R. c. Khan*, [1990] 2 R.C.S. 531, et *R. c. Smith*, [1992] 2 R.C.S. 915, sont des exemples où l'exigence de fiabilité était remplie parce que les circonstances dans lesquelles des déclarations relatées avaient été faites étaient suffisamment rassurantes quant à leur véracité et à leur exactitude. Les arrêts *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740, et *R. c. Hawkins*, [1996] 3 R.C.S. 1043, sont des exemples où le seuil de fiabilité reposait sur l'existence de substituts adéquats aux garanties traditionnelles invoquées pour vérifier la preuve. De même, dans l'arrêt *R. c. U. (F.J.)*, [1995] 3 R.C.S. 764, les similitudes frappantes entre la déclaration extrajudiciaire incompatible que la plaignante avait faite antérieurement et celle que l'accusé avait faite de façon indépendante étaient si convaincantes qu'il était nécessaire d'admettre quant au fond la déclaration de la plaignante en raison de sa très grande fiabilité. [67-68] [73] [82] [86] [88]

La déclaration enregistrée sur bande vidéo que S avait faite à la police était inadmissible. Même s'il était nécessaire de recourir à la déclaration relatée de S parce que celui-ci était décédé avant l'ouverture du procès, cette déclaration n'était pas suffisamment fiable pour écarter les dangers qu'elle présentait. Les circonstances dans lesquelles elle avait été faite ne constituaient pas un gage raisonnable de fiabilité inhérente. Un certain nombre de questions sérieuses se posent, notamment celles de savoir si S jouissait de toutes ses facultés mentales, s'il comprenait les conséquences de sa déclaration, s'il a été influencé par C, si sa déclaration était motivée par une insatisfaction à l'égard de l'administration de la maison de retraite et si ses blessures

étaient dues à une chute. L'impossibilité de contre-interroger S limitait substantiellement la capacité de l'accusé de vérifier la preuve et la capacité du juge des faits d'en déterminer correctement la valeur. Même si l'existence d'une similitude frappante entre les déclarations de divers plaignants pourrait bien être suffisamment probante pour justifier l'admission d'une preuve par ouï-dire dans un cas approprié, les déclarations des autres plaignants en l'espèce présentaient des difficultés encore plus grandes et n'étaient pas admissibles quant au fond pour aider à apprécier la fiabilité des allégations de S. L'admission de cette preuve risquait de compromettre l'équité du procès. En outre, la déposition de S aurait pu être prise, avant son décès, par un commissaire en présence de l'accusé ou de son avocat, ce qui aurait permis de préserver à la fois la preuve et les droits de l'accusé. [7] [108]

Jurisprudence

Arrêt modifié : *R. c. Starr*, [2000] 2 R.C.S. 144, 2000 CSC 40; **arrêts interprétés :** *R. c. Khan*, [1990] 2 R.C.S. 531; *R. c. Smith*, [1992] 2 R.C.S. 915; *R. c. U. (F.J.)*, [1995] 3 R.C.S. 764; *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740; *R. c. Hawkins*, [1996] 3 R.C.S. 1043; **arrêts analysés :** *R. c. C. (B.)* (1993), 12 O.R. (3d) 608; *Idaho c. Wright*, 497 U.S. 805 (1990); **arrêts mentionnés :** *R. c. Abbey*, [1982] 2 R.C.S. 24; *R. c. O'Brien*, [1978] 1 R.C.S. 591; *R. c. Mapara*, [2005] 1 R.C.S. 358, 2005 CSC 23; *Dersch c. Canada (Procureur général)*, [1990] 2 R.C.S. 1505; *R. c. Rose*, [1998] 3 R.C.S. 262; *R. c. Mills*, [1999] 3 R.C.S. 668; *R. c. Wilcox* (2001), 152 C.C.C. (3d) 157, 2001 NSCA 45; *R. c. Czibulka* (2004), 189 C.C.C. (3d) 199.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 7.

Code criminel, L.R.C. 1985, ch. C-46, art. 709 à 714.

Loi sur la preuve au Canada, L.R.C. 1985, ch. C-5, art. 16.

Doctrine citée

Paciocco, David M. « The Hearsay Exceptions: A Game of "Rock, Paper, Scissors" », dans *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence*. Toronto : Irwin Law, 2004, 17.

Wigmore, John Henry. *Evidence in Trials at Common Law*, vol. III, 2nd ed. Boston : Little, Brown, and Company, 1923.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Rosenberg, Armstrong et Blair) (2005), 195 O.A.C. 11, 194 C.C.C. (3d) 161, 26 C.R. (6th) 1, [2005] O.J. No. 723 (QL), qui a annulé les déclarations de culpabilité prononcées contre l'accusé. Pourvoi rejeté.

John S. McInnes et *Eliott Behar*, pour l'appelante.

Timothy E. Breen, pour l'intimé.

Alexander Budlovsky, pour l'intervenant le procureur général de la Colombie-Britannique.

Louis P. Strezos et *Joseph Di Luca*, pour l'intervenante la Criminal Lawyers' Association (Ontario).

Procureur de l'appelante : Ministère du Procureur général de l'Ontario, Toronto.

Procureurs de l'intimé : Fleming, Breen, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Ministère du Procureur général de la Colombie-Britannique, Vancouver.

Procureurs de l'intervenante la Criminal Lawyers' Association (Ontario) : Louis P. Strezos and Associate, et Di Luca Barristers, Toronto.

Traduction

COUR SUPRÊME DU CANADA

SA MAJESTÉ LA REINE

- c. -

RAMNARINE KHELAWON

- et -

PROCUREUR GÉNÉRAL DE LA COLOMBIE-BRITANNIQUE et CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

CORAM : La Juge en chef et les juges Binnie, LeBel, Deschamps, Fish, Abella et Charron

LA JUGE CHARRON —

1. Aperçu

1 Le présent pourvoi porte sur l'admissibilité des déclarations relatées en vertu de l'exception raisonnée à la règle du ouï-dire, qui s'applique cas par cas et repose sur la nécessité et la fiabilité. Plus particulièrement, des indications sont requises sur les facteurs à considérer pour décider si une déclaration relatée est suffisamment fiable pour être admissible. L'arrêt de notre Cour *R. c. Starr*,

[2000] 2 R.C.S. 144, 2000 CSC 40, est généralement interprété comme signifiant que les circonstances « extrinsèques » dans lesquelles la déclaration a été recueillie n'ont une incidence que sur sa fiabilité en dernière analyse et ne peuvent pas être prises en considération par le juge du procès lorsqu'il se prononce sur son admissibilité. Cet arrêt a suscité une multitude de commentaires dans la jurisprudence et de critiques dans la doctrine pour diverses raisons, dont la difficulté de définir ce qui constitue une circonstance « extrinsèque » et l'incohérence manifeste entre cette conclusion de l'arrêt *Starr* et le fait que la Cour a pris en considération une tache de sperme trouvée sur les vêtements de la déclarante dans l'affaire *R. c. Khan*, [1990] 2 R.C.S. 531, la raison de mentir de la déclarante dans l'affaire *R. c. Smith*, [1992] 2 R.C.S. 915, et, ce qui est le plus pertinent en l'espèce, les similitudes frappantes entre les déclarations dans l'affaire *R. c. U. (F.J.)*, [1995] 3 R.C.S. 764.

2 En général, tout élément de preuve pertinent est admissible. La règle excluant le ouï-dire est une exception bien établie à ce principe général. Bien qu'aucun raisonnement unique n'en sous-tende l'évolution historique, l'exclusion dont les déclarations relatées sont présumées faire l'objet tient essentiellement à l'incapacité générale d'en vérifier la fiabilité. Si le déclarant n'est pas présent en cour, il peut se révéler impossible de mettre à l'épreuve sa perception, sa mémoire, sa relation du fait en question ou sa sincérité. Il se peut que la déclaration elle-même ne fasse pas l'objet d'un compte rendu exact. Des erreurs, des exagérations ou des faussetés délibérées peuvent passer inaperçues et mener à des verdicts injustes. Ainsi, la règle interdisant le ouï-dire est censée accroître l'exactitude des conclusions de fait du tribunal et non entraver sa fonction de recherche de la vérité. Toutefois, la difficulté de déterminer la valeur de la preuve par ouï-dire varie selon le contexte. Dans certains cas, cette preuve présente des dangers minimes et son *exclusion* au lieu de son admission gênerait la

constatation exacte des faits. C'est ainsi que les tribunaux ont établi, au fil du temps, un certain nombre d'exceptions à la règle. Tout comme les exceptions traditionnelles à la règle d'exclusion ont été largement conçues en fonction des circonstances où les dangers liés à l'admission de la preuve étaient suffisamment atténués, il doit en être de même pour l'exception générale raisonnée à la règle du ouï-dire. Lorsqu'il est nécessaire de recourir à ce type de preuve, une déclaration relatée peut être admise si son contenu est fiable en raison de la manière dont elle a été faite ou si les circonstances permettent, en fin de compte, au juge des faits d'en déterminer suffisamment la valeur. Si la partie qui veut présenter la preuve ne peut satisfaire au double critère de la nécessité et de la fiabilité, la règle d'exclusion générale l'emporte. Le juge du procès joue le rôle de gardien en effectuant cette appréciation préliminaire du « seuil de fiabilité » de la déclaration relatée et laisse au juge des faits le soin d'en déterminer en fin de compte la valeur.

3 La distinction entre seuil de fiabilité et fiabilité en dernière analyse reflète la différence importante entre admettre un élément de preuve et s'y fier. Le juge du procès détermine l'admissibilité en fonction des règles de preuve applicables. C'est au juge des faits qu'il appartient en fin de compte de décider, au regard de l'ensemble de la preuve, s'il y a lieu de se fier à cet élément de preuve pour trancher les questions en litige. L'omission de respecter cette distinction aurait pour effet non seulement de prolonger indûment les audiences portant sur l'admissibilité, mais également de fausser le processus de constatation des faits. En tranchant la question du seuil de fiabilité, le juge du procès doit être conscient que la preuve par ouï-dire est présumée *inadmissible*. Son rôle est de prévenir l'admission d'une preuve par ouï-dire qui n'est pas nécessaire pour trancher la question en litige ou dont la fiabilité ne ressort pas clairement de la véracité de son contenu ou ne peut, en dernière analyse, être vérifiée utilement par le

juge des faits. Dans une affaire criminelle, l'incapacité de l'accusé de vérifier la preuve risque de compromettre l'équité du procès, d'où la dimension constitutionnelle de la règle. Les préoccupations relatives à l'équité du procès imprègnent non seulement la décision concernant l'admissibilité, mais encore guident l'exercice du pouvoir discrétionnaire résiduel du juge du procès d'exclure des éléments de preuve même si leur nécessité et leur fiabilité peuvent être démontrées. Comme dans tout litige, le juge du procès a le pouvoir discrétionnaire d'exclure une preuve admissible lorsque son effet préjudiciable est disproportionné par rapport à sa valeur probante.

4 Comme je l'expliquerai, je suis arrivée à la conclusion que les facteurs à considérer lors de l'examen de l'admissibilité ne sauraient être rangés dans des catégories de seuil de fiabilité et de fiabilité en dernière analyse. Les observations contraires formulées dans la jurisprudence de notre Cour ne devraient plus être suivies. Plus exactement, tous les facteurs pertinents devraient être considérés, y compris, dans les cas appropriés, la présence d'éléments de preuve à l'appui ou contradictoires. Dans chaque cas, l'examen doit être fonction des dangers particuliers que présente la preuve et ne porter que sur la question de l'admissibilité.

5 En mai 1999, cinq personnes âgées résidant dans une maison de retraite ont dit à différentes personnes que le directeur de l'établissement, l'intimé Ramnarine Khelawon, les avaient agressées. Au moment du procès, environ deux ans et demi plus tard, quatre des plaignants étaient décédés de causes non liées aux agressions et le cinquième n'était plus habile à témoigner. Un seul des plaignants avait témoigné à l'enquête préliminaire. La principale question en litige était de savoir si les déclarations relatées des plaignants atteignaient un seuil de fiabilité suffisant pour qu'elles puissent être admises en preuve. Le juge Grossi a conclu que les déclarations

relatées de chacun des plaignants étaient suffisamment fiables pour être admises en preuve, en raison, dans une large mesure, de leur similitude « frappante ». En fin de compte, il a déclaré M. Khelawon coupable des infractions relatives à deux des plaignants, soit MM. Skupien et Dinino, et l'a acquitté à l'égard des autres chefs. M. Khelawon a été condamné à une peine d'emprisonnement de deux ans et demi pour les infractions relatives à M. Skupien et à une peine additionnelle de deux ans pour celles relatives à M. Dinino.

6 Lors de l'appel devant la Cour d'appel de l'Ontario, le juge Rosenberg (avec l'appui du juge Armstrong) a exclu toutes les déclarations et a acquitté M. Khelawon. Le juge Blair, dissident, aurait pour sa part maintenu les déclarations de culpabilité relatives à M. Skupien seulement. Dans son pourvoi de plein droit devant notre Cour, le ministère public sollicite le rétablissement des déclarations de culpabilité relatives à M. Skupien. Il a également sollicité l'autorisation d'appeler des accusations relatives à M. Dinino, mais celle-ci lui a été refusée.

7 À mon avis, la déclaration enregistrée sur bande vidéo que M. Skupien a faite à la police était inadmissible. Même s'il était nécessaire de recourir à ce type de témoignage de M. Skupien parce que celui-ci était décédé avant l'ouverture du procès, la déclaration n'était pas suffisamment fiable pour écarter les dangers qu'elle présentait. Les circonstances dans lesquelles elle a été faite ne constituaient pas un gage raisonnable de fiabilité inhérente. Au contraire, elles soulevaient un certain nombre de questions sérieuses, notamment celles de savoir si M. Skupien jouissait de toutes ses facultés mentales, s'il comprenait les conséquences de sa déclaration, s'il avait été influencé, dans ses allégations, par une employée mécontente qui avait été congédiée par M. Khelawon, si sa déclaration était motivée par une insatisfaction

générale à l'égard de l'administration de la maison de retraite et si ses blessures étaient dues à une chute plutôt qu'à l'agression. Dans ces circonstances, l'impossibilité de contre-interroger M. Skupien limitait substantiellement la capacité de l'accusé de vérifier la preuve et, partant, la capacité du juge des faits d'en déterminer correctement la valeur. Les déclarations des autres plaignants présentaient des difficultés encore plus grandes et n'étaient pas admissibles quant au fond pour aider à apprécier la fiabilité des allégations de M. Skupien. Compte tenu de l'ensemble des circonstances et, en particulier, du fait que la preuve du ministère public contre M. Khelawon reposait sur la déclaration relatée, l'admission de ce témoignage risquait de compromettre l'équité du procès et n'aurait pas dû être autorisée. Comme l'a judicieusement fait remarquer le juge Rosenberg, l'admission de la preuve suivant la méthode d'analyse raisonnée de la règle du ouï-dire n'est pas la seule façon de préserver le témoignage de personnes qui peuvent être dans l'impossibilité de se présenter au procès. Les articles 709 à 714 du *Code criminel*, L.R.C. 1985, ch. C-46, envisagent expressément cette éventualité et établissent une procédure de prise de déposition par un commissaire en présence de l'accusé ou de son avocat, ce qui permet de préserver à la fois la preuve et les droits de l'accusé.

8 Pour les motifs qui suivent, je suis d'avis de rejeter le pourvoi et de confirmer les acquittements.

2. Contexte

9 M. Khelawon a été accusé de voies de fait graves et de menaces de mort à l'endroit de Teofil Skupien. Il a également été accusé de voies de faits graves et d'agression armée à l'endroit d'Atillio Dinino ainsi que d'agression ayant causé des

lésions corporelles à trois autres plaignants. Ces infractions auraient été commises au cours du mois de mai 1999 et, à l'époque, tous les plaignants étaient des résidents de Bloor West Village Retirement Home. M. Khelawon était le directeur de l'établissement et sa mère en était la propriétaire. Comme je l'ai indiqué précédemment, aucun des plaignants n'était disponible pour témoigner au procès. En conséquence, la principale question concernait l'admissibilité des déclarations relatées qu'ils avaient faites à diverses personnes. Il y avait en tout 10 déclarations, dont quatre à la police qui étaient enregistrées sur bande vidéo. Le procès tenu devant le juge Grossi siégeant sans jury s'est déroulé essentiellement comme un voir-dire sur l'admissibilité de la preuve, les avocats ayant convenu qu'il ne serait pas nécessaire de reprendre la preuve concernant les déclarations qui seraient par la suite jugées admissibles. Aucune des déclarations n'était visée par quelque exception traditionnelle à la règle du ouï-dire. Pour qu'elles soient admissibles, le ministère public devait plutôt satisfaire à la double exigence de nécessité et de fiabilité selon la méthode d'analyse raisonnée de la règle du ouï-dire, établie dans les arrêts *Khan*, *Smith* et, par la suite, *Starr*.

10 Les accusations relatives à M. Skupien sont les seules soumises à notre Cour. Je vais donc faire un résumé plus détaillé de la preuve concernant les déclarations de M. Skupien. Je vais également décrire les circonstances entourant l'obtention des déclarations des autres plaignants dans la mesure où elles sont pertinentes pour trancher le présent pourvoi. Le ministère public a cherché à produire trois déclarations de M. Skupien : la première faite à une employée de la maison de retraite, la deuxième, au médecin qui a soigné ses blessures, et la troisième, à la police.

Seule la dernière déclaration a été admise en preuve au procès. Je décrirai chacune des déclarations à tour de rôle.

2.1 *La déclaration de M. Skupien à Mme Stangrat*

11 Au moment des faits en question, M. Skupien était âgé de 81 ans et vivait depuis quatre ans dans l'établissement Bloor West Village Retirement Home. Il a adressé sa première plainte à l'une des employés de la maison de retraite, Mme Joanna Stangrat. Celle-ci, connue également sous plusieurs autres noms, était cuisinière à la maison de retraite depuis quelques mois. Elle connaissait M. Skupien parce que celui-ci se rendait souvent à la cuisine et l'accompagnait parfois jusqu'au métro à la fin de son quart de travail. Mme Stangrat a joué un rôle important dans le dossier concernant M. Skupien. La thèse de la défense voulait notamment qu'elle ait amené M. Skupien et les autres plaignants à porter plainte pour se venger de M. Khelawon qui lui avait remis un avis de cessation d'emploi quelques semaines auparavant.

12 Le 8 mai 1999, Mme Stangrat a remarqué que M. Skupien n'était pas venu prendre son petit déjeuner. Elle s'est rendue à sa chambre pour vérifier s'il allait bien et l'a trouvé étendu sur son lit. Son visage était rouge et il avait du sang autour de la bouche. Lorsqu'elle s'est approchée de lui, elle a constaté que son oeil et son nez étaient contusionnés. Ses yeux étaient enflés. Lorsque M. Skupien l'a aperçue, il lui a demandé d'entrer et de fermer la porte. Il semblait être en état de choc et très mal en point. Mme Stangrat a remarqué la présence sur le plancher de deux grands sacs à ordures verts remplis. Elle a fermé la porte et lui a demandé ce qui s'était passé et ce que contenaient les deux sacs à ordures. M. Skupien lui a raconté ce qui s'était passé

le soir précédent. Il lui a aussi montré les ecchymoses qu'il avait sur la partie supérieure gauche de sa poitrine.

13 M. Skupien a dit à Mme Stangrat qu'il devait quitter la maison de retraite avant midi ce même jour parce que « Tony », le surnom de M. Khelawon, reviendrait pour le tuer. Il a expliqué à Mme Stangrat que M. Khelawon était entré dans sa chambre en colère vers 20 h le soir précédent et l'avait roué de coups de poing au visage et dans les côtes. Après l'avoir battu, M. Khelawon avait entassé ses vêtements dans les sacs à ordures verts qu'ils avaient ensuite laissés sur le plancher. Mme Stangrat a demandé à M. Skupien pourquoi M. Khelawon l'avait ainsi attaqué. Celui-ci a répondu que Tony lui reprochait de se rendre à la cuisine alors qu'il n'avait aucune raison d'y aller. Après avoir agressé M. Skupien, M. Khelawon l'a menacé en lui disant de quitter la maison de retraite avant midi le lendemain, sinon il reviendrait pour le tuer. M. Skupien a demandé à Mme Stangrat ce qu'il devait faire. Elle lui a dit qu'elle téléphonerait à sa fille pour qu'elle vienne le chercher et lui a conseillé de rester dans sa chambre jusqu'à ce qu'elle ait terminé ses tâches de la journée.

14 Mme Stangrat a fait en sorte que M. Skupien demeure chez sa fille plus tard le même jour, et ensuite à son propre appartement. M. Skupien était souffrant, mais il refusait alors de consulter un médecin parce qu'il avait peur. Mme Stangrat l'a gardé à son appartement où elle et une de ses amies se sont occupé de lui à tour de rôle.

Quelques jours plus tard, M. Skupien a accepté de se rendre chez le médecin. Mme Stangrat et son amie l'ont amené voir le Dr Pietraszek.

2.2 *La déclaration de M. Skupien au médecin traitant*

15 Le 12 mai 1999, le Dr Pietraszek a examiné M. Skupien. Il a constaté la présence d'ecchymoses dans son visage ainsi que dans son dos et sur la partie gauche de sa poitrine. Il a aussi remarqué que M. Skupien semblait éprouver de la douleur en respirant. Des radiographies ont permis de constater que trois de ses côtes étaient fracturées. Dans son témoignage, le Dr Pietraszek a affirmé que M. Skupien lui avait dit avoir été frappé au visage et sur le corps avec ce qui lui avait semblé être une canne ou un tuyau. Le médecin a rejeté toute idée que Mme Stangrat ait raconté cette histoire, mais il a reconnu qu'elle était présente et qu'elle pouvait avoir aidé M. Skupien à décrire ce qui s'était passé. Le Dr Pietraszek a estimé que les blessures pouvaient avoir été causées de la façon relatée par M. Skupien. Il a également témoigné que les blessures pouvaient être dues à une chute.

2.3 *La déclaration enregistrée sur bande vidéo que M. Skupien a faite à la police*

16 Le lendemain, soit le 13 mai 1999, Mme Stangrat a conduit M. Skupien au poste de police. Le détective Karpow a reçu sa plainte. Il a remarqué la présence d'ecchymoses sur la partie gauche du visage de M. Skupien, près de l'oeil. Le détective s'est arrangé pour que M. Skupien fasse une déclaration enregistrée sur bande vidéo. Le détective Karpow et l'agent John Birrell étaient présents. La déclaration n'a pas été faite sous serment, mais on a demandé à M. Skupien s'il comprenait qu'il était très important de dire la vérité et que, s'il mentait, [TRADUCTION]« des accusations en

ce sens pourraient être portées contre [lui] ». M. Skupien a répondu « oui » aux deux questions. Après quelques autres questions préliminaires, on lui a demandé en quoi consistait sa plainte. Il a alors expliqué comment, le 7 mai 1999, Tony s'était rendu à sa chambre et lui avait dit « en voilà assez ». Il s'était ensuite mis à le battre en lui administrant des gifles et des coups de poing au visage, dans les côtes et un peu partout, et en lui interdisant d'aller à la cuisine. Tony avait dit à M. Skupien que s'il ne partait pas, il reviendrait à midi le lendemain pour l'abattre. M. Skupien a ensuite pris la peine d'ajouter plusieurs plaintes concernant l'administration générale de la maison de retraite, jusqu'à ce que le détective Karpow lui rappelle l'objet de sa démarche en lui posant d'autres questions sur l'épisode en cause et la suite des événements. M. Skupien a généralement bien répondu aux questions du policier.

17 À la suite de cet entretien, M. Khelawon a été arrêté.

2.4 *L'enquête plus approfondie*

18 Mme Stangrat a remis aux policiers une liste d'autres personnes auxquelles, selon elle, ils devraient aller s'adresser à la maison de retraite. Le lendemain, soit le 14 mai 1999, plusieurs policiers sont allés rencontrer ces personnes à la maison de retraite. Comme il n'y avait pas d'inscriptions sur les portes, les agents ont dû visiter tout l'établissement, s'entretenant avec des résidents et des membres du personnel infirmier. Parmi les personnes trouvées, certaines se sont montrées [TRADUCTION] « peu réceptives », d'où l'impossibilité d'avoir un entretien utile avec elles. D'autres, toutefois, ont pu et ont voulu parler. Après avoir divulgué leur identité, les policiers demandaient aux résidents comment ça allait à la maison de retraite et s'ils souhaitaient discuter de ce qui pouvait leur être arrivé. Les policiers se sont arrangés

pour enregistrer sur bande vidéo les déclarations des personnes qui voulaient leur parler, dont celles de trois autres plaignants, M. Dinino, Mme Poliszak et M. Grocholska. Le quatrième plaignant, M. Peiszterer, n'a pas été en mesure de communiquer avec la police, mais son fils a fourni une déclaration enregistrée sur bande vidéo.

2.5 *Les dossiers médicaux*

19 Le 15 mai 1999, le détective Karpow s'est rendu à la maison de retraite où il a rencontré le Dr Michalski, un médecin appelé régulièrement à y soigner les résidents. Le 18 mai 1999, la police est retournée à la maison de retraite et a saisi les dossiers médicaux et un journal contenant des notes du personnel infirmier.

20 La documentation tirée du dossier de M. Skupien a révélé que celui-ci habitait en appartement jusqu'à ce qu'il soit victime d'un accident vasculaire cérébral (AVC) en février 1995. Il a été transféré à la maison de retraite en avril 1995. Un rapport daté du 13 avril 1995 fait état de sa condition après l'AVC. Il connaissait parfois des périodes de confusion, il ne pouvait sortir seul à l'extérieur et il avait besoin d'aide pour préparer ses repas, effectuer ses opérations bancaires et se rappeler de prendre ses médicaments, mais il était en mesure d'accomplir toutes les tâches en matière de soins personnels.

21 Le dossier du Dr Michalski faisait état de rencontres fréquentes avec M. Skupien pendant son séjour à la maison de retraite. Parfois, il était décrit comme étant [TRADUCTION] « dépressif », « agressif », « en colère » et « paranoïaque ». En juin 1998, un diagnostic de psychose paranoïaque a été établi et des médicaments ont

été prescrits. En juillet 1998, « la paranoïa a diminué quelque peu ». En août 1998, M. Skupien a été décrit comme étant « en colère et agressif » et la dose a été augmentée. En août 1998, il était qualifié de « confus ». La possibilité de démence était notée pour la première fois. En septembre 1998, un diagnostic de « dépression » a été établi et des médicaments ont été prescrits. Toujours en septembre 1998, une note indique que la dépression est atténuée et, même si elle était apparemment « éliminée » en janvier 1999, la dépression a de nouveau été notée en février 1999. Ces notes font également état d'un certain nombre de plaintes de fatigue, de faiblesse et d'étourdissements.

2.6 *Le témoignage d'expert lors du voir-dire*

22 La D[re] Susan Lieff, une psychiatre gériatrique, a été autorisée à présenter, lors du voir-dire, un témoignage d'opinion sur la capacité de M. Skupien de comprendre l'importance de dire la vérité et de communiquer les faits dans son témoignage. Elle a également exprimé une opinion au sujet de M. Dinino. Son opinion était fondée uniquement sur son examen des entretiens enregistrés sur bande vidéo et des dossiers médicaux. En ce qui concerne M. Skupien, la D[re] Lieff a témoigné que l'enregistrement ne révélait aucun affaiblissement de jugement, aucun délire, aucune hallucination ni aucune pathologie mentale. Il paraissait comprendre les questions posées et il donnait des réponses pertinentes. Selon la D[re] Lieff, le « oui » que M. Skupien a répondu lorsqu'il a été informé de la nécessité de dire la vérité indiquait qu'il avait bien compris ce qu'on lui disait. La D[re] Lieff n'a pas consulté le Dr Michalski, mais elle a contesté son diagnostic de « démence ». À son avis, les symptômes observés par le Dr Michalski s'apparentaient davantage à des effets secondaires du médicament antipsychotique que M. Skupien prenait à l'époque. La

D[re] Lieff a conclu que M. Skupien comprenait l'importance de dire la vérité et qu'il était capable de communiquer les faits dans son témoignage.

3. La décision du juge du procès concernant l'admissibilité

23 À titre préliminaire, le juge du procès a conclu que les quatre plaignants ayant fait des déclarations enregistrées sur bande vidéo avaient à l'époque la capacité requise au sens de l'art. 16 de la *Loi sur la preuve au Canada*, L.R.C. 1985, ch. C-5, qu'il a interprété comme exigeant que [TRADUCTION] « les témoins connaissent l'importance de dire la vérité et soient capables de communiquer les faits dans leur témoignage ». Il a fondé sa conclusion sur son propre visionnement des bandes vidéo et sur le témoignage d'opinion de la D[re] Lieff. (La capacité mentale du déclarant est pertinente pour examiner l'admissibilité d'une déclaration relatée étant donné qu'elle peut avoir une incidence sur la fiabilité de cette déclaration; cependant, il importe de souligner que l'art. 16 ne s'applique pas en l'espèce. Cet article établit la capacité minimale requise pour qu'un témoignage soit admis *en cour*. Ce seuil est bas et si le témoignage est reçu, il fait ensuite l'objet du contre-interrogatoire habituel qui porte notamment sur toute question pertinente concernant l'état d'esprit du témoin. L'examen de l'admissibilité d'une déclaration relatée peut requérir un examen plus approfondi de la capacité mentale du déclarant au moment où il a fait la déclaration, dans le cas où il est impossible de le contre-interroger.)

24 Après avoir tranché la question de l'art. 16, le juge du procès s'est penché sur le critère de la nécessité. Bien que des questions soulevées au procès aient visé à déterminer si certaines déclarations des plaignants satisfaisaient à ce critère, aucune de

ces questions ne concernaient M. Skupien et c'est pourquoi il n'est pas nécessaire de les examiner en l'espèce.

25 Enfin, le juge du procès a examiné la question du seuil de fiabilité. Il a conclu que toutes les déclarations enregistrées sur bande vidéo qui ont été faites à la police satisfaisaient à l'exigence de fiabilité. À l'appui de cette conclusion, il a souligné qu'il n'y avait [TRADUCTION] « rien de malencontreux dans la procédure suivie par la police pour recueillir les déclarations », et il a conclu que, bien que trois des déclarations des plaignants aient été recueillies à la maison de retraite plutôt qu'au poste de police, « les circonstances dans lesquelles les déclarations ont été recueillies [étaient], en l'occurrence, aussi formelles et solennelles que possible ». Le juge du procès a fait remarquer que, dans leurs déclarations, les plaignants ne faisaient que formuler leurs plaintes respectives « sans montrer de l'animosité pour l'accusé ». Les plaignants « paraissaient francs », ils n'étaient « pas évasifs » et ils « ne tentaient pas d'exagérer leurs blessures ». Les questions posées n'étaient pas « trop suggestives », et les seules questions suggestives touchaient la valeur probante plutôt que l'admissibilité. Toutes les déclarations avaient été effectuées au moment où les faits décrits étaient survenus, ou peu après. Les plaignants connaissaient bien leur agresseur et il n'y avait aucune autre possibilité réaliste de soupçonner quelqu'un d'autre. De plus, MM. Skupien et Dinino avaient tous les deux des blessures corroborantes.

26 Toutefois, la décision du juge du procès semble reposer essentiellement sur son application de l'arrêt *U. (F.J.)* de notre Cour, où la déclaration extrajudiciaire de la plaignante a été admise en preuve à cause de sa « similitude frappante » avec la déclaration de l'accusé concernant les mêmes faits. Dans ses motifs, le juge du procès a mentionné, à maintes reprises, la similitude entre les déclarations et a conclu que

[TRADUCTION] « la combinaison cumulative de points semblables rend[ait] la similitude globale entre les déclarations suffisamment distinctive pour rejeter la coïncidence comme explication probable ». Tout en estimant que les déclarations orales étaient également « suffisamment similaires pour être visées par le principe de l'arrêt *R. c. U. (F.J.)* », il a conclu, en se fondant sur le par. 217 de l'arrêt *Starr*, que « les admettre en preuve équivaudrait à admettre un témoignage justificatif du fait que je suis en possession des déclarations sur bande vidéo ».

27 Selon le juge du procès, le seul véritable danger en matière de ouï-dire que comportait l'admission en preuve des déclarations était l'absence de contre-interrogatoire, mais, s'appuyant sur l'arrêt *Smith*, il a décidé qu'une preuve fiable ne devrait pas être exclue pour ce seul motif. L'intérêt public à ce que « les personnes âgées soient bien traitées » l'autorisait à « considérer les déclarations sur bande vidéo dans leur ensemble pour renforcer la crédibilité des plaignants ». Il a donc conclu à l'admissibilité des déclarations enregistrées sur bande vidéo et à l'inadmissibilité des déclarations orales.

28 À la fin du procès, le juge Grossi a décidé, en fin de compte, que seules deux des déclarations enregistrées sur bande vidéo étaient suffisamment crédibles pour justifier une déclaration de culpabilité, à savoir celles de MM. Dinino et Skupien. Comme le présent pourvoi ne porte que sur la décision concernant l'admissibilité, il n'est pas nécessaire d'examiner les motifs de la déclaration de culpabilité. Les parties conviennent que si les déclarations de M. Skupien sont inadmissibles, les déclarations de culpabilité doivent être annulées et le pourvoi, rejeté.

4. Cour d'appel de l'Ontario (2005), 195 O.A.C. 11

29 M. Khelawon a interjeté appel contre ses déclarations de culpabilité en faisant valoir que le juge du procès avait commis une erreur en admettant en preuve les déclarations enregistrées sur bande vidéo. La Cour d'appel a statué à l'unanimité que la déclaration de M. Dinino n'était pas suffisamment fiable pour être admise en preuve. Les juges majoritaires ont estimé que la déclaration de M. Skupien était également inadmissible en raison de sa non-fiabilité.

30 Les trois juges ont tous interprété les motifs du juge du procès comme signifiant que, n'eût été la similitude entre les déclarations des divers plaignants, aucune d'elles n'aurait satisfait à l'exigence de fiabilité, de sorte qu'elles auraient toutes été inadmissibles (le juge Rosenberg, par. 90; le juge Blair, par. 29). La cour a donc mis l'accent sur cet aspect de la preuve et, en fait, le désaccord entre les juges majoritaires et le juge dissident tenait à la question de savoir si la similitude entre les déclarations pouvait être prise en considération pour apprécier la fiabilité suivant la méthode d'analyse raisonnée.

31 Le juge Rosenberg, s'exprimant au nom des juges majoritaires, a conclu que le principe de l'arrêt *U. (F.J.)* ne pouvait s'appliquer que lorsque les déclarations concernent les mêmes faits et que, dans la plupart des cas, il ne serait appliqué que s'il est possible de contre-interroger le déclarant (par. 114). En l'espèce, les déclarations concernaient des faits différents. Un juge des faits pourrait conclure, suivant le raisonnement des faits similaires, que la même personne a commis tous les crimes, mais c'est là une question de fiabilité en dernière analyse et non de seuil de fiabilité (par. 115). Seul le dernier est pertinent pour déterminer l'admissibilité. De plus, selon

le juge Rosenberg, les déclarations de comparaison doivent également être admissibles quant au fond, parce que la décision finale concernant la probabilité de coïncidence ou de collusion appartient au juge des faits (par. 128), et il serait étrange que celui-ci apprécie la fiabilité en dernière analyse sans avoir accès à [TRADUCTION] « l'élément de preuve même qui a convaincu le juge du procès que la déclaration était fiable » (par. 130). La décision du juge Grossi constituait donc un élargissement inacceptable de la portée du principe de l'arrêt *U. (F.J.)*. Le juge Rosenberg a également décidé, au par. 92, qu'un tel élargissement était incompatible avec l'affirmation du juge Iacobucci dans l'arrêt *Starr*, au par. 217, selon laquelle il n'y a pas lieu de tenir compte d'une « preuve corroborante » pour établir le seuil de fiabilité.

32 Le juge Blair, dissident, a conclu que la notion fondamentale sous-tendant « l'exception » de l'arrêt *U. (F.J.)* veut que, en l'absence de collusion, de connaissance préalable ou d'influence indue, [TRADUCTION] « les similitudes frappantes entre les déclarations écartent toute coïncidence et renforcent donc la fiabilité de la déclaration examinée » (par. 44). Bien qu'il ait décidé que l'absence de contre-interrogatoire demeurait un élément à soupeser en appréciant le seuil de fiabilité, le juge Blair était d'avis que cette absence, en soi, ne faisait pas obstacle à l'application raisonnée de l'exception de l'arrêt *U. (F.J.)*. Il a également conclu que cette exception pouvait s'appliquer quand les déclarations concernaient des faits différents, ajoutant que, pour déterminer le seuil de fiabilité, il ne voyait — compte tenu de la raison d'être du raisonnement des faits similaires — aucune « différence logique » entre une déclaration voulant que le même accusé « ait accompli le même acte à la même occasion » et une déclaration voulant que « le même accusé ait accompli le même acte à différentes occasions » (par. 48), étant donné que les deux situations comportent l'admission d'un élément de preuve fondée sur « l'improbabilité d'une coïncidence » (par. 49). Enfin,

il a estimé que les déclarations de comparaison jugées inadmissibles quant au fond ne devraient pas être exclues de l'analyse de la fiabilité, faisant remarquer que des déclarations par ailleurs fiables pourraient être jugées inadmissibles pour diverses raisons, dont la conclusion qu'elles n'étaient pas nécessaires (par. 53).

33 Compte tenu de ces conclusions, le juge Blair a statué que le juge du procès n'avait commis aucune erreur en tenant compte de la similitude des déclarations pour en déterminer le seuil de fiabilité. Il a ensuite appliqué [TRADUCTION] « l'exception de l'arrêt *U. (F.J.)* » aux déclarations visées par l'appel et a conclu que, même si la déclaration de M. Dinino enregistrée sur bande vidéo était inadmissible, celle de M. Skupien aussi enregistrée sur bande vidéo était par ailleurs admissible.

5. La règle interdisant le ouï-dire

5.1 *Une règle d'exclusion générale*

34 La règle de preuve fondamentale veut que tous les éléments de preuve pertinents soient admissibles. Cette règle fondamentale comporte un certain nombre d'exceptions. L'une des principales exceptions est la règle interdisant le ouï-dire : sauf exception, la preuve par ouï-dire *n'est pas* admissible. La preuve par ouï-dire n'est pas exclue parce qu'elle n'est pas pertinente — une règle spéciale n'est pas nécessaire pour exclure une preuve non pertinente. Comme nous le verrons, c'est plutôt la difficulté de vérifier la preuve par ouï-dire qui sous-tend la règle d'exclusion et, en général, l'atténuation de cette difficulté qui constitue le fondement des exceptions à la règle.

Bien que la preuve par ouï-dire comprenne la conduite expressive, je m'en tiendrai généralement aux déclarations relatées.

5.2 *Définition du ouï-dire*

35 Au départ, il importe de déterminer ce qui constitue du ouï-dire et ce qui n'en constitue pas. Les difficultés que les tribunaux et les auteurs de doctrine ont eues à définir le ouï-dire ont déjà fait l'objet d'un examen approfondi et il n'est pas nécessaire de les reprendre en l'espèce : voir *R. c. Abbey*, [1982] 2 R.C.S. 24, p. 40-41, le juge Dickson. Il suffit de noter, comme notre Cour l'a fait au par. 159 de l'arrêt *Starr*, que les plus récentes définitions du ouï-dire sont axées sur la préoccupation majeure qui sous-tend cette règle du ouï-dire, soit la difficulté de vérifier la fiabilité de l'affirmation du déclarant. Voir, par exemple, l'arrêt *R. c. O'Brien*, [1978] 1 R.C.S. 591, p. 593-594. Notre système accusatoire attache une grande importance à l'assignation de témoins qui déposent sous la foi du serment ou d'une affirmation solennelle et dont le comportement peut être observé par le juge des faits, et le témoignage, vérifié au moyen d'un contre-interrogatoire. Nous considérons que ce processus représente la meilleure façon de vérifier la preuve testimoniale. Parce qu'elle se présente sous une forme différente, la preuve par ouï-dire suscite des préoccupations particulières. La règle d'exclusion générale reconnaît la difficulté pour le juge des faits d'apprécier le poids à donner, s'il y a lieu, à une déclaration d'une personne qui n'a été ni vue ni entendue et qui n'a pas eu à subir un contre-interrogatoire. On craint que la preuve par ouï-dire non vérifiée se voie accorder plus de poids qu'elle n'en mérite. Les caractéristiques déterminantes essentielles du ouï-dire sont donc les suivantes : 1) le fait que la déclaration soit présentée pour établir la véracité de son contenu et 2) l'impossibilité de

contre-interroger le déclarant au moment précis où il fait cette déclaration. J'examinerai chacune de ces caractéristiques déterminantes à tour de rôle.

5.2.1 <u>Déclarations présentées pour établir la véracité de leur contenu</u>

36 Le but dans lequel la déclaration extrajudiciaire est présentée revêt de l'importance lorsqu'il s'agit de déterminer ce qui constitue du ouï-dire, car c'est seulement lorsque la preuve est présentée pour établir la véracité de son contenu qu'il devient nécessaire d'en vérifier la fiabilité. Prenons l'exemple suivant. Au procès d'un accusé inculpé de conduite avec facultés affaiblies, un policier témoigne qu'il a intercepté l'automobile de l'accusé à la suite d'un appel d'un inconnu l'informant que le véhicule était conduit par une personne en état d'« ébriété avancée » qui venait tout juste de quitter une taverne de quartier. Si la déclaration concernant l'état d'ébriété du conducteur est présentée dans le seul but d'établir les motifs que le policier avait d'intercepter le véhicule, il importe peu de savoir si la déclaration de l'auteur inconnu de l'appel était exacte, exagérée ou même fausse. Même si la déclaration est totalement dénuée de fondement, cela n'enlève rien à l'explication que le policier a donnée au sujet de ses actes. Si, par contre, la déclaration est présentée dans le but de prouver que l'accusé avait effectivement les facultés affaiblies, l'incapacité du juge des faits d'en vérifier la fiabilité suscite des préoccupations réelles. Ce n'est donc que dans ce dernier cas que la preuve relative à la déclaration de l'auteur de l'appel constitue du ouï-dire et est assujettie à la règle d'exclusion générale.

5.2.2 <u>L'impossibilité de contre-interroger au moment précis où la déclaration est faite</u>

37 L'exemple précédent, à savoir lorsque le témoin raconte au tribunal ce que A lui a dit, est la forme la plus évidente de preuve par ouï-dire. A n'est pas devant le tribunal de manière à pouvoir être vu, entendu et contre-interrogé. Toutefois, la règle traditionnelle du ouï-dire s'applique également à la déclaration extrajudiciaire du témoin qui dépose en cour lorsque cette déclaration extrajudiciaire est présentée pour établir la véracité de son contenu. Cette définition élargie du ouï-dire a été adoptée au Canada : *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740, p. 763-764; *Starr*, par. 158. Il est important de comprendre pourquoi les déclarations extrajudiciaires d'un témoin sont considérées comme étant du ouï-dire.

38 Lorsque, devant le tribunal, le témoin réitère ou adopte — sous la foi du serment ou d'une affirmation solennelle — une déclaration extrajudiciaire antérieure, il va de soi qu'aucune question de ouï-dire ne se pose. Ce n'est pas la déclaration elle-même qui constitue un élément de preuve, mais plutôt le témoignage, qui peut être vérifié de la façon habituelle en observant le témoin et en lui faisant subir un contre-interrogatoire. Toutefois, la question du ouï-dire se pose lorsque le témoin ne réitère pas ou n'adopte pas le contenu de la déclaration extrajudiciaire, et que la déclaration elle-même est présentée pour établir la véracité de son contenu. Prenons l'exemple suivant pour illustrer les préoccupations suscitées par cet élément de preuve.

39 Dans une déclaration extrajudiciaire, W désigne l'accusé comme étant son agresseur. Au procès de l'accusé pour voies de fait, W témoigne que l'accusé *n'est pas* son agresseur. Le ministère public cherche à présenter la déclaration extrajudiciaire pour prouver que l'accusé a effectivement agressé W. Dans ces circonstances, on

demande au juge des faits de retenir la déclaration extrajudiciaire plutôt que le témoignage sous serment du témoin. Compte tenu de l'importance habituellement accordée au témoignage devant le tribunal, une question sérieuse se pose , soit celle de savoir s'il est absolument nécessaire de présenter la déclaration. De plus, la fiabilité de cette déclaration devient déterminante. Jusqu'à quel point est-elle fiable? Dans quelles circonstances W a-t-elle fait cette déclaration? L'a-t-elle faite à brûle-pourpoint à des amis lors d'une activité sociale, ou plutôt à la police à titre de plainte formelle? W était-elle consciente des conséquences que pouvait avoir cette déclaration, voulait-elle qu'on y donne suite? Avait-elle une raison de mentir? Dans quel état était W au moment où elle a fait la déclaration? Bien d'autres questions peuvent venir à l'esprit au sujet de la fiabilité de cette déclaration extrajudiciaire. Lorsqu'on demande au juge des faits de considérer que la déclaration extrajudiciaire prouve que l'accusé a effectivement agressé W, il peut se révéler difficile d'apprécier la fiabilité de cette preuve.

40 Des préoccupations concernant la fiabilité de la déclaration naissent également lorsque W ne revient pas sur sa déclaration extrajudiciaire, mais témoigne qu'elle ne se souvient pas l'avoir faite, ou pis encore, qu'elle n'a aucun souvenir de l'agression elle-même. Le juge des faits ne voit pas ou n'entend pas le témoin faire la déclaration et, puisque qu'il n'y a aucune possibilité de contre-interroger le témoin *au moment précis* où il fait sa déclaration, la possibilité de vérifier utilement la véracité de cette déclaration peut être limitée. De plus, il peut y avoir lieu de se demander si la déclaration antérieure est reproduite intégralement et fidèlement.

41 Ainsi, bien qu'il se puisse que la raison d'être de la règle d'exclusion générale ne soit pas aussi évidente lorsque le déclarant est disponible pour témoigner,

elle reste la même, soit la difficulté de vérifier la fiabilité de la déclaration extrajudiciaire. La difficulté d'apprécier la déclaration extrajudiciaire de W explique pourquoi elle est visée par la définition du ouï-dire et est assujettie à la règle d'exclusion générale. Toutefois, on le comprendra aisément, la difficulté peut être atténuée substantiellement lorsque le déclarant peut être contre-interrogé au sujet de sa déclaration antérieure, en particulier lorsqu'il est possible de déposer en preuve un compte rendu exact de la déclaration. Je reviendrai sur cette question plus loin. Je ne tiens ici qu'à expliquer pourquoi, par définition, le ouï-dire englobe les déclarations extrajudiciaires présentées pour établir la véracité de leur contenu, et ce, même lorsque le déclarant est devant le tribunal.

5.3 *Les exceptions à la règle du ouï-dire : une méthode d'analyse raisonnée*

42 On reconnaît depuis longtemps qu'une application rigide de la règle d'exclusion entraînerait la perte injustifiée d'éléments de preuve très précieux. La déclaration relatée peut, en raison de la manière dont elle a été faite, être intrinsèquement fiable, ou il peut exister suffisamment de moyens de la vérifier en dépit du fait qu'elle est relatée. Partant, un certain nombre d'exceptions de common law ont peu à peu fait leur apparition. Une application rigide de ces exceptions s'est révélée, à son tour, problématique et a donné lieu, dans certains cas, à l'exclusion inutile d'éléments de preuve ou, dans d'autres cas, à leur admission injustifiée. Wigmore a préconisé une application plus souple de la règle, fondée sur les deux principes directeurs qui sous-tendent les exceptions de common law traditionnelles, à savoir la nécessité et la fiabilité (*Wigmore on Evidence* (2e éd. 1923), vol. 3, § 1420, p. 153). Notre Cour a d'abord retenu cette approche dans l'arrêt *Khan* et en a, par la suite, reconnu la primauté dans l'arrêt *Starr*. Le cadre d'analyse applicable selon

l'arrêt *Starr* a été résumé récemment dans l'arrêt *R. c. Mapara*, [2005] 1 R.C.S. 358, 2005 CSC 23, par. 15 :

> a) La preuve par ouï-dire est présumée inadmissible à moins de relever d'une exception à la règle du ouï-dire. Les exceptions traditionnelles continuent présomptivement de s'appliquer.
>
> b) Il est possible de contester une exception à l'exclusion du ouï-dire au motif qu'elle ne présenterait pas les indices de nécessité et de fiabilité requis par la méthode d'analyse raisonnée. On peut la modifier au besoin pour la rendre conforme à ces exigences.
>
> c) Dans de « rares cas », la preuve relevant d'une exception existante peut être exclue parce que, dans les circonstances particulières de l'espèce, elle ne présente pas les indices de nécessité et de fiabilité requis.
>
> d) Si la preuve par ouï-dire ne relève pas d'une exception à la règle d'exclusion, elle peut tout de même être admissible si l'existence d'indices de fiabilité et de nécessité est établie lors d'un voir-dire.

43 Dans la présente affaire, il est question d'admission de preuve selon l'al. d). En particulier, les tribunaux d'instance inférieure étaient partagés quant à deux questions principales : 1) Quels facteurs doit-on considérer pour décider si la preuve est suffisamment fiable pour être admise? 2) L'« exception » reconnue par notre Cour dans l'arrêt *U. (F.J.)* peut-elle s'appliquer aux faits de la présente affaire? Je vais d'abord commenter la deuxième question.

44 À mon avis, la débat entourant la question de savoir si « l'exception de l'arrêt *U. (F.J.)* » s'applique en l'espèce illustre le souci exprimé dans l'arrêt *U. (F.J.)* lui-même, à savoir que la « nouvelle façon d'aborder le ouï-dire ne devienne pas en soi une analyse rigide de catégories » (par. 35). Dans l'arrêt *U. (F.J.)*, un débat semblable a porté sur la question de savoir si « l'exception de l'arrêt *B. (K.G.)* » à la règle interdisant l'admission quant au fond des déclarations antérieures incompatibles

s'appliquait dans le cas où la fiabilité de la déclaration du plaignant tenait non pas tant aux circonstances dans lesquelles elle avait été faite, comme l'affaire dans *B. (K.G.)*, mais plutôt à sa similitude frappante avec une déclaration de l'accusé. Le juge en chef Lamer a expliqué comment sa décision dans l'affaire *B. (K.G.)* était une application de la méthode d'analyse raisonnée au ouï-dire et comment en outre « l'établissement d'un seuil de fiabilité est parfois possible, dans les cas où le témoin peut être contre-interrogé, lorsqu'il existe une similitude frappante entre deux déclarations » (par. 40). Il a conclu son analyse en prévoyant que d'autres situations peuvent encore se présenter. Voici ce qu'il a affirmé (par. 45) :

> Je m'attends à ce que soient rares les cas de déclarations dont la similitude est frappante au point d'étayer leur fiabilité. Conformément à notre démarche en matière de ouï-dire fondée sur des principes et souple, il peut y avoir d'autres situations où les déclarations antérieures incompatibles seront jugées admissibles quant au fond, compte tenu du fait que le contre-interrogatoire seul donne d'importants indices de fiabilité. En l'espèce, il n'est pas nécessaire de décider si le contre-interrogatoire seul donne une assurance suffisante quant au seuil de fiabilité pour permettre l'admission, quant au fond, de déclarations antérieures incompatibles.

45 Comme je l'expliquerai plus loin, les arrêts *B. (K.G.)* et *U. (F.J.)* font tous les deux ressortir les préoccupations particulières suscitées dans des cas de déclaration antérieure incompatible. Toutefois, compte tenu de la mise en garde du juge en chef Lamer contre une « analyse rigide de catégories » (*U. (F.J.)*, par. 35), j'estime que ni l'arrêt *B. (K.G.)* ni l'arrêt *U. (F.J.)* ne devraient être interprétés comme créant des catégories d'exceptions — fondées sur des critères fixes — à la règle interdisant le ouï-dire. Le jugement majoritaire dans l'affaire *B. (K.G.)* permet lui-même de remplacer par des substituts adéquats les critères qu'il énonce. De plus, interpréter ces arrêts comme créant de nouvelles catégories d'exceptions ne serait pas conforme à la méthode souple d'analyse raisonnée applicable cas par cas. Nous nous trouverions

simplement à remplacer la série d'exceptions traditionnelles par une nouvelle série moins sclérosée (pour l'instant). Au lieu d'établir des catégories fixes, ces arrêts donnent plutôt des indications sur l'application cas par cas de la méthode d'analyse raisonnée en décrivant les préoccupations pertinentes et les facteurs à considérer pour déterminer l'admissibilité.

46 J'examinerai sous cet angle les arrêts *B. (K.G.)* et *U. (F.J.)*, de même que certains autres arrêts pertinents de notre Cour. Puisque les questions soulevées dans le présent pourvoi concernent l'appréciation de la fiabilité, mon analyse portera sur ce critère. Toutefois, comme je l'expliquerai, la nécessité et la fiabilité ne devraient pas être examinées séparément. Un critère peut influer sur l'autre. Par exemple, comme nous le verrons, la nécessité de la preuve peut, dans certains cas, découler en grande partie du fait que la déclaration relatée est très fiable et que le processus de constatation des faits serait faussé sans elle. Toutefois, avant d'analyser les facteurs liés à la fiabilité, je tiens à dire un mot sur le principe dominant de l'équité du procès.

5.4 *La dimension constitutionnelle : l'équité du procès*

47 Avant d'admettre les déclarations relatées en vertu de l'exception raisonnée à la règle du ouï-dire, le juge du procès doit décider, lors d'un voir-dire, que la nécessité et la fiabilité ont été établies. Il incombe à la personne qui cherche à présenter la preuve d'établir ces critères selon la prépondérance des probabilités. En matière criminelle, l'examen peut comporter une dimension constitutionnelle parce que la difficulté de vérifier la preuve ou, à l'inverse, l'impossibilité de présenter une preuve fiable peut compromettre la capacité de l'accusé de présenter une défense pleine et entière, qui est un droit garanti par l'art. 7 de la *Charte canadienne des droits et*

libertés : *Dersch c. Canada (Procureur général)*, [1990] 2 R.C.S. 1505. Le droit de présenter une défense pleine et entière est, à son tour, lié à un autre principe de justice fondamentale, à savoir le droit à un procès équitable : *R. c. Rose*, [1998] 3 R.C.S. 262. La préoccupation relative à l'équité du procès est l'une des raisons primordiales de rationaliser les exceptions traditionnelles à la règle du ouï-dire conformément à la méthode d'analyse raisonnée. Comme l'a précisé le juge Iacobucci, au par. 200 de l'arrêt *Starr*, quant à la preuve du ministère public, « [s]i on permettait au ministère public de présenter une preuve par ouï-dire non fiable contre l'accusé, peu importe qu'elle se trouve ou non à relever d'une exception existante, cela compromettrait l'équité du procès et ferait apparaître le spectre des déclarations de culpabilité erronées. »

48 Comme je l'ai indiqué précédemment, notre système accusatoire repose sur l'hypothèse voulant que le contre-interrogatoire représente le meilleur moyen de révéler les causes d'inexactitude ou de manque de fiabilité. C'est principalement en raison de l'incapacité de la vérifier de cette façon que la preuve par ouï-dire est présumée inadmissible. Toutefois, le droit constitutionnel garanti par l'art. 7 de la *Charte* n'est pas en soi le droit de confronter ou contre-interroger des témoins opposés. Le processus judiciaire accusatoire, qui comprend le contre-interrogatoire, n'est que le moyen de parvenir à la fin recherchée. L'équité du procès, en tant que principe de justice fondamentale, est la fin qui doit être atteinte. L'équité du procès englobe plus que les droits de l'accusé. Bien qu'elle comprenne indubitablement le droit de présenter une défense pleine et entière, l'équité du procès doit aussi être évaluée à la lumière de préoccupations sociales plus globales : voir *R. c. Mills*, [1999] 3 R.C.S. 668, par. 69-76. Dans le contexte d'un examen de l'admissibilité, l'une de

ces préoccupations est l'intérêt qu'a la société à ce que le processus judiciaire permette de découvrir la vérité.

49 La gamme plus vaste d'intérêts compris dans l'équité du procès se reflète dans le double principe de la nécessité et de la fiabilité. Le critère de la nécessité repose sur l'intérêt qu'a la société à découvrir la vérité. Étant donné qu'il n'est pas toujours possible de satisfaire au critère optimal du contre-interrogatoire effectué au moment précis où la déclaration est faite, au lieu de simplement perdre la valeur de la preuve en question, il devient nécessaire dans l'intérêt de la justice de se demander si cette preuve devrait néanmoins être admise sous sa forme relatée. Le critère de la fiabilité vise à assurer l'intégrité du processus judiciaire. Bien qu'elle soit nécessaire, la preuve n'est pas admissible, sauf si elle est suffisamment fiable pour écarter les dangers que comporte la difficulté de la vérifier. Comme nous le verrons, deux motifs différents, qui ne s'excluent pas mutuellement, permettent généralement de satisfaire à l'exigence de fiabilité. Dans certains cas, il se peut que, en raison des circonstances dans lesquelles la déclaration relatée a été faite, le contenu de cette déclaration soit si fiable qu'il aurait été peu ou pas utile de contre-interroger le déclarant au moment précis où il s'est exprimé. Dans d'autres cas, il peut arriver que la preuve ne soit pas aussi convaincante, mais les circonstances permettront de la vérifier suffisamment autrement qu'au moyen d'un contre-interrogatoire effectué au moment précis où elle est présentée. Dans ces circonstances, l'admission de la preuve compromettra rarement l'équité du procès. Toutefois, vu que l'équité du procès peut englober des facteurs allant au-delà de l'examen rigoureux de la nécessité et de la fiabilité, le juge du procès a le pouvoir discrétionnaire d'exclure la preuve par ouï-dire lorsque son effet

préjudiciable l'emporte sur sa valeur probante, et ce, même si les deux critères sont respectés.

6. L'examen de l'admissibilité

6.1 *La distinction entre seuil de fiabilité et fiabilité en dernière analyse : source de confusion*

50 Comme nous l'avons vu, le juge du procès décide uniquement si la preuve par ouï-dire est admissible. Il appartient au juge des faits de décider, à l'issue du procès, s'il s'en remettra, en fin de compte, à la déclaration relatée pour trancher les questions en litige, après l'avoir examinée en fonction de l'ensemble de la preuve. Au stade de l'admissibilité, il importe de ne pas empiéter sur la compétence du juge des faits. Si le procès a lieu devant un juge et un jury, il est essentiel que les questions de fiabilité en dernière analyse soient laissées au jury — dans un procès criminel, c'est un impératif constitutionnel. Si le juge siège sans jury, il importe tout autant qu'il ne préjuge pas de la fiabilité en dernière analyse de la preuve avant d'avoir entendu l'ensemble de la preuve au dossier. Il faut donc établir une distinction entre « fiabilité en dernière analyse » et « seuil de fiabilité ». Lors d'un voir-dire portant sur l'admissibilité, l'examen se limite au seuil de fiabilité.

51 La distinction entre seuil de fiabilité et fiabilité en dernière analyse (ou fiabilité ultime ou absolue) a été établie dans un certain nombre d'arrêts (voir, par exemple, *B. (K.G.)* et *R. c. Hawkins*, [1996] 3 R.C.S. 1043). Cependant, nous nous intéressons surtout en l'espèce à l'explication de ce principe contenue dans l'arrêt *Starr*. Une bonne partie des discussions et des commentaires a porté notamment sur l'extrait suivant de l'analyse de la Cour (par. 215 et 217) :

> À cet égard, lorsque la fiabilité d'une déclaration est examinée selon la méthode fondée sur des principes, il importe d'établir une distinction entre le seuil de fiabilité et la fiabilité absolue. Seul le seuil de fiabilité est pertinent relativement à l'admissibilité : voir *Hawkins*, précité, à la p. 1084. Là encore, il ne convient pas, dans les circonstances du présent pourvoi, de fournir une liste détaillée des facteurs qui peuvent influer sur le seuil de fiabilité. Toutefois, notre jurisprudence est utile dans une certaine mesure à ce sujet. Le seuil de fiabilité ne concerne pas la question de savoir si la déclaration est véridique ou non; c'est une question de fiabilité absolue. Il concerne plutôt la question de savoir si les circonstances ayant entouré la déclaration elle-même offrent des garanties *circonstancielles* de fiabilité. Ces garanties pourraient découler du fait que le déclarant n'avait aucune raison de mentir (voir *Khan* et *Smith*, précités) ou du fait qu'il y avait des mesures de protection qui permettaient de déceler les mensonges (voir *Hawkins*, *U. (F.J.)* et *B. (K.G.)*, précités).
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> . . .
>
> À l'étape de l'admissibilité de la preuve par ouï-dire, le juge du procès ne devrait pas tenir compte de la réputation générale de sincérité du déclarant, ni d'aucune déclaration antérieure ou ultérieure, compatible ou incompatible. Ces facteurs n'ont pas trait aux circonstances de la déclaration elle-même. De même, je ne tiendrais pas compte de la présence d'une preuve corroborante ou contradictoire. Sur ce point, je suis d'accord avec l'arrêt de la Cour d'appel de l'Ontario *R. c. C. (B.)* (1993), 12 O.R. (3d) 608; voir également *Idaho c. Wright*, 497 U.S. 805 (1990). En résumé, en vertu de la méthode fondée sur des principes, le tribunal ne doit pas empiéter sur la compétence du juge des faits ni subordonner l'admissibilité de la preuve par ouï-dire à la question de savoir si la preuve est absolument fiable. Il devra cependant examiner si les circonstances ayant entouré la déclaration confèrent suffisamment de crédibilité pour pouvoir conclure que le seuil de fiabilité est atteint. [Je souligne.]

52 L'affirmation de la Cour selon laquelle « [l]e seuil de fiabilité ne concerne pas la question de savoir si la déclaration est véridique ou non » a créé une certaine incertitude. Même s'il est évident que le juge du procès ne décide pas si la déclaration sera tenue pour véridique en définitive, il n'est pas aussi évident que, dans toute affaire, le seuil de fiabilité *ne* concerne *pas* la question de savoir si la déclaration est véridique ou non. En fait, dans l'arrêt *U. (F.J.)*, on a justifié l'admission de la déclaration relatée de la plaignante par le fait que « la seule explication probable » de

la similitude frappante entre cette déclaration et la déclaration faite de façon indépendante par l'accusé était que « tous les deux disaient la vérité » (par. 40).

53 De plus, il n'est pas facile de discerner ce qui est et ce qui n'est pas une circonstance « ayant entouré la déclaration elle-même ». Par exemple, lorsqu'elle s'est prononcée sur le seuil d'admissibilité dans l'affaire *Smith*, la Cour a tenu compte du fait que la victime pouvait avoir eu une raison de mentir. Comme l'ont souligné les juges Rosenberg et Blair dans leurs motifs respectifs, [TRADUCTION] « pour décider si le déclarant avait une raison de mentir, le juge sera nécessairement amené à considérer des facteurs extérieurs à la déclaration elle-même ou aux circonstances immédiates qui l'ont entourée » (par. 97).

54 La confusion qui règne dans ce domaine du droit tient en grande partie à cette tentative de classer certains facteurs comme touchant uniquement la fiabilité en dernière analyse. Un autre exemple est l'interdiction de tenir compte d'une « preuve corroborante ou contradictoire » parce qu'elle n'est pertinente qu'en ce qui concerne la question de la fiabilité en dernière analyse. De toute évidence, la nature corroborante de la tache de sperme, dans l'affaire *Khan*, a joué un rôle important dans l'établissement du seuil de fiabilité de la déclaration relatée de l'enfant.

55 Cette partie de l'analyse de l'arrêt *Starr* a donc besoin d'être clarifiée et, à certains égards, d'être reconsidérée. J'expliquerai comment les facteurs à considérer lors de l'examen de l'admissibilité ne peuvent pas toujours être classés comme ayant trait soit au seuil de fiabilité, soit à la fiabilité en dernière analyse. La pertinence d'un facteur dépendra plutôt des dangers particuliers découlant du fait que la déclaration constitue du ouï-dire, et des moyens possibles, s'il en est, de les écarter. Je reviendrai

ensuite au passage contesté de l'arrêt *Starr*, en m'attardant plus précisément à la question de la preuve à l'appui étant donné que cette mention paraît avoir soulevé le plus de controverse.

6.2 *Détermination des facteurs pertinents : une approche fonctionnelle*

6.2.1 Reconnaissance du ouï-dire

56 La première question à trancher avant de procéder à l'examen de l'admissibilité d'une preuve par ouï-dire est bien sûr celle de savoir si la preuve proposée constitue du ouï-dire. Cela peut paraître assez évident, mais c'est une première étape importante. Les objections malencontreuses à l'admissibilité d'une déclaration extrajudiciaire, qui tiennent à une méprise sur ce qui constitue du ouï-dire, ne sont pas rares. Comme nous l'avons vu, les déclarations extrajudiciaires ne constituent pas toutes du ouï-dire. Rappelons-nous les caractéristiques déterminantes du ouï-dire. Une déclaration extrajudiciaire constituera du ouï-dire, premièrement, si elle est présentée pour établir la véracité de son contenu *et*, deuxièmement, s'il y a impossibilité de contre-interroger le déclarant au moment précis où il fait cette déclaration.

57 S'arrêter au départ aux caractéristiques déterminantes du ouï-dire permet de mieux orienter l'examen de l'admissibilité. Comme nous l'avons vu, la première caractéristique particulière du ouï-dire oblige à examiner le but dans lequel la preuve est présentée. Ce n'est que si elle est présentée pour établir la véracité de son contenu que la preuve constitue du ouï-dire. Le fait que la déclaration extrajudiciaire soit présentée pour établir la *véracité* de son contenu devrait être examiné dans le contexte

des questions en litige afin que le tribunal soit mieux en mesure d'évaluer l'effet potentiel de la présentation de cette preuve relatée.

58 Deuxièmement, si on s'arrête au départ à la seconde caractéristique déterminante du ouï-dire, soit l'impossibilité de contre-interroger le déclarant au moment précis où il fait sa déclaration, l'examen de l'admissibilité porte aussitôt sur les dangers d'admettre la preuve par ouï-dire. Dans l'arrêt *Starr*, le juge Iacobucci a décrit l'impossibilité de vérifier la preuve comme étant la « préoccupation majeure » qui sous-tend la règle du ouï-dire. Dans l'arrêt *U. (F.J.)*, le juge en chef Lamer a exprimé le même point de vue, mais plus directement en ces termes : « Le ouï-dire n'est pas admissible comme preuve parce que sa fiabilité ne peut être vérifiée » (par. 22).

6.2.2 La présomption d'inadmissibilité de la preuve par ouï-dire

59 Dès que la preuve proposée est désignée comme étant du ouï-dire, elle est présumée *inadmissible*. J'insiste sur le fait que la règle du ouï-dire est par nature une règle d'exclusion générale, car l'assouplissement accru du droit canadien de la preuve au cours des dernières décennies a parfois eu tendance à estomper la distinction entre admissibilité et valeur probante. Des modifications ont été apportées à un certain nombre de règles — dont la règle interdisant le ouï-dire — afin de les mettre à jour et d'assurer qu'elles favorisent la réalisation des objectifs de recherche de la vérité, d'efficacité du système judiciaire et d'équité du processus accusatoire, au lieu de l'entraver. Toutefois, les règles de preuve traditionnelles témoignent d'une sagesse et d'une expérience judiciaire considérables. L'approche moderne a consolidé, et non écarté, leur raison d'être fondamentale. Dans l'arrêt *Starr* lui-même, où notre Cour a

reconnu la primauté de la méthode d'analyse raisonnée des exceptions à la règle du ouï-dire, la présomption d'exclusion de la preuve par ouï-dire a été réaffirmée de manière non équivoque. Le juge Iacobucci s'est ainsi exprimé (par. 199) :

> En écartant les éléments de preuve susceptibles de donner lieu à des verdicts inéquitables et en assurant que les parties aient généralement la possibilité de confronter des témoins opposés, la règle du ouï-dire est une pierre angulaire d'un système de justice équitable.

6.2.3 Les exceptions traditionnelles

60 Dans l'arrêt *Starr*, la Cour a aussi réaffirmé que les exceptions traditionnelles à la règle du ouï-dire sont toujours pertinentes. Plus récemment, dans l'arrêt *Mapara*, notre Cour a confirmé le maintien des exceptions traditionnelles en établissant le cadre d'analyse applicable, exposé plus haut au par. 42. Par conséquent, si le juge du procès conclut que la preuve relève de l'une des exceptions de common law traditionnelles, cette conclusion est définitive et la preuve est jugée admissible sauf si, dans de rares cas, l'exception elle-même est contestée, comme le précisent ces deux arrêts.

6.2.4 La méthode d'analyse raisonnée : écarter les dangers du ouï-dire

61 Étant donné que la préoccupation majeure sous-jacente est l'impossibilité de vérifier la preuve par ouï-dire, il s'ensuit que, selon la méthode d'analyse raisonnée, l'exigence de fiabilité vise à déterminer les cas où cette difficulté est suffisamment surmontée pour justifier l'admission de la preuve à titre d'exception à la règle d'exclusion générale. Comme certains tribunaux et commentateurs ont pris soin de le souligner, il y a deux manières de satisfaire à l'exigence de fiabilité : voir, par

exemple, *R. c. Wilcox* (2001), 152 C.C.C. (3d) 157, 2001 NSCA 45; *R. c. Czibulka* (2004), 189 C.C.C. (3d) 199 (C.A. Ont.); D. M. Paciocco, « The Hearsay Exceptions: A Game of "Rock, Paper, Scissors" », dans *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence* (2004), 17, p. 29.

62 Une manière consiste à démonter qu'il n'y a pas de préoccupation réelle quant au caractère véridique ou non de la déclaration, vu les circonstances dans lesquelles elle a été faite. Le bon sens veut que, si on peut avoir suffisamment confiance en la véracité et l'exactitude de la déclaration, le juge des faits devrait en tenir compte indépendamment du fait qu'elle est relatée. À cet égard, Wigmore a donné l'explication suivante :

> [TRADUCTION] Dans de nombreux cas, on peut facilement voir qu'une telle épreuve requise [c'est-à-dire le contre-interrogatoire] ajouterait peu comme garantie parce que ses objets ont en grande partie déjà été atteints. Si une déclaration a été faite dans des circonstances où même un sceptique prudent la considérerait comme très probablement fiable (en temps normal), il serait trop pointilleux d'insister sur une épreuve dont l'objet principal est déjà atteint. [§ 1420, p. 154]

63 Une autre manière de satisfaire à l'exigence de fiabilité consiste à démontrer que le fait que la déclaration soit relatée ne suscite aucune préoccupation réelle étant donné que, dans les circonstances, sa véracité et son exactitude peuvent néanmoins être suffisamment vérifiées. Rappelons-nous que, dans notre système accusatoire, la meilleure façon de vérifier la preuve est de faire témoigner le déclarant sous serment devant le tribunal, tout en lui faisant subir un contre-interrogatoire minutieux. Cette méthode privilégiée n'est pas seulement un vestige de traditions passées. Elle demeure une méthode éprouvée et fiable, particulièrement lorsqu'il faut résoudre des questions de crédibilité. C'est une chose de faire une déclaration

préjudiciable à propos d'autrui dans un contexte où il se peut que cette déclaration n'ait pas vraiment d'importance; c'est une toute autre chose que le déclarant répète sa déclaration dans le cadre de procédures formelles où il doit en garantir la véracité et l'exactitude, être observé et entendu, et être appelé à l'expliquer ou à la défendre. Cette dernière situation, en plus de fournir un compte rendu exact de ce qu'a réellement dit le témoin, nous rassure beaucoup plus quant à la fiabilité de la déclaration. Toutefois, dans certains cas, il n'est pas possible de vérifier la preuve de la meilleure façon, mais les circonstances sont telles que le juge des faits sera néanmoins en mesure d'en vérifier suffisamment la véracité et l'exactitude. Là encore, le bon sens nous indique qu'il ne faudrait pas perdre l'avantage de cette preuve lorsqu'il existe d'autres façons adéquates de la vérifier.

64 Il est également possible de distinguer ces deux principales façons de satisfaire à l'exigence de fiabilité dans le cas des exceptions traditionnelles à la règle du ouï-dire. Le juge Iacobucci note ainsi cette distinction dans l'arrêt *Starr* :

> Par exemple, le témoignage fait dans le cadre d'une instance antérieure est admis, du moins en partie, parce que bien des dangers qui se rattachent traditionnellement à la preuve par ouï-dire ne se posent pas. Comme il a été souligné dans Sopinka, Lederman et Bryant, *op. cit.*, aux pp. 278 et 279 :
>
> > [TRADUCTION] . . . une déclaration qui a été faite antérieurement sous la foi du serment, qui a fait l'objet d'un contre-interrogatoire et qui a été admise en tant que preuve testimoniale lors d'une instance antérieure est admise lors d'un procès ultérieur *parce que les dangers que comporte la preuve par ouï-dire ne se posent pas.*
>
> D'autres exceptions sont fondées non pas sur la suppression des dangers traditionnels de la preuve par ouï-dire, mais sur le fait que la déclaration offre des garanties circonstancielles de fiabilité. Cette méthode se retrouve dans des exceptions reconnues comme les déclarations de mourants, les déclarations spontanées et les déclarations au détriment des intérêts financiers de leur auteur. [En italique dans l'original; par. 212]

65 Certaines exceptions traditionnelles ont une assise différente, tels les aveux de parties (confessions en matière criminelle) et les déclarations de coconspirateurs : voir l'arrêt *Mapara*, par. 21. Dans ces cas, les préoccupations relatives à la fiabilité tiennent à des considérations autres que l'incapacité de la partie en question de vérifier l'exactitude de sa propre déclaration ou de celles de ses coconspirateurs. Partant, les critères d'admissibilité ne sont pas établis de la même façon. Toutefois, dans les cas où la règle d'exclusion repose sur les dangers habituels du ouï-dire, la distinction entre les deux principales façons de satisfaire à l'exigence de fiabilité — bien qu'elle ne crée aucunement des catégories mutuellement exclusives — peut aider à reconnaître les facteurs à considérer pour déterminer l'admissibilité.

66 L'affaire *Khan* est un exemple où l'exigence de fiabilité était remplie parce que les circonstances dans lesquelles la déclaration avait été faite étaient suffisamment rassurantes quant à sa véracité et à son exactitude. De même, dans l'affaire *Smith*, l'examen de l'admissibilité était aussi axé sur les circonstances qui tendaient à démontrer la véracité de la déclaration. Par contre, dans les affaires *B. (K.G.)* et *Hawkins,* l'admissibilité de la déclaration relatée reposait sur l'existence d'autres moyens adéquats de vérifier la preuve. Comme nous le verrons, la possibilité de contre-interroger le déclarant permet dans une large mesure de satisfaire à l'exigence de substituts adéquats. Dans l'arrêt *U (F.J.)*, la Cour a pris en considération tant les circonstances tendant à démontrer la véracité de la déclaration que l'existence d'autres moyens adéquats de vérifier la preuve. L'arrêt *U. (F.J.)* souligne que la préoccupation relative à la fiabilité augmente dans le cas de déclarations antérieures incompatibles, où le juge des faits est invité à retenir une déclaration extrajudiciaire au lieu du témoignage sous serment du même déclarant. J'examinerai brièvement comment, dans

chacune de ces affaires, l'analyse de la Cour était axée sur la possibilité d'écarter les dangers particuliers du ouï-dire soulevés par la preuve.

6.2.4.1 *R. c. Khan, [1990] 2 R.C.S. 531*

67 Comme je l'ai déjà dit, l'arrêt *Khan* est un exemple où l'exigence de fiabilité était remplie parce que les circonstances dans lesquelles la déclaration avait été faite étaient suffisamment rassurantes quant à sa véracité et à son exactitude. Les faits sont bien connus. Il y était question d'une agression sexuelle commise par un médecin sur une très jeune enfant. L'enfant était inhabile à témoigner. Les déclarations que l'enfant avait faites à sa mère au sujet de l'épisode n'étaient pas admissibles en application des exceptions traditionnelles à la règle du ouï-dire. Toutefois, la déclaration de l'enfant présentait plusieurs caractéristiques qui donnaient à penser que la déclaration était véridique. Ces caractéristiques répondaient à de nombreuses préoccupations qui auraient été censées être examinées à l'étape de la vérification de la preuve si celle-ci avait pu être présentée en cour de la façon habituelle. La juge McLachlin les a ainsi résumées dans un énoncé souvent cité :

> Je conclus qu'en l'espèce la déclaration de la mère aurait dû être reçue en preuve. Elle était nécessaire puisque le témoignage de vive voix de l'enfant avait été rejeté. Elle était également fiable. L'enfant n'avait aucune raison d'inventer son histoire qu'elle a racontée naturellement sans être incitée à le faire. En outre, le fait qu'on ne pouvait s'attendre à ce que l'enfant connaisse ce genre d'acte sexuel confère à sa déclaration une fiabilité toute particulière. Enfin, sa déclaration a été corroborée par une preuve matérielle. [p. 548]

Les faits révélaient aussi que la déclaration avait suivi presque immédiatement les faits reprochés. Cette caractéristique écartait toute crainte de souvenir inexact. Le fait que l'enfant n'avait aucune raison de mentir atténuait la préoccupation relative à la

sincérité. Puisque la déclaration avait été faite naturellement et sans avoir été provoquée, il n'y avait pas de véritable danger qu'elle ait été faite sous l'influence de la mère. Qui plus est, comme l'indique la citation précédente, les faits décrits dépassaient l'expérience normale d'une enfant de son âge, ce qui conférait à la déclaration une « fiabilité toute particulière ». Enfin, la déclaration était confirmée par la présence d'une tache de sperme sur les vêtements de l'enfant. Chacune de ces caractéristiques touchait la véracité et l'exactitude de la déclaration et, ensemble, elles justifiaient amplement son admission. Le critère de fiabilité était rempli. À l'exception de la preuve à l'appui constituée de la tache de sperme, les facteurs considérés dans l'affaire *Khan* n'avaient rien de controversé. Je reviendrai plus loin sur cette question.

6.2.4.2 *R. c. Smith, [1992] 2 R.C.S. 915*

68 Dans l'arrêt *Smith*, l'examen des garanties circonstancielles de fiabilité effectué par notre Cour était axé également sur les circonstances tendant à démontrer la véracité de la déclaration.

69 M. Smith était accusé du meurtre de K. La preuve du ministère public incluait le témoignage de la mère de K au sujet de quatre appels téléphoniques que K lui avait faits la nuit du meurtre. L'avocat de la défense ne s'est pas opposé à la présentation de cette preuve. M. Smith a été déclaré coupable en première instance. La Cour d'appel a accueilli l'appel et ordonné la tenue d'un nouveau procès pour le motif que les appels téléphoniques constituaient du ouï-dire et que seuls les deux premiers appels étaient admissibles pour établir l'état d'esprit de K. En refusant d'appliquer la disposition réparatrice, la Cour d'appel a conclu que le ouï-dire avait

servi à établir que K était avec M. Smith au moment de son décès, ce qui avait eu pour effet « de renforcer une certaine preuve d'identification d'une fiabilité douteuse » (p. 922-923). Le ministère public s'est pourvu devant notre Cour.

70 Après avoir décidé que l'exception de l'état d'esprit ou des « intentions existantes » ne s'appliquait pas aux appels téléphoniques, le juge en chef Lamer a explicité puis appliqué la méthode exposée dans l'arrêt *Khan*. Après avoir cité longuement Wigmore au sujet la raison d'être de la règle du ouï-dire et de ses exceptions, il s'est attardé au volet « fiabilité » de la méthode d'analyse raisonnée et a déclaré ce qui suit (p. 933) :

> Si une déclaration qu'on veut présenter par voie de preuve par ouï-dire a été faite dans des circonstances qui écartent considérablement la possibilité que le déclarant ait menti ou commis une erreur, on peut dire que la preuve est « fiable », c'est-à-dire qu'il y a une garantie circonstancielle de fiabilité. [Je souligne.]

71 Au sujet de la fiabilité des appels téléphoniques, le juge en chef Lamer a décidé que les deux premiers appels étaient fiables, mais que le troisième ne l'était pas (le quatrième n'étant pas en cause devant notre Cour). Dans le cas des deux premiers appels, il n'y avait aucune raison de douter de la véracité des propos de K — « [e]lle n'avait aucune raison connue de mentir » — et les dangers traditionnellement associés au ouï-dire, à savoir les problèmes de perception, de mémoire et de crédibilité, « étaient dans une large mesure inexistants » (p. 935). Comme nous pouvons le constater, la Cour a pris en considération des facteurs qui auraient vraisemblablement été examinés en contre-interrogatoire si la déclarante avait été disponible pour témoigner, et a conclu que ces préoccupations habituelles étaient grandement atténuées en raison de la façon dont les déclarations avaient été faites. La Cour a donc conclu

que l'incapacité de contre-interroger K devait influer sur le poids accordé à cette preuve et non sur son admissibilité.

72 Toutefois, en ce qui a trait au troisième appel téléphonique, le juge en chef Lamer a statué que « les conditions dans lesquelles la déclaration a été faite ne fournissent pas la garantie circonstancielle de fiabilité qui justifierait son admission sans possibilité de contre-interroger » (p. 935). Premièrement, il a conclu que K a pu se tromper quant au retour de M. Smith à l'hôtel ou quant à la raison de son retour (p. 936). Deuxièmement, il a décidé qu'elle pouvait avoir menti pour empêcher sa mère d'envoyer un autre homme la chercher. Quant à cette seconde possibilité, le juge en chef Lamer a estimé que le fait que K voyageait sous un nom d'emprunt en utilisant une carte de crédit qu'elle savait volée ou contrefaite démontrait qu'elle était « à tout le moins capable de tromper » (p. 936). Là encore, la Cour a pris en considération des facteurs qui auraient vraisemblablement été examinés en contre-interrogatoire si la déclarante avait été disponible pour témoigner, et a conclu que ces « hypothèses » démontraient que les circonstances dans lesquelles la déclaration avait été faite n'étaient pas de nature à « justifie[r] l'admission de son contenu » puisqu'il était impossible de dire que cette preuve ne serait pas susceptible de changer lors d'un contre-interrogatoire (p. 937). Il importe de noter que la Cour n'a pas ensuite décidé si, selon sa perception de la preuve, la déclarante était dans l'erreur ou avait menti — ce sont là des questions qui devaient être tranchées en fin de compte par le juge des faits. Lors de l'examen de l'admissibilité, il suffisait que les circonstances dans lesquelles la déclaration avait été faite aient soulevé ces questions pour en empêcher l'admission.

6.2.4.3 *R. c. B. (K.G.), [1993] 1 R.C.S. 740*

73 L'arrêt *B. (K.G.)* est un exemple où le seuil de fiabilité reposait essentiellement sur l'existence de substituts adéquats aux garanties traditionnelles invoquées pour vérifier la preuve.

74 La question litigieuse dans l'arrêt *B. (K.G.)* portait sur l'admissibilité quant au fond de déclarations antérieures incompatibles de trois amis de B, dans lesquelles ceux-ci avaient dit à la police que B avait poignardé à mort la victime au cours d'une bagarre. Les trois sont revenus sur leurs déclarations au procès. (Ils ont, par la suite, plaidé coupable à des accusations de parjure.) Le ministère public sollicitait l'admission des déclarations antérieures faites à la police pour établir la véracité de leur contenu. Bien qu'il n'ait aucunement douté de la fausseté des rétractations, le juge du procès a suivi la règle de common law traditionnelle (« orthodoxe ») selon laquelle les déclarations ne pouvaient servir qu'à attaquer la crédibilité des témoins. Vu le caractère douteux des autres éléments de preuve d'identification, le juge du procès a acquitté B.

75 La question soumise à notre Cour était de savoir s'il y avait lieu de maintenir l'application de la règle orthodoxe à l'égard des déclarations antérieures incompatibles. En faisant l'historique, le juge en chef Lamer a constaté que, bien que l'interdiction du ouï-dire n'ait pas toujours été reconnue comme étant le fondement de la règle, des « dangers » semblables avaient été évoqués pour interdire l'admission d'une déclaration, à savoir l'absence de serment ou d'affirmation solennelle, l'incapacité du juge des faits d'apprécier le comportement et l'absence de contre-interrogatoire au moment précis où la déclaration avait été faite (p. 763-764). Après avoir examiné les

critiques d'auteurs de doctrine, les opinions de membres de commissions de réforme du droit, les changements apportés par le législateur au Canada et ailleurs, ainsi que l'évolution de la règle du ouï-dire, le juge en chef Lamer a conclu qu'il était du ressort et du devoir de la Cour de formuler une nouvelle règle (p. 777). Il a estimé que « la preuve des déclarations antérieures incompatibles d'un témoin, autre que l'accusé, doit être admissible quant au fond, d'après l'analyse fondée sur les principes élaborée dans les arrêts de notre Cour, *Khan* et *Smith* », et que les exigences de fiabilité et de nécessité « doivent être adapté[e]s et raffiné[e]s dans le contexte présent, vu les problèmes particuliers soulevés par la nature de ces déclarations » (p. 783).

76 Le facteur contextuel le plus important dans l'arrêt *B. (K.G.)* est la disponibilité du déclarant. Contrairement à la situation dans l'affaire *Khan* ou l'affaire *Smith*, le juge des faits est beaucoup mieux en mesure d'apprécier la fiabilité de la preuve parce que le déclarant est disponible pour être contre-interrogé au sujet de sa déclaration antérieure incompatible. Par conséquent, l'examen du seuil de fiabilité applicable en matière d'admissibilité ne porte pas tant sur la question de savoir s'il y a un motif de croire que la déclaration est véridique que sur celle de savoir si le juge des faits sera en mesure d'apprécier rationnellement la preuve. Il faut chercher des substituts adéquats au processus qui aurait été disponible si la preuve avait été présentée de la façon habituelle, à savoir par l'entremise du témoin qui vient déposer sous la foi du serment ou d'une affirmation solennelle et qui subit un contre-interrogatoire au moment précis où la déclaration est faite.

77 Étant donné que le déclarant témoigne en cour sous la foi du serment ou d'une affirmation solennelle et qu'il est possible de le contre-interroger, la question est alors de savoir pourquoi se préoccupe-t-on encore de la fiabilité de la déclaration antérieure.

Comme je l'ai indiqué précédemment, la nécessité et la fiabilité ne devraient pas être examinées séparément. Un critère peut influer sur l'autre. La situation dans l'affaire *B. (K.G.)* en est un exemple. Comme l'a fait remarquer le juge en chef Lamer, « [l]es déclarations antérieures incompatibles posent des problèmes embarrassants par rapport au critère de la nécessité » (p. 796). En fait, le déclarant est disponible pour témoigner. Pourquoi la règle habituelle ne devrait-elle pas s'appliquer, et pourquoi le témoignage sous serment du témoin qui se rétracte ne devrait-il pas seul permettre de découvrir la vérité? Après tout, n'est-ce pas là le critère optimal en matière de fiabilité — à savoir que le témoin se présente pour être vu et entendu, pour promettre, sous la foi du serment ou d'une affirmation solennelle, de dire la vérité dans le cadre formel de procédures judiciaires, et pour faire l'objet d'un contre-interrogatoire? Si un témoin revient sur une déclaration antérieure et en nie la véracité, la solution par défaut consiste à conclure que le procès a eu les résultats escomptés : les renseignements faux ou inexacts ont été éliminés. Il doit y avoir une bonne raison de présenter la déclaration antérieure incompatible comme preuve quant au fond de préférence au témoignage sous serment devant le tribunal.

78 Comme nous le savons, dans l'arrêt *B. (K.G.)*, la Cour a statué en fin de compte — et ce principe est maintenant bien établi — que la nécessité ne saurait être assimilée à la non-disponibilité du témoin. Le critère de la nécessité reçoit une définition souple. Dans certains cas comme dans l'affaire *B. (K.G.)* où un témoin revient sur une déclaration antérieure, la nécessité tient à la non-disponibilité du *témoignage* et non du témoin. Malgré le fait qu'il peut être satisfait de diverses manières au critère de la nécessité, le contexte qui engendre la nécessité de la preuve par ouï-dire peut bien avoir une incidence sur le *degré* de fiabilité exigé pour en justifier l'admission. Comme l'a dit le juge en chef Lamer dans l'arrêt *B. (K.G.)*,

lorsque la preuve par ouï-dire est une déclaration antérieure incompatible, la fiabilité est une « préoccupation fondamentale » (p. 786-787) :

> Cette préoccupation s'accentue dans le cas des déclarations antérieures incompatibles parce que le juge des faits doit choisir entre deux déclarations faites par le même témoin, par opposition aux autres formes de ouï-dire dans lesquelles une seule version des faits est présentée. Autrement dit, dans le cas des déclarations antérieures incompatibles, l'examen est axé sur la fiabilité relative de la déclaration antérieure et du témoignage entendu au procès, de sorte que des indices et garanties de fiabilité autres que ceux énoncés dans les arrêts *Khan* et *Smith* doivent être prévus afin que la déclaration antérieure soit soumise à une norme de fiabilité comparable avant que les déclarations de ce genre soient admises quant au fond.

79 Le juge en chef Lamer a ensuite décrit les caractéristiques générales d'un témoignage en cour qui offre les garanties habituelles de fiabilité. Il a examiné longuement les raisons impérieuses de préférer les déclarations faites sous la foi du serment ou d'une affirmation solennelle, l'utilité de voir et d'entendre le témoin pour apprécier la crédibilité, l'importance d'avoir un compte rendu exact de ce qui a réellement été dit, et l'avantage du contre-interrogatoire effectué au moment précis où la déclaration est faite. En étudiant ce qui constituerait un substitut adéquat à l'égard de la déclaration antérieure incompatible, il a conclu, aux p. 795-796, qu'il y aura des « garanties circonstancielles de fiabilité suffisantes » pour rendre de telles déclarations admissibles quant au fond

> (i) si la déclaration est faite sous serment ou affirmation solennelle après une mise en garde quant à l'existence de sanctions et à l'importance du serment ou de l'affirmation solennelle, (ii) si elle est enregistrée intégralement sur bande vidéo, et (iii) si la partie adverse [. . .] a la possibilité voulue de contre-interroger le témoin au sujet de la déclaration [. . .] Subsidiairement, il se peut que d'autres garanties circonstancielles de fiabilité suffisent à rendre une telle déclaration admissible quant au fond, à la condition que le juge soit convaincu que les circonstances offrent des garanties suffisantes de fiabilité qui se substituent à celles que la règle du ouï-dire exige habituellement.

80 Il n'est pas tout à fait juste d'affirmer qu'une déclaration est suffisamment fiable parce qu'elle est faite en personne et sous serment, et que le déclarant est contre-interrogé. Maints témoignages en cour s'avèrent tout à fait indignes de foi. Toutefois, c'est là que se situe la garantie — dans le *processus* qui en a révélé le manque de fiabilité. L'existence de substituts adéquats à ce processus établit donc un seuil de fiabilité et permet d'admettre sans risque la preuve.

81 Le juge en chef Lamer a également assujetti à une réserve importante — sur laquelle je reviendrai plus loin — le pouvoir discrétionnaire du juge du procès de refuser que la déclaration soit soumise au jury comme preuve de fond même dans le cas où les critères susmentionnés sont respectés, s'il y a quelque crainte que la déclaration soit le produit d'une forme d'inconduite de la part des enquêteurs (p. 801-802). En l'espèce, bien que les déclarations aient été enregistrées sur bande vidéo et que les témoins aient été contre-interrogés, ces déclarations n'ont pas été faites sous serment. La question de savoir s'il y avait un substitut suffisant pour justifier l'admission quant au fond a été renvoyée au juge du procès pour qu'il la tranche (p. 805). Le pourvoi a été accueilli et un nouveau procès a été ordonné. Le juge Cory (avec l'appui de la juge L'Heureux-Dubé) était d'accord avec le résultat, mais pour des motifs différents qui, pour les besoins de notre analyse, n'ont pas à être examinés ici.

6.2.4.4 *R. c. U. (F.J.), [1995] 3 R.C.S. 764*

82 Dans l'affaire *U. (F.J.)*, la question de l'admissibilité des déclarations antérieures incompatibles a de nouveau été soumise à la Cour. Au cours d'un entretien avec la police, la plaignante, J.U., a déclaré au policier qui l'interrogeait que l'accusé, son père, avait eu des rapports sexuels avec elle [TRADUCTION] « presque chaque jour »

(par. 4). Elle a donné de nombreux détails concernant ces activités sexuelles et a également fait état de deux agressions physiques. Le policier qui l'a interrogée a témoigné plus tard qu'il avait tenté d'enregistrer l'entretien, mais que le magnétoscope avait mal fonctionné. Il a, par la suite, préparé un résumé en se fondant en partie sur les notes qu'il avait prises et en partie sur ce qu'il avait retenu.

83 Immédiatement après avoir interrogé J.U., le même policier a interrogé l'accusé. Là encore, l'entretien n'a pas été enregistré. L'accusé a reconnu avoir eu des rapports sexuels avec J.U. [TRADUCTION] « bien des fois », décrivant des actes sexuels similaires et les deux agressions physiques dont elle avait fait état (par. 5). Au procès, J.U. est revenue sur ses allégations d'abus sexuel. Elle a soutenu avoir menti à la demande de sa grand-mère. L'accusé a nié avoir dit à la police qu'il avait eu des rapports sexuels avec J.U.

84 Le débat devant la Cour portait sur la question de savoir si la « règle » de l'arrêt *B. (K.G.)* s'appliquait à l'affaire. Bien que les critères de l'arrêt *B. (K.G.)* aient été fondés sur la méthode d'analyse raisonnée adoptée dans les arrêts *Khan* et *Smith*, il n'était pas évident que l'arrêt *B. (K.G.)* établissait une « règle » distincte applicable à l'admission des déclarations antérieures incompatibles. Le juge en chef Lamer a cherché à clarifier en ces termes le lien entre ces affaires (par. 35) :

> Il ressort des arrêts *Khan* et *Smith* que la preuve par ouï-dire sera admissible quant au fond lorsqu'elle est nécessaire et suffisamment fiable. Il y est également dit qu'on doit interpréter de façon souple tant la nécessité que la fiabilité, tenant compte des circonstances de l'affaire et veillant à ce que notre nouvelle façon d'aborder le ouï-dire ne devienne pas en soi une analyse rigide de catégories. Ma décision dans *B. (K.G.)* est une application de ces principes à une branche particulière de la règle du ouï-dire, la règle interdisant l'admission quant au fond des déclarations antérieures incompatibles. La principale distinction entre l'arrêt *B. (K.G.)* d'une part, et les arrêts *Khan* et *Smith* d'autre part, réside dans le fait que,

> dans l'arrêt *B. (K.G.)*, l'auteur de la déclaration peut être contre-interrogé. Ce seul fait contribue à l'assurance du respect du critère de l'admissibilité quant à la fiabilité. L'espèce diffère de l'arrêt *B. (K.G.)* seulement quant aux indices de fiabilité disponibles. Le critère de la nécessité est rempli en l'espèce de la même façon qu'il y est satisfait dans *B. (K.G.)* : la déclaration antérieure est nécessaire parce qu'une preuve de la même qualité ne peut être obtenue au procès. C'est pour cette raison qu'il est déterminant d'évaluer la fiabilité de la déclaration antérieure incompatible en question en l'espèce.

85 Le juge en chef Lamer a ensuite déterminé comment les indices de fiabilité pouvaient reposer sur d'autres critères que ceux énoncés dans l'arrêt *B. (K.G.)*. La déclaration de la plaignante à la police n'avait pas été faite sous serment et n'avait pas non plus été enregistrée sur bande vidéo. Qui plus est cependant, la déclarante pouvait être contre-interrogée, ce qui atténuait considérablement les dangers habituels découlant de la présentation d'une preuve par ouï-dire. Pourtant, cette affaire suscitait les mêmes préoccupations quant à la fiabilité de la déclaration antérieure incompatible. La plaignante était revenue sur ses allégations antérieures. Dans le cours normal du processus judiciaire, cela devrait mettre un terme à l'affaire. Supposons, par exemple, qu'en jouant avec certaines de ses amies au jeu de la vérité « Truth or Dare », dans lequel chaque joueur est encouragé à surpasser le joueur précédent en disant ou faisant quelque chose qui choque, la plaignante aurait allégué avoir été agressée sexuellement par son père. L'utilisation, à titre de preuve quant au fond, de la déclaration qu'elle a faite à brûle-pourpoint — de préférence à son témoignage sous serment voulant que ces faits ne se soient jamais produits — serait difficilement justifiable. L'accent doit donc être mis sur la fiabilité de la déclaration antérieure incompatible.

86 Dans l'arrêt *B. (K.G.)*, la Cour a conclu qu'une déclaration antérieure incompatible est suffisamment fiable pour être admise quant au fond si elle est faite dans des circonstances comparables à celles d'un témoignage devant le tribunal. Dans

l'affaire *U. (F.J.)*, on a satisfait à l'exigence de fiabilité en démontrant plutôt que la question de savoir si la plaignante avait dit la vérité dans sa déclaration à la police n'était pas vraiment un sujet de préoccupation. Les similitudes frappantes entre sa déclaration et celle faite de façon indépendante par son père étaient si convaincantes que la seule explication vraisemblable était qu'ils disaient tous les deux la vérité. Là encore, les critères de la nécessité et de la fiabilité se recoupent. Par souci de recherche de la vérité, il était nécessaire d'admettre quant au fond la déclaration en raison de sa très grande fiabilité.

87 Là encore, le juge en chef Lamer a ajouté la condition suivante (par. 49) :

> Je soulignerais également les conditions que j'ai précisées dans *B. (K.G.)*, à savoir que le juge du procès doit être convaincu, selon la prépondérance des probabilités, que la déclaration n'est pas le produit de la coercition, que ce soit menaces, promesses, questions trop suggestives de l'enquêteur ou d'une autre personne en situation d'autorité, ou autres manquements des enquêteurs.

6.2.4.5 *R. c. Hawkins, [1996] 3 R.C.S. 1043*

88 L'arrêt *Hawkins* de notre Cour portait surtout sur la question de l'inhabilité à témoigner du conjoint. Toutefois, cet arrêt est également intéressant en ce qui concerne l'application de la méthode d'analyse raisonnée à la règle du ouï-dire. Mes remarques ne visent ici que ce dernier aspect de l'arrêt. Il illustre comment, dans certaines circonstances, seule l'existence de substituts adéquats aux garanties traditionnelles invoquées pour vérifier le témoignage au procès peut permettre de satisfaire à l'exigence de fiabilité. Comme nous le verrons, là encore, la possibilité de contre-interroger la déclarante était un facteur crucial. Parce qu'il y avait suffisamment d'indices de fiabilité pour que le juge des faits dispose d'une base satisfaisante pour examiner la véracité de la déclaration, la Cour a conclu que le juge

du procès avait commis une erreur en excluant la déclaration parce qu'il la croyait dépourvue de valeur probante.

89 M. Hawkins, un policier, a été accusé d'avoir entravé la justice et d'avoir par corruption accepté de l'argent. G, qui était sa petite amie à l'époque, a témoigné à l'enquête préliminaire. Après avoir témoigné la première fois, G a demandé à témoigner de nouveau, et elle est revenue, en s'expliquant, sur une grande partie de ce qu'elle avait dit. Au moment du procès, M. Hawkins et G étaient mariés, et G était, de ce fait, inhabile à témoigner en vertu de l'art. 4 de la *Loi sur la preuve au Canada*. Après avoir décidé que la règle de common law de l'inhabilité du conjoint à témoigner s'appliquait et que le témoignage de G recueilli à l'enquête préliminaire ne pouvait pas être lu au procès en application de l'art. 715 du *Code criminel*, le juge du procès a conclu que la preuve n'était pas admissible selon la méthode d'analyse raisonnée parce qu'elle n'était pas suffisamment fiable. M. Hawkins a été acquitté. Le verdict a été écarté par une décision majoritaire de la Cour d'appel de l'Ontario. Le pourvoi formé par la suite devant notre Cour a été rejeté, mais pour des motifs différents. La Cour a refusé de se rendre à l'invitation de modifier la règle de common law de l'inhabilité du conjoint à témoigner. Elle a convenu avec le juge du procès que la règle de common law s'appliquait et que le témoignage ne pouvait pas être lu en application de l'art. 715. Toutefois, les juges majoritaires de la Cour ont décidé que le témoignage recueilli à l'enquête préliminaire pouvait être lu au procès suivant la méthode d'analyse raisonnée applicable à l'admission du ouï-dire. Les trois juges dissidents ont estimé que cela dérogeait à la politique sous-jacente de l'art. 4 et ne devait pas être permis.

90 Après avoir déterminé que le critère de la nécessité était rempli, le juge en chef Lamer et le juge Iacobucci (avec l'appui des juges Gonthier et Cory) ont abordé

la question de la fiabilité. Dans les circonstances de cette affaire, on ne pouvait guère affirmer que le témoignage de la plaignante était en soi digne de foi. Les versions qu'elle avait toutes présentées sous serment étaient contradictoires. La Cour a plutôt vérifié s'il existait une base satisfaisante pour examiner la véracité de la déclaration, affirmant ceci (par. 75) :

> Le critère de la fiabilité vise un seuil de fiabilité et non une fiabilité absolue. La tâche du juge du procès se limite à déterminer si la déclaration relatée en question renferme suffisamment d'indices de fiabilité pour fournir au juge des faits une base satisfaisante pour examiner la véracité de la déclaration. Plus particulièrement, le juge doit cerner les dangers spécifiques du ouï-dire auxquels donne lieu la déclaration et déterminer ensuite si les faits entourant cette déclaration offrent suffisamment de garanties circonstancielles de fiabilité pour contrebalancer ces dangers. Il continue d'appartenir au juge des faits de se prononcer sur la fiabilité absolue de la déclaration et le poids à lui accorder. [Je souligne.]

91 La Cour a statué qu'en général un témoignage recueilli à l'enquête préliminaire satisfait au critère du seuil de fiabilité puisque le fait qu'il a été présenté sous serment et que le témoin a alors été contre-interrogé dans le cadre d'une audience mettant en cause les mêmes parties et essentiellement les mêmes questions en litige fournit suffisamment de garanties de fiabilité de ce témoignage (par. 76). De plus, l'exactitude de la déclaration est certifiée par une transcription signée par le juge, et la partie contre laquelle la preuve par ouï-dire est présentée a le pouvoir d'assigner le déclarant à témoigner. L'impossibilité pour le juge des faits d'observer le comportement a été qualifiée de « plus que contrebalancé[e] par les garanties circonstancielles de fiabilité propres à la procédure décisionnelle de nature accusatoire que constitue l'enquête préliminaire » (par. 77). Le fait qu'à l'origine on était disposé en common law à admettre en preuve un témoignage antérieur dans certaines circonstances indiquait qu'on en reconnaissait implicitement la fiabilité malgré

l'absence du déclarant (par. 78). Le juge en chef Lamer et le juge Iacobucci ont donc conclu ceci (par. 79) :

> Pour ces motifs, nous sommes d'avis qu'un témoignage enregistré lors d'une enquête préliminaire comporte suffisamment de garanties de fiabilité pour permettre au juge des faits d'en faire une utilisation quant au fond au cours du procès. Les circonstances entourant ce témoignage, tout particulièrement l'existence d'un serment ou d'une affirmation et la possibilité de contre-interrogatoire au moment de la déclaration font plus que contrebalancer l'impossibilité pour le juge des faits d'observer le comportement du témoin en cour. L'absence du témoin au procès influe sur le poids et non sur l'admissibilité du témoignage.

Appliquant ce raisonnement à la déclaration en cause, la Cour a estimé qu'elle était fiable (par. 80).

92 Le juge en chef Lamer et le juge Iacobucci ont ajouté que le juge du procès avait commis une erreur en tenant compte des contradictions internes du témoignage parce que ces considérations se rapportaient, à juste titre, à l'appréciation en dernière analyse de la valeur probante même du témoignage, qui doit être faite par le juge des faits. Bien qu'une partie de l'analyse relative à ce dernier point consiste à classer des facteurs comme se rapportant soit au seuil de fiabilité soit à la fiabilité en dernière analyse — méthode qui ne devrait plus être suivie —, la conclusion de la Cour à cet égard illustre où doit être tracée la ligne de démarcation en matière d'examen du seuil de fiabilité. Lorsque l'exigence de fiabilité est remplie parce que le juge des faits dispose d'une base suffisante pour apprécier la véracité et l'exactitude de la déclaration, il n'est pas nécessaire de vérifier davantage si la déclaration est susceptible d'être véridique. Cette question relève alors entièrement, en dernière analyse, du juge des faits et le juge du procès outrepasse son rôle en vérifiant si la déclaration est susceptible d'être véridique. Lorsque la fiabilité dépend de la fiabilité inhérente de la

déclaration, le juge du procès doit examiner les facteurs tendant à démontrer que la déclaration est véridique ou non — qu'on se rappelle l'arrêt *U. (F.J.)*.

6.3 *Réexamen des par. 215 et 217 de l'arrêt Starr*

93 Comme le révèle, je l'espère, l'analyse qui précède, la question de savoir si certains facteurs toucheront uniquement la fiabilité en dernière analyse dépendra du contexte. Partant, certains des commentaires formulés aux par. 215 et 217 de l'arrêt *Starr* ne devraient plus être suivis. Les facteurs pertinents ne doivent plus être rangés dans des catégories de seuil de fiabilité et de fiabilité en dernière analyse. Le tribunal devrait plutôt adopter une approche plus fonctionnelle, comme nous l'avons vu précédemment, et se concentrer sur les dangers particuliers que comporte la preuve par ouï-dire qu'on cherche à présenter, de même que sur les caractéristiques ou circonstances que la partie qui veut présenter la preuve invoque pour écarter ces dangers. De plus, le juge du procès doit demeurer conscient du rôle limité qu'il joue lorsqu'il se prononce sur l'admissibilité — il est essentiel pour assurer l'intégrité du processus de constatation des faits que la question de la fiabilité en dernière analyse ne soit pas préjugée lors du voir-dire portant sur l'admissibilité.

94 Je tiens à dire quelques mots sur un facteur décrit dans l'arrêt *Starr*, à savoir « la présence d'une preuve corroborante ou contradictoire » (par. 217), puisqu'il semble que ce soit ce commentaire qui a soulevé le plus de controverse. Pour des raisons de commodité, je reproduis le commentaire en question :

> De même, je ne tiendrais pas compte de la présence d'une preuve corroborante ou contradictoire. Sur ce point, je suis d'accord avec l'arrêt de la Cour d'appel de l'Ontario *R. c. C. (B.)* (1993), 12 O.R. (3d) 608; voir également *Idaho c. Wright*, 497 U.S. 805 (1990). [par. 217]

95 J'examinerai brièvement les deux décisions invoquées à l'appui de cet énoncé. La première n'est pas vraiment utile à cet égard et la seconde, selon moi, ne devrait pas être suivie.

96 Dans l'affaire *R. c. C.(B.)* (1993), 12 O.R. (3d) 608 (C.A.), en déclarant l'accusé coupable, le juge du procès avait utilisé la déclaration d'un coaccusé comme preuve étayant le témoignage de la plaignante. La Cour d'appel a conclu que cela constituait une erreur. Alors que la déclaration d'un coaccusé était admissible contre lui comme preuve de sa véracité, elle restait du ouï-dire à l'égard de l'accusé. Le coaccusé était revenu sur sa déclaration au procès. Il n'a pas été démontré que sa déclaration était suffisamment fiable pour être admise contre l'accusé à titre d'exception à la règle du ouï-dire. Cette affaire n'est donc d'aucun secours pour ce qui est de savoir s'il y a lieu de considérer une preuve à l'appui pour décider de l'admissibilité d'un ouï-dire. On y réaffirme simplement la règle bien établie selon laquelle la déclaration d'un accusé n'est admissible que contre lui et non contre un coaccusé.

97 L'arrêt *Idaho c. Wright*, 497 U.S. 805 (1990), est plus à propos. Dans cette affaire, cinq des neuf juges de la Cour suprême des États-Unis n'étaient pas convaincus que [TRADUCTION] « la preuve corroborant la véracité d'une déclaration relatée puisse étayer, à juste titre, la conclusion que la déclaration comporte "des garanties particulières de fiabilité" » (p. 822). Selon les juges majoritaires, l'utilisation d'une preuve corroborante à cette fin « permettrait d'admettre une déclaration présumée peu fiable en se fondant sur la fiabilité d'un autre élément de preuve au procès, résultat que nous croyons contraire à l'exigence que la preuve par ouï-dire admise en vertu de la clause de confrontation des témoins soit à ce point digne de foi qu'il serait peu utile de

contre-interroger le déclarant » (p. 823). Par exemple, les juges majoritaires ont fait observer qu'une déclaration faite sous la contrainte peut se révéler véridique, mais qu'une preuve tendant à corroborer la véracité de cette déclaration ne saurait être substituée au contre-interrogatoire du déclarant au procès. Les juges majoritaires ont aussi exprimé la crainte, surtout dans les affaires d'abus sexuels d'enfants, qu'un jury s'appuie sur la corroboration partielle fournie par la preuve médicale pour inférer à tort la fiabilité de toute l'allégation.

98 Dans ses motifs dissidents, le juge Kennedy, avec l'appui des trois autres juges, s'est dit en profond désaccord avec le point de vue des juges majoritaires concernant l'utilisation potentielle d'un élément de preuve à l'appui ou contradictoire. À mon avis, ses motifs reprennent une bonne partie des critiques formulées au sujet de la position de notre Cour dans l'arrêt *Starr*. Il a affirmé ceci :

> [TRADUCTION] Je ne vois rien qui justifie constitutionnellement cette décision de dissocier la preuve corroborante de l'examen de la question de savoir si les déclarations d'un enfant sont fiables. Il va de soi pour la plupart des gens que l'un des meilleurs moyens de savoir si quelqu'un est digne de foi consiste à vérifier si ses propos sont corroborés par une autre preuve. Par exemple, dans un cas de violence envers une enfant, si une partie de la déclaration relatée de l'enfant veut que l'assaillant lui ait lié les poignets ou qu'il ait eu une cicatrice au bas de l'abdomen, et qu'une preuve matérielle ou un témoignage corrobore cette déclaration — preuve que l'enfant n'aurait pas pu fabriquer —, nous serons probablement plus enclins à croire que l'enfant dit la vérité. À l'inverse, on peut penser à la déclaration qu'un enfant fait de manière spontanée ou, par ailleurs dans des circonstances indiquant qu'elle est fiable, mais qui contient aussi des inexactitudes factuelles incontestées si énormes que la crédibilité de ses déclarations s'en trouve considérablement minée. Selon l'analyse de la Cour, la déclaration satisferait aux exigences de la clause de confrontation des témoins malgré un doute considérable quant à sa fiabilité. [p. 828-829]

99 Le juge Kennedy était aussi en profond désaccord avec le point de vue des juges majoritaires selon lequel seules les circonstances entourant la déclaration doivent être considérées :

> [TRADUCTION] L[es juges majoritaires] n'offre[nt] aucune justification pour écarter l'examen de la preuve corroborante, si ce n'est qu'[ils] indique[nt] que celle-ci ne renforce pas la « fiabilité inhérente » des déclarations. Mais pour déterminer la fiabilité des déclarations, je ne vois aucune différence entre les facteurs qui, selon la Cour, indiquent l'existence de « fiabilité inhérente » et ceux qui, comme la preuve corroborante, ne paraissent pas le faire. Même les facteurs retenus par la Cour obligeront à examiner la preuve même que celle-ci entend soustraire à l'analyse de la fiabilité. La Cour note que l'un des critères de fiabilité est de savoir si l'enfant a « utilis[é] [. . .] un vocabulaire inattendu de la part d'un enfant de son âge ». Mais pour se prononcer sur ce point, il faut examiner les connaissances de l'enfant sur le plan du vocabulaire et la possibilité qu'il a eu ou non d'apprendre le vocabulaire en cause. Et lorsque toutes les circonstances extrinsèques d'une affaire sont prises en compte, il peut se révéler que l'usage d'un mot ou d'un vocabulaire particulier étaye en fait l'inférence d'un contact prolongé avec le défendeur, qui était connu pour son utilisation du vocabulaire en question. Comme autre exemple, la Cour note qu'un motif d'inventer une histoire est significatif en ce qui concerne la question de la fiabilité. Mais si le suspect accuse un tiers d'avoir inventé une fausse preuve contre lui et d'avoir préparé l'enfant, il est sûrement utile de démontrer que ce tiers n'a eu aucun contact avec l'enfant ni aucune possibilité de proposer un faux témoignage. Vu les contradictions inhérentes du critère de la Cour qui se dégagent de ses propres exemples, je pense que sa conclusion se révélera rapidement aussi inapplicable qu'illogique.
>
> Bref, tant les circonstances entourant les déclarations de l'enfant que l'existence d'une preuve corroborante indiquent plus ou moins si les déclarations sont fiables. Si la Cour veut donner à entendre que les circonstances entourant une déclaration sont les meilleurs indices de fiabilité, je doute qu'il en soit ainsi dans tous les cas. Et, si cela était vrai dans une affaire donnée, cela ne justifie pas de passer sous silence d'autres indices de fiabilité comme la preuve corroborante, s'il n'y a aucune autre raison de les écarter. D'ailleurs, je crois que la preuve corroborante sous forme de témoignage ou de preuve matérielle, outre les circonstances bien précises entourant la déclaration, serait un moyen privilégié de déterminer la fiabilité d'une déclaration pour les besoins de la clause de confrontation, pour la simple raison que, contrairement aux autres indices de fiabilité, la preuve corroborante peut être étudiée par le défendeur et appréciée de façon objective et critique par le tribunal de première instance. [Renvois omis; p. 833-834.]

100 À mon avis, l'opinion du juge Kennedy reflète mieux l'expérience canadienne sur cette question. Il s'est révélé difficile et parfois paradoxal de limiter l'enquête aux circonstances entourant la déclaration. Notre Cour elle-même n'a pas toujours adopté cette approche restrictive. De plus, je ne juge pas convaincante la préoccupation des juges majoritaires quant au caractère « autocorroborant » de la preuve corroborante. À cet égard, je suis d'accord avec les commentaires suivants du professeur Paciocco concernant le raisonnement majoritaire de l'arrêt *Idaho c. Wright* (p. 36) :

> [TRADUCTION] Le raisonnement final proposé veut qu'admettre une preuve simplement parce qu'une autre preuve établit qu'elle est fiable en ferait une preuve « autocorroborante ». En fait, on réserve généralement cette étiquette aux arguments circulaires selon lesquels un élément de preuve douteux « s'appuie sur lui-même » pour s'ériger en exception. Par exemple, une partie soutient qu'elle peut s'appuyer sur une déclaration relatée parce qu'elle a été faite sous une pression ou contrainte telle que la possibilité d'invention peut être écartée à juste titre, mais s'appuie ensuite sur le contenu de cette même déclaration pour prouver l'existence de cette pression ou contrainte : *Ratten c. The Queen*, [1972] A.C. 378. Ou encore, une partie affirme qu'elle peut compter sur la véracité d'une déclaration parce qu'elle a été faite par une partie opposée, mais s'appuie ensuite sur le contenu de la déclaration pour prouver qu'elle a été faite par une partie opposée : voir *R. c. Evans*, [1991] 1 R.C.S. 869. S'en remettre à un *autre* élément de preuve pour confirmer la fiabilité d'une preuve, ce que l'arrêt *Idaho c. Wright* vise à prévenir, est l'antithèse même de la preuve « autocorroborante ».

7. Application à la présente affaire

101 Les déclarations que M. Skupien a faites à la cuisinière, Mme Stangrat, au médecin et à la police constituaient du ouï-dire. Le ministère public cherchait à présenter ces déclarations pour établir la véracité de leur contenu. Dans le contexte du présent procès, cette preuve était très importante — en fait, les deux accusations portées

contre M. Khelawon relativement à ce plaignant reposaient entièrement sur la véracité des allégations contenues dans les déclarations de ce dernier.

102 Les déclarations relatées de M. Skupien étaient présumées inadmissibles. Aucune des exceptions traditionnelles à la règle du ouï-dire ne pouvait aider le ministère public à établir sa preuve. La preuve ne pouvait être admise qu'en application de l'exception raisonnée à la règle du ouï-dire.

103 Le décès de M. Skupien avant le procès a forcé le ministère public à recourir à son témoignage sous sa forme relatée. Il a été concédé dans toutes les cours que l'on avait satisfait à l'exigence de nécessité. Il s'agissait donc de savoir si le témoignage était suffisamment fiable pour être admis en preuve.

104 Comme M. Skupien était décédé avant le procès, il ne pouvait plus être vu, entendu et contre-interrogé en cour. Il ne pouvait pas être contre-interrogé au moment précis de sa déclaration. Il n'y avait pas eu non plus d'autre possibilité de le contre-interroger à aucune autre audience. Même si M. Skupien était âgé et frêle au moment de ses allégations, rien ne prouve que le ministère public a tenté de préserver son témoignage en application des art. 709 à 714 du *Code criminel*. M. Skupien n'a pas témoigné à l'enquête préliminaire. Le dossier n'indique pas s'il était décédé à cette époque. En faisant ces commentaires, je ne remets pas en question la nécessité pour le ministère public de recourir au témoignage sous forme relatée de M. Skupien. Je reconnais que c'était nécessaire. Toutefois, dans une instance appropriée, il se peut bien que, pour trancher la question de la nécessité, le tribunal se demande si la partie qui veut présenter la preuve a déployé tous les efforts raisonnables pour préserver la preuve du

déclarant de manière à préserver également les droits de l'autre partie. Cette question ne se pose pas en l'espèce.

105 Il reste toutefois que l'absence de possibilité de contre-interroger M. Skupien a une incidence sur la question de la fiabilité. La préoccupation majeure que suscite le caractère relaté de la preuve est l'incapacité de vérifier de la manière habituelle les allégations que cette preuve comporte. La preuve est inadmissible à moins qu'il y ait un autre motif suffisant de la vérifier ou que le contenu de la déclaration soit suffisamment fiable.

106 De toute évidence, il n'y avait aucune preuve à faire en l'espèce au sujet de l'existence d'autres moyens adéquats de vérifier la preuve. Il ne s'agit pas d'une situation comme celle dans l'affaire *Hawkins* où les difficultés présentées par la non-disponibilité de la déclarante pouvaient facilement être surmontées par le fait que l'on disposait de la transcription de l'audience préliminaire où on avait eu l'occasion de contre-interroger la plaignante dans le cadre d'une audience portant essentiellement sur les mêmes questions en litige. Il ne s'agit pas non plus d'une situation comme celle dans l'affaire *B. (K.G.)* où un serment et une bande vidéo s'ajoutaient à la disponibilité du déclarant au procès. Il n'y a en l'espèce aucun autre moyen adéquat de vérifier la preuve. Il y a la bande vidéo de la police — rien d'autre. L'exception raisonnée à la règle du ouï-dire ne constitue pas un moyen de fonder une déclaration de culpabilité sur une déclaration faite à la police sur bande vidéo ou autrement, sans plus. Pour satisfaire à l'exigence de fiabilité en l'espèce, le ministère public ne pouvait se fonder que sur la fiabilité inhérente de la déclaration.

107 À mon avis, il n'y avait aucune preuve à faire sur ce fondement non plus. Il ne s'agissait pas d'une situation comme celle dans l'arrêt *Khan* où la force probante de la preuve était telle que, comme l'a affirmé Wigmore, il serait [TRADUCTION] « trop pointilleux d'insister sur une épreuve dont l'objet principal est déjà atteint » (§ 1420, p. 154). Au contraire, tout comme dans le cas de la troisième déclaration jugée inadmissible dans l'arrêt *Smith*, les circonstances soulevaient un certain nombre de questions sérieuses de sorte qu'il était impossible de dire que cette preuve ne serait pas susceptible de changer lors d'un contre-interrogatoire. M. Skupien était âgé et frêle. Sa capacité mentale était en cause — les dossiers médicaux faisaient état de diagnostics répétés de paranoïa et de démence. Il y avait également la possibilité que ses blessures aient résulté d'une chute plutôt que d'une agression — les dossiers médicaux révélaient un certain nombre de plaintes de fatigue, de faiblesse et d'étourdissements et le médecin traitant, le Dr Pietraszek, a témoigné que les blessures pouvaient être dues à une chute (d.a., vol. 2, p. 259). Les sacs à ordures remplis d'effets personnels de M. Skupien étaient peu utiles pour déterminer si la déclaration était susceptible d'être véridique — il pouvait avoir rempli ces sacs lui-même. D'autres difficultés résultaient du motif évident que Mme Stangrat avait de discréditer M. Khelawon. Les premières allégations ont été formulées devant elle — dans son témoignage, le Dr Pietraszek a reconnu que Mme Stangrat était présente lorsqu'il a rencontré M. Skupien et qu'elle pouvait avoir aidé ce dernier en fournissant des indices sur ce qui s'était produit. Il fallait déterminer dans quelle mesure cette employée mécontente pouvait avoir influencé M. Skupien lorsqu'il a fait sa déclaration. M. Skupien avait lui-même certaines récriminations au sujet de la façon dont la maison de retraite était gérée. Cela ressort de ses plaintes incohérentes contenues dans l'enregistrement vidéo de la police. L'absence de serment et le simple « oui » répondu lorsque le policier lui a demandé s'il comprenait qu'il était important de dire la vérité n'aident pas beaucoup à déterminer s'il saisissait vraiment les

conséquences de sa déclaration pour M. Khelawon. Dans ces circonstances, l'impossibilité de contre-interroger M. Skupien limitait considérablement la capacité de l'accusé de vérifier la preuve et, partant, la capacité du juge des faits d'en déterminer correctement la valeur.

108 Comme nous l'avons vu, la conclusion du juge du procès que la preuve était suffisamment fiable reposait essentiellement sur les « similitudes frappantes » entre les déclarations des cinq plaignants. À l'instar du juge Rosenberg, je suis moi aussi d'avis de ne pas écarter le fait que l'existence d'une similitude frappante entre les déclarations de divers plaignants pourrait bien être suffisamment probante pour justifier l'admission d'une preuve par ouï-dire dans un cas approprié. Toutefois, les déclarations des autres plaignants en l'espèce présentaient des difficultés encore plus grandes et ne pouvaient être admises quant au fond pour aider à apprécier la fiabilité des allégations de M. Skupien. Par exemple, l'entretien enregistré sur bande vidéo de M. Dinino, sur lequel reposait la deuxième déclaration de culpabilité de M. Khelawon, durait neuf minutes et avait été précédé d'un entretien de 30 minutes avec la police. Le policier ne possédait aucune note de l'entretien initial. L'agent Pietroniro a reconnu qu'il était [TRADUCTION] « très difficile » d'obtenir des réponses de M. Dinino et qu'une grande partie de l'enregistrement était inaudible. Il répétait généralement à M. Dinino ce qu'il croyait que celui-ci avait dit, et M. Dinino répondait par « oui » ou « ouais ». L'agent Pietroniro a reconnu qu'il faisait des suppositions éclairées au sujet de ce que M. Dinino disait et qu'il n'avait pas saisi certains propos de ce dernier. Outre ces difficultés, le dossier est loin d'indiquer clairement sur quelles caractéristiques précises le juge du procès s'est fondé pour conclure à l'existence d'une « similitude frappante » entre les diverses déclarations. Toutefois, je ne juge pas nécessaire de m'étendre sur cette

question. L'admissibilité des autres déclarations n'est plus en cause. La Cour d'appel a décidé, à l'unanimité, qu'elles étaient inadmissibles.

109 Je conclus que la preuve ne satisfait pas à l'exigence de fiabilité. Les juges majoritaires de la Cour d'appel ont eu raison de la déclarer inadmissible.

8. Conclusion

110 Pour ces motifs, je suis d'avis de rejeter le pourvoi.

731.

Federal Court of Appeal

Cour d'appel fédérale

Date: 20000208

Docket: A-434-00

Neutral citation: 2001 FCA 8

01 060 047

CORAM: **RICHARD C.J.**
ROTHSTEIN J.A.
MALONE J.A.

BETWEEN:

CANADIAN TIRE CORPORATION, LIMITED

Appellant

- and -

P.S. PARTSOURCE INC.

Respondent

Heard at Toronto, Ontario, on Thursday, February 1, 2001.

JUDGMENT delivered at Ottawa, Ontario, on Thursday, February 8, 2001.

REASONS FOR JUDGMENT BY: MALONE J.A.

CONCURRED IN BY: RICHARD C.J.
ROTHSTEIN J.A.

Federal Court of Appeal Cour d'appel fédérale

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REASONS FOR JUDGMENT

MALONE J.A.

FACTS

[1] This is an appeal from an order of a Motions Judge of the Trial Division which dismissed an appeal from an order of a Prothonotary. The Prothonotary had dismissed a motion made by the Appellant, Canadian Tire Corporation Limited ("CTC"), to strike out a paragraph in an affidavit filed on behalf of the respondent, P.S. Partsource Inc. ("Partsource"), on the ground that it was not based on personal knowledge.

[2] The affidavit was filed in proceedings commenced by Partsource under section 57 of the *Trade-marks Act* to expunge certain of CTC's trade marks. Under subsection 59(3) of the *Trade-marks Act*, unless the Court otherwise directs, the matter is to proceed on the basis of evidence adduced by affidavit. Such proceedings are final, as opposed to interlocutory, as the eventual Court order will determine the substantive rights of the parties.

[3] Paragraph 9 of the affidavit of Philip Bish, sworn April 11, 2000, provides as follows:

> Within a few weeks of the respondent's announcement in the fall of 1999, the applicant received at least 60 to 70 inquiries about it from its customers. These were customers who expressed a belief, contrary to the fact, that the new business announced by Canadian Tire Corporation was part of the applicant's business, or was affiliated with the applicant. For example, some customers asked what parts they would now be able to get from the new stores. Some said they saw the announcement and looked up Partsource in the phone book and called us for information on what parts they could get.

[4] By notice of motion, CTC sought an order striking out paragraph 9 of the Bish affidavit on the basis that it was not based on personal knowledge as required by rule 81(1) of the *Federal Court Rules, 1998*. Rule 81(1) provides:

81. (1) Affidavits shall be confined to facts within the personal knowledge of the deponent, except on motions in which statements as to the deponent's belief, with the grounds therefor, may be included.	81. (1) Les affidavits se limitent aux faits don't le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête, auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

[5] In dismissing CTC's motion, the Prothonotary gave no reasons. The Motions Judge dismissed the appeal from the decision of the Prothonotary for the following reasons:

> "(a) First, this paragraph is not said to be made on information and belief and the statements which it contains may or may not be hearsay. It depends upon the purpose for which they are introduced. If they are introduced simply to prove that the statements were made, no hearsay is involved.

(b) Second, to rule on admissibility now deprives the trial judge to consider [sic] paragraph 9 in its entire context, whether the new principled approach on hearsay evidence has application with the appropriate weight to be give to such evidence. Justice Gibson adopted this view, to which I subscribe, in *Eli Lilly and Co.* v. *Apotex Inc.* (1997), 75 C.P.R. (3d) 312.

(c) Third, it is an established principle that as a Court will not usually make an *a priori* ruling on admissibility; it takes an obvious case which is not the situation here."

ANALYSIS

[6] Rule 81 of the *Federal Court Rules, 1998* requires that, except on motions, affidavits be confined to facts within the personal knowledge of the deponent. This rule reflects the general rule of evidence relating to hearsay. The requirement for personal knowledge by the deponent means that the deponent has his own knowledge of the facts asserted and has not obtained that knowledge from others. It also means that he cannot recount out-of-court statements made by others.

[7] Paragraph 9 says that "the applicant received at least 60 to 70 inquiries ...". The applicant is Partsource Corporation, Limited. Mr. Bish does not say he took the calls himself, although he refers to himself in the first person in other parts of his affidavit. On its face, the facts in paragraph 9 are not stated to be facts of which Mr. Bish has firsthand knowledge.

[8] Counsel for Partsource argued that it may have been Mr. Bish who took the calls. If so, why didn't he say so? At best, for Partsource, the question of who took the calls is unclear. Partsource cannot take advantage of an ambiguity of its own making. As it is framed in

paragraph 9, Mr. Bish's statement is hearsay being offered in a proceeding that is final in nature and contrary to rule 81.

[9] The first reason of the Motions Judge to dismiss the motion brought by CTC is that paragraph may have been offered only to establish that telephone calls were made. Accordingly, even if paragraph 9 was limited to an attempt to establish that statement were made, as opposed to proving the truth of the statements, it would still be hearsay in these circumstances, where it is not clearly established that the deponent personally received the telephone calls..

[10] However, the information in paragraph 9 was not offered only to prove that statements were made. The paragraph recounts, in summary form, what the callers said. This is obviously an attempt to demonstrate actual confusion on the part of the callers. This evidence is clearly hearsay.

[11] As to his second reason, the Motions Judge left for the Trial Judge the issue of whether the new "principled" approach for admitting hearsay evidence might justify an exception to rule 81. In *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Smith*, [1992] 2 S.C.R. 915, the Supreme Court has recognized that hearsay evidence may be admitted if it is demonstrated that the evidence is reliable and that its admission is necessary.

[12] Before dealing with whether the question should have been left to the Trial Judge, I would observe that as worded, except on motions, rule 81(1) admits of no exceptions to the

requirement that affidavits shall be confined to facts within the personal knowledge of the deponent. Nonetheless, prior decisions indicate that hearsay evidence may be admitted according to the "principled" approach. (See *Ethier v. Canada (R.C.M.P. Commissioner)*, [1993] 2 F.C. 659 (C.A.)).

[13] Rule 81(1) is a rule of practice and procedure in the Court. It is made under the authority of paragraph 46(1)(a) of the *Federal Court Act* which provides, in part:

46. (1) Subject to the approval of the Governor in Council and subject also to subsection (4), the rules committee may make general rules and orders (a) for regulating the practice and procedure in the Trial Division and in the Court of Appeal, [...]	46. (1) Sous réserve de l'approbation du gouverneur en conseil et, en outre, du paragraphe (4), le comité peut, par règles ou ordonnances générales : a) réglementer la pratique et la procédure à la Section de première instance et à la Cour d'appel, et notamment :

As a rule of practice and procedure, rule 81(1) reflects the general rule against hearsay. However, it does not displace longstanding common law exceptions to the hearsay rule, nor the reliability and necessity exception of more recent vintage.[1] In any event, under rule 55, the Court may dispense with compliance with any rule. Rule 55 provides:

55. In special circumstances, on motion, the Court may dispense with compliance with any of these Rules.	55. Dans des circonstances particulières, la Cour peut, sur requête, dispenser de l'observation d'une disposition des présentes règles.

1 There had been some debate as to whether the reliability and necessity exception to the hearsay rule is now the only test for admissibility or whether it is an additional exception to the long list of exceptions that have hitherto been part of the common law. (See Sopinka, Lederman, and Bryant, *The Law of Evidence in Canada* (2d ed., 1999), para. 6.64). The Supreme Court has subsequently addressed the relationship between the traditional exceptions and the reliability and necessity exception in *R. v. Starr*, [2000] 2 S.C.R. 144.

In appropriate circumstances, a party desiring to introduce hearsay evidence on the basis of an exception to rule 81 may consider bringing a motion under rule 55 to have the matter resolved in advance of trial.

[14] In the circumstances here, if Partsource intended to rely on exceptions to the hearsay rule, it was for Partsource, in response to the motion to strike, to put forward evidence and/or arguments before the Prothonotary or Motions Judge as to admissibility. It was for the Prothonotary or Motions Judge to conduct their own analysis as to the reliability and necessity of such evidence. As Partsource took the position that the evidence was not hearsay, no evidence or argument was submitted justifying admissibility on the grounds of necessity and reliability. It was for Partsource to introduce evidence and argue why it should be necessary to rely on hearsay evidence in these circumstances and why such evidence should be considered reliable. Without such evidence or argument, questions of the admissibility of evidence on the basis of necessity and reliability did not arise and should not have been considered by the Motions Judge as a reason to defer the matter to the Trial Judge.

[15] In leaving the matter to the Trial Judge, the approach of the Motions Judge would deny to CTC the right to know the evidence it has to refute until such time as the Trial Judge has made his or her ruling on admissibility. However, CTC cannot be certain that the Trial Judge will exclude paragraph 9. It is, therefore, in the position of having to cross-examine on it.

[16] CTC cannot effectively cross-examine in respect of hearsay statements made by unidentified sources. Notwithstanding that the onus is on Partsource to demonstrate its entitlement to the relief it seeks, in order to respond to the allegation in paragraph 9 of the Bish affidavit, CTC would be required to explore, through cross-examination on the affidavit, the identity of the customers to whom reference is made and, if they are identified, to interview them or otherwise conduct an investigation for the purpose of ascertaining the veracity of the statements attributed to them. This would effectively reverse the onus in the expungement application. This is clearly prejudicial to CTC.

[17] The third reason given by the Motions Judge for dismissing the motion to strike was that the Court will usually not make an *a priori* ruling on admissibility unless the case is obvious. As I have indicated, this case is obvious. The words of paragraph 9, on their face, show that the evidence is hearsay. It is clearly proffered for its truth. There is no suggestion that the necessity and reliability exception applies. This is a case in which, prior to the hearing, it is appropriate to strike the offending paragraph.

[18] Nonetheless, I would emphasize that motions to strike all or parts of affidavits are not to become routine at any level of this Court. This is especially the case where the question is one of relevancy. Only in exceptional cases where prejudice is demonstrated and the evidence is obviously irrelevant will such motions be justified. In the case of motions to strike based on hearsay, the motion should only be brought where the hearsay goes to a controversial issue,

where the hearsay can be clearly shown and where prejudice by leaving the matter for disposition at trial can be demonstrated.

[19] The appeal will be allowed with costs and paragraph 9 of the Bish affidavit will be struck out.

(B. Malone)

J.A.

I agree
J. Richard
C.J.

I agree
Marshall Rothstein

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	RICHARD C.J. and ROTHSTEIN J.A.
DATED:	February 8th, 2001

APPEARANCES:

John S. McKeown	FOR THE APPELLANT
Christine Pallotta	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Cassels Brock & Blackwell L.L.P. Toronto, Ontario	FOR THE APPELLANT
Oyen Wiggs Green & Mutula Vancouver, British Columbia	FOR THE RESPONDENT

10p

SUPREME COURT OF CANADA

CITATION: R. *v.* Bradshaw, 2017 SCC 35, [2017] 1 S.C.R. 865

APPEAL HEARD: November 3, 2016
JUDGMENT RENDERED: June 29, 2017
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BETWEEN:

Her Majesty The Queen
Appellant

and

Robert David Nicholas Bradshaw
Respondent

- and -

Attorney General of Ontario, British Columbia Civil Liberties Association and Criminal Lawyers' Association of Ontario
Interveners

CORAM: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Côté and Brown JJ.

REASONS FOR JUDGMENT: (paras. 1 to 97) — Karakatsanis J. (McLachlin C.J. and Abella, Wagner and Brown JJ. concurring)

DISSENTING REASONS: (paras. 98 to 188) — Moldaver J. (Côté J. concurring)

R. *v.* Bradshaw, 2017 SCC 35, [2017] 1 S.C.R. 865

Her Majesty The Queen *Appellant*

v.

Robert David Nicholas Bradshaw *Respondent*

and

Attorney General of Ontario,
British Columbia Civil Liberties Association and
Criminal Lawyers' Association of Ontario *Interveners*

Indexed as: R. *v.* Bradshaw

2017 SCC 35

File No.: 36537.

2016: November 3; 2017: June 29.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Côté and Brown JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Evidence — Hearsay — Admissibility — Principled exception to hearsay rule — Trial judge admitting co-accused's hearsay statement into evidence — When can trial judge rely on corroborative evidence to conclude that threshold reliability of hearsay statement is established.

Two people were shot to death. Suspected by police, T became the target of a Mr. Big investigation, during which he told an undercover officer that he shot both victims. He then told Mr. Big that he had shot one victim and that B had shot the other. T was arrested. When he later re-enacted the murders for police, he implicated B in both. T and B were charged with two counts of first degree murder and T pled guilty to second degree murder. Because T refused to give sworn testimony at B's trial, the Crown sought to admit into evidence T's re-enactment, which had been video-recorded. Following a *voir dire*, the trial judge admitted the re-enactment, under the principled exception to the hearsay rule. A jury convicted B on two counts of first degree murder. The Court of Appeal allowed the appeal, set aside B's convictions and ordered a new trial.

Held (Moldaver and Côté JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Abella, Karakatsanis, Wagner and Brown JJ.: Hearsay evidence is presumptively inadmissible because it is often difficult for the trier of fact to assess its truth. However, it can be admitted under the principled exception if the criteria of necessity and threshold reliability are met on a balance of

probabilities.

In this case, the necessity of the hearsay evidence is established because T refused to testify. Thus, its admissibility rests on whether threshold reliability is met. Threshold reliability is established when the hearsay is sufficiently reliable to overcome the dangers arising from the difficulty of testing it. The hearsay dangers relate to the difficulties of assessing the declarant's perception, memory, narration or sincerity. These dangers can be overcome by showing that (1) there are adequate substitutes for testing truth and accuracy (procedural reliability) or (2) that there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability). Substantive reliability is established when the statement is unlikely to change under cross-examination. To determine whether substantive reliability is established, the trial judge can consider the circumstances in which the statement was made and evidence (if any) that corroborates or conflicts with the statement.

A trial judge can only rely on corroborative evidence to establish substantive reliability if it shows, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.

First, corroborative evidence must go to the truthfulness or accuracy of the material aspects of the hearsay statement. Since hearsay is tendered for the truth

of its contents, corroborative evidence must go to the truthfulness or accuracy of the content of the statement that the moving party seeks to rely on.

Second, corroborative evidence must assist in overcoming the specific hearsay dangers raised by the tendered statement. Corroborative evidence does so if its combined effect, when considered in the circumstances of the case, shows that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement. Otherwise, alternative explanations for the statement that could have been elicited or probed through cross-examination, and the hearsay dangers, persist. Corroborative evidence is of assistance in establishing substantive reliability if it shows that alternative explanations for the statement are unavailable. In contrast, corroborative evidence that is equally consistent with the truthfulness and accuracy of the statement as well as another hypothesis is of no assistance. To be relied on for the purpose of rejecting alternative hypotheses, corroborative evidence must itself be trustworthy.

In sum, to determine whether corroborative evidence is of assistance in the substantive reliability inquiry, a trial judge should: (1) identify the material aspects of the hearsay statement that are tendered for their truth; (2) identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case; (3) based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement; and (4) determine whether, given the circumstances of the case, the corroborative evidence led at the

voir dire rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.

The trial judge erred in relying significantly on corroborative evidence that was of no assistance in establishing substantive reliability to deem the re-enactment statement admissible. The material aspect of the statement was T's assertion that B participated in the murders. The specific danger raised by T's statement was the inability of the trier of fact to assess whether T lied about B's participation in the murders. T gave inconsistent statements about B's participation. He also had a significant motive to lie to reduce his own culpability. Furthermore, T was a *Vetrovec* witness, a witness who cannot be trusted due to his unsavoury character. Given the hearsay dangers presented by the re-enactment statement, an alternative explanation is that T lied about B's participation in the murders. Therefore, corroborative evidence will only assist in establishing the substantive reliability of the re-enactment statement if it shows, when considered in the circumstances of the case, that the only likely explanation is that T was truthful about B's participation. Considered as a whole, the corroborative evidence relied on by the trial judge did not meet this standard. For example, while the weather evidence and forensic evidence showed that T accurately described the way the murders unfolded and the weather on the nights of the murders, this evidence does not mitigate the danger that T lied about B's participation. Furthermore, while there are recordings of B admitting that he participated in the murders, there are concerns about the

trustworthiness of these admissions. Much of the corroborative evidence relied on by the trial judge was probative of B's guilt, and thus could be considered by the trier of fact in the trial on the merits, but none of it was of assistance in establishing the threshold reliability of the re-enactment statement.

The threshold reliability of the hearsay statement is not otherwise established. Jury warnings about the dangers of hearsay evidence or *Vetrovec* testimony do not provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the hearsay statement. Instructing a jury on how to evaluate a statement that it lacks the means to evaluate does not address the hearsay dangers that underlie the exclusionary rule. Given that the trier of fact could not adequately test the trustworthiness of T's statement, and there were no circumstances or corroborative evidence showing that this statement was inherently trustworthy, it should not have been admitted into evidence.

Per Moldaver and Côté JJ. (dissenting): The trial judge did not err in admitting T's re-enactment. His ruling was amply supported by the record and is entitled to deference.

The principled approach to hearsay recognizes that threshold reliability can be met in three ways: (1) where a statement has sufficient features of substantive reliability; (2) where the statement has adequate features of procedural reliability; or (3) where the statement does not satisfy either of the first two ways, but incorporates features of both which, in combination, justify its admission. Under this third way,

where a statement has a sufficient level of trustworthiness, relative to the strength of the procedural safeguards for the trier of fact to evaluate its ultimate reliability, the statement is safe to admit.

In this case, T's re-enactment was admissible under the third way of establishing threshold reliability. The hearsay dangers at issue — sincerity along with memory and perception — were sufficiently overcome by powerful corroborative evidence indicating the statement's trustworthiness and a number of procedural safeguards that provided the jury with the tools it needed to evaluate its truth and accuracy.

In reaching a different conclusion, the majority has departed from the functional approach to threshold reliability by unduly restricting the extrinsic evidence that a court can consider when assessing a statement's substantive reliability and by adopting a narrow view of the procedural safeguards available at trial that can equip the jury with the tools it needs to assess the ultimate reliability of a statement.

The functional approach emphasizes that there is no bright-line distinction between factors that inform threshold and ultimate reliability. For extrinsic evidence, the inquiry is focused on whether the evidence addresses hearsay dangers by providing information about whether the statement is trustworthy. The majority's approach instead creates a threshold test within the threshold test, which unnecessarily complicates the analysis and discards extrinsic evidence that can be crucial for evaluating threshold reliability. Trial judges should be trusted to limit the

scope of extrinsic evidence that can be considered in a hearsay *voir dire* on a case-by-case basis to ensure that the proceedings are not derailed.

In this unusual case, the corroborative evidence included surreptitiously recorded conversations in which B admitted his involvement in the murders, telephone records as circumstantial evidence implicating B in the murders and forensic evidence from the crime scenes confirming T's account of the details of the murders. Considered cumulatively, this evidence provides powerful support for the trustworthiness of T's re-enactment. There was also circumstantial indicia of trustworthiness, including: the fact that the re-enactment was voluntary and free flowing; that it was contrary to T's interest, in that he did not attempt to shift blame to B but instead implicated himself in two counts of first degree murder; and that T's alleged motivation to fabricate was rebutted by his prior consistent statement to Mr. Big. There is no evidence of any inducements or assurances made by the police prior to T's re-enactment, nor is there any information to suggest that T's plea to second degree murder had anything to do with his participation in the re-enactment.

As for procedural reliability, there is no principled distinction between safeguards in place at the time the hearsay statement was made and safeguards available at trial. Both enhance the ability of the trier of fact to critically evaluate the evidence. As in this case, the latter may include jury cautions, the limited admission of prior inconsistent statements that contradict the hearsay statement, requiring the Crown to call the police officers who took prior inconsistent statements as witnesses

so that they can be cross-examined by defence counsel, and permitting enhanced leeway for defence counsel during closing submissions. The trial judge is uniquely positioned to adapt and implement these measures based on the specific circumstances of the case.

The majority's unwillingness to consider these various procedural safeguards relied upon by the trial judge in this case leads it to skirt the third way of establishing threshold reliability — the one applied by the trial judge in this case — in which features of substantive and procedural reliability may, in conjunction, justify the admission of a hearsay statement.

In conjunction, the re-enactment's features of substantive and procedural reliability were capable of satisfying the test for threshold reliability. The trial judge made a difficult call in a close case. He was in the best position to make that call based on his assessment of the trustworthiness of the evidence and the jury's ability to evaluate it. And his analysis discloses no legal error. As a result, his ruling is entitled to deference. It is not the role of the Court to second guess the trial judge's reasonably exercised judgment from a position far removed from the trial setting. Doing so betrays both the deference owed to trial judges and the trust and confidence placed in juries to follow instructions and use their common sense and reason to evaluate evidence.

The trial judge's refusal to admit T's prior inconsistent statement given on May 15, 2010, for the truth of its contents is also entitled to deference. The trial

judge applied the correct test and considered the relevant factors in finding this statement to be inadmissible. This included the fact that the statement was not video-recorded, that it was contradicted by extrinsic evidence and that T had a strong incentive to exaggerate his involvement in the murders.

Ultimately, there is no reason to send this case back for a second trial. B had a fair trial before a properly instructed jury that was well positioned to critically evaluate the reliability of the re-enactment. Accordingly, his two convictions for first degree murder should be restored.

Cases Cited

By Karakatsanis J.

Applied: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787; **referred to:** *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520; *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720; *R. v. Hawkins*, [1996] 3 S.C.R. 1043; *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764; *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517; *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298; *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144; *R. v. R. (D.)*, [1996] 2 S.C.R. 291; *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104; *R. v. Smith*, 2009 SCC 5, [2009] 1 S.C.R. 146; *R. v. Salah*, 2015 ONCA 23, 319 C.C.C. (3d) 373.

By Moldaver J. (dissenting)

R. v. Baldree, 2013 SCC 35, [2013] 2 S.C.R. 520; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787; *R. v. Devine*, 2008 SCC 36, [2008] 2 S.C.R. 283; *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298, aff'g (2006), 84 O.R. (3d) 292; *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720; *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517; *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Hawkins*, [1996] 3 S.C.R. 1043; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Hamilton*, 2011 ONCA 399, 271 C.C.C. (3d) 208; *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544; *R. v. Abbey*, 2009 ONCA 624, 246 C.C.C. (3d) 301; *R. v. Carroll*, 2014 ONCA 2, 304 C.C.C. (3d) 252; *R. v. McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193; *R. v. R. (T.)*, 2007 ONCA 374, 85 O.R. (3d) 481; *R. v. Lowe*, 2009 BCCA 338, 274 B.C.A.C. 92; *R. v. Goodstoney*, 2007 ABCA 88, 218 C.C.C. (3d) 270; *R. v. Smith*, 2009 SCC 5, [2009] 1 S.C.R. 146; *R. v. Adjei*, 2013 ONCA 512, 309 O.A.C. 328; *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272; *R. v. Corbett*, [1988] 1 S.C.R. 670; *R. v. Carroll*, 1999 BCCA 65, 118 B.C.A.C. 219; *R. v. Noël*, 2002 SCC 67, [2002] 3 S.C.R. 433; *R. v. S. (S.)*, 2008 ONCA 140, 232 C.C.C. (3d) 158; *R. v. Post*, 2007 BCCA 123, 217 C.C.C. (3d) 225; *R. v. Tash*, 2013 ONCA 380, 306 O.A.C. 173; *R. v. Kimberley* (2001), 56 O.R. (3d) 18.

Authors Cited

Akhtar, Suhail. "Hearsay: The Denial of Confirmation" (2005), 26 C.R. (6th) 46.

Lacelle, Laurie. "The Role of Corroborating Evidence in Assessing the Reliability of

Hearsay Statements for Substantive Purposes" (1999), 19 C.R. (5th) 376.

Lederman, Sidney N., Alan W. Bryant and Michelle K. Fuerst. *The Law of Evidence in Canada*, 4th ed. Markham, Ont.: LexisNexis, 2014.

Paciocco, David M., and Lee Stuesser. *The Law of Evidence*, 7th ed. Toronto: Irwin Law, 2015.

Stewart, Hamish. "*Khelawon*: The Principled Approach to Hearsay Revisited" (2008), 12 *Can. Crim. L.R.* 95.

Wigmore, John Henry. *A treatise on the Anglo-American System of Evidence in Trials at Common Law*, vol. III, 2nd ed. Boston: Little, Brown and Co., 1923.

APPEAL from a judgment of the British Columbia Court of Appeal (Neilson, Bennett and Garson JJ.A.), 2015 BCCA 195, 323 C.C.C. (3d) 475, 372 B.C.A.C. 77, 640 W.A.C. 77, 20 C.R. (7th) 398, [2015] B.C.J. No. 884 (QL), 2015 CarswellBC 1168 (WL Can.), setting aside the accused's convictions for first degree murder and ordering a new trial. Appeal dismissed, Moldaver and Côté JJ. dissenting.

Margaret A. Mereigh and *David Layton*, for the appellant.

Richard S. Fowler, *Q.C.*, *Eric Purtzki* and *Karin Blok*, for the respondent.

Michael Bernstein, for the intervener the Attorney General of Ontario.

Greg J. Allen, for the intervener the British Columbia Civil Liberties Association.

Louis P. Strezos and *Samuel Walker*, for the intervener the Criminal

Lawyers' Association of Ontario.

The judgment of McLachlin C.J. and Abella, Karakatsanis, Wagner and Brown JJ. was delivered by

KARAKATSANIS J. —

I. Introduction

[1] Hearsay is an out-of-court statement tendered for the truth of its contents. It is presumptively inadmissible because — in the absence of the opportunity to cross-examine the declarant at the time the statement is made — it is often difficult for the trier of fact to assess its truth. Thus hearsay can threaten the integrity of the trial's truth-seeking process and trial fairness. However, hearsay may exceptionally be admitted into evidence under the principled exception when it meets the criteria of necessity and threshold reliability.

[2] In this case, the Crown tendered hearsay from Roy Thielen, an accomplice, implicating Robert Bradshaw, the accused, in two murders. The trial judge ruled that this hearsay statement was admissible. The Court of Appeal allowed the appeal and ordered a new trial.

[3] The following issue arises in this appeal: When can a trial judge rely on corroborative evidence to conclude that the threshold reliability of a hearsay statement is established?

[4] In my view, corroborative evidence may be used to assess threshold reliability if it overcomes the specific hearsay dangers presented by the statement. These dangers may be overcome on the basis of corroborative evidence if it shows, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement. The material aspects are those relied on by the moving party for the truth of their contents.

[5] Here, the hearsay statement was tendered for the truth of Thielen's claim that Bradshaw participated in the murders. The specific hearsay danger raised by Thielen's statement was the inability of the trier of fact to assess whether Thielen lied about Bradshaw's participation in the murders. In addition to the reliability dangers that are inherent in all hearsay statements, there are specific reasons to be concerned that Thielen lied. Thielen had a motive to lie to shift the blame to Bradshaw. Thielen previously said that he had shot both victims, and had not implicated Bradshaw. Furthermore, Thielen was a *Vetrovec* witness, a witness who cannot be trusted to tell the truth due to his unsavoury character (*Vetrovec v. The Queen*, [1982] 1 S.C.R. 811).

[6] The trial judge relied significantly on the existence of corroborative

evidence to deem Thielen's statement admissible. However, the evidence he relied on did not, when considered in the circumstances of the case, show that the only likely explanation was that Thielen was truthful about Bradshaw's involvement in the murders. It did not substantially negate the possibility that Thielen lied about Bradshaw's participation in the murders. While this corroborative evidence may increase the probative value of the re-enactment statement if admitted, it is of no assistance in assessing the statement's threshold reliability. The trial judge therefore erred in relying on this corroborative evidence.

[7] Given that the trier of fact could not adequately test the trustworthiness of Thielen's statement, and there were no circumstances or corroborative evidence showing that this statement was inherently trustworthy, it should not have been admitted into evidence.

[8] For the reasons that follow, I would dismiss the appeal.

II. Background

[9] Laura Lamoureux and Marc Bontkes were killed in March 2009, five days apart. The police suspected that Thielen was involved in both murders. They ran a Mr. Big operation targeting Thielen. In a Mr. Big operation, undercover officers recruit a suspect into a fictitious criminal organization for the purpose of eliciting a confession from him (*R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544, at para. 85). The

officers befriend the suspect and demonstrate that membership in the criminal organization provides rewards and friendship. The suspect discovers that his membership is conditional on a confession to the crime boss, Mr. Big (*Hart*, at paras. 1-2).

[10] As part of the Mr. Big operation, Thielen went on a road trip with Cst. B., an undercover agent, in May 2010. During the road trip, Thielen told Cst. B. that he had shot both Lamoureux and Bontkes.

[11] In July 2010, Thielen met an undercover agent posing as the crime boss. During this meeting, Thielen said that he had shot Lamoureux but that “Paulie” and Michelle Motola had shot Bontkes. “Paulie” was Bradshaw’s nickname.

[12] Later that day, Thielen and Bradshaw met up at the Best Western Hotel. Their conversation was recorded, but only the latter part is audible. Bradshaw said that he had shot Bontkes and had participated in both murders.

[13] Two days later, Thielen and Bradshaw met at Bothwell Park. Bradshaw discussed an unsuccessful attempt to kill Bontkes, which preceded Bontkes’s actual murder in March 2009.

[14] Thielen was arrested on July 30, 2010. He initially denied his involvement in both murders. However, when the police told Thielen that he had been the target of a Mr. Big operation, he then described the murders and identified

unnamed participants. The next day, he made another statement to the police in which he described the murders and directly named Bradshaw. A few days later, Thielen re-enacted the murders for the police officers and implicated Bradshaw in both murders. This re-enactment was recorded in a roughly six-hour video.

[15] Thielen and Bradshaw were initially charged together with two counts of first degree murder. However, Thielen pled guilty to second degree murder before the trial started. Thielen was called as a Crown witness in Bradshaw's trial, but refused to be sworn to give testimony. As a result, he was held in contempt of court. The Crown sought to admit part of the re-enactment video — a hearsay statement — into evidence.

III. Decisions Below

[16] Following a *voir dire*, Greyell J. admitted the re-enactment video into evidence (2012 BCSC 2025). He found that this hearsay statement was necessary and sufficiently reliable to be admitted. In finding that the statement was sufficiently reliable, he noted that the re-enactment was voluntary, incriminating, and was made after Thielen received legal advice. The statement was also corroborated by extrinsic evidence. However, given Thielen's unsavoury character, the trial judge determined that a strong *Vetrovec* warning regarding the re-enactment video was required.

[17] The British Columbia Court of Appeal held that the trial judge erred in

admitting the re-enactment video because it was not sufficiently reliable. The court noted that the trial judge relied significantly on evidence that did not implicate Bradshaw in the murders as corroboration. Furthermore, in the recorded conversations at the Best Western Hotel and Bothwell Park, Bradshaw did not implicate himself in the murders to the degree that Thielen implicated Bradshaw in the re-enactment. The British Columbia Court of Appeal concluded that the trial judge erred in finding that threshold reliability was established. It allowed the appeal, set aside the guilty verdicts, and ordered a new trial (2015 BCCA 195, 323 C.C.C. (3d) 475).

IV. Analysis

A. *Legal Principles*

[18] Hearsay can exceptionally be admitted into evidence if it is necessary and sufficiently reliable. This appeal raises the following question: When can a trial judge rely on corroborative evidence to conclude that the threshold reliability of a hearsay statement is established? To answer, I turn to the rationale for the rule against hearsay and for the principled exception to this rule.

(1) The Principled Exception to the Hearsay Rule

[19] The truth-seeking process of a trial is predicated on the presentation of evidence in court. Litigants make their case by presenting real evidence and *viva voce*

testimony to the trier of fact. In court, witnesses give testimony under oath or solemn affirmation. The trier of fact directly observes the real evidence and hears the testimony, so there is no concern that the evidence was recorded inaccurately. This process gives the trier of fact robust tools for testing the truthfulness of evidence and assessing its value. To determine whether a witness is telling the truth, the trier of fact can observe the witness's demeanor and assess whether the testimony withstands testing through cross-examination (*R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 35).

[20] Hearsay is an out-of-court statement tendered for the truth of its contents. Because hearsay is declared outside of court, it is often difficult for the trier of fact to assess whether it is trustworthy. Generally, hearsay is not taken under oath, the trier of fact cannot observe the declarant's demeanor as she makes the statement, and hearsay is not tested through cross-examination (*R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at p. 764). Allowing a trier of fact to consider hearsay can therefore compromise trial fairness and the trial's truth-seeking process. The hearsay statement may be inaccurately recorded, and the trier of fact cannot easily investigate the declarant's perception, memory, narration, or sincerity (*Khelawon*, at para. 2). As Fish J. explains in *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520:

> First, the declarant may have *misperceived* the facts to which the hearsay statement relates; second, even if correctly perceived, the relevant facts may have been *wrongly remembered*; third, the declarant may have narrated the relevant facts in an *unintentionally misleading manner*; and finally, the declarant may have *knowingly made a false assertion*. The opportunity to fully probe these potential sources of error

> arises only if the declarant is present in court and subject to cross-examination. [Emphasis in original; para. 32.]

[21] Given the dangers that hearsay evidence presents, "[t]he fear is that untested hearsay evidence may be afforded more weight than it deserves" (*Khelawon*, at para. 35). Therefore, while all relevant evidence is generally admissible, hearsay is presumptively inadmissible (*Khelawon*, at paras. 2-3).

[22] However, some hearsay evidence "presents minimal dangers and its *exclusion*, rather than its admission, would impede accurate fact finding" (*Khelawon*, at para. 2 (emphasis in original)). Thus, categorical exceptions to the rule excluding hearsay developed through the common law over time. These traditional exceptions are based on admitting types of hearsay statements that were considered necessary and reliable, such as dying declarations (*Khelawon*, at para. 42; *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720, at para. 20; J. H. Wigmore, *Evidence in Trials at Common Law* (2nd ed. 1923), vol. III, at p. 152).

[23] Eventually, a more flexible approach to hearsay developed through the jurisprudence. Under the principled exception, hearsay can exceptionally be admitted into evidence when the party tendering it demonstrates that the twin criteria of necessity and threshold reliability are met on a balance of probabilities (*Khelawon*, at para. 47).

[24] By only admitting necessary and sufficiently reliable hearsay, the trial

judge acts as an evidentiary gatekeeper. She protects trial fairness and the integrity of the truth-seeking process (*Youvarajah*, at paras. 23 and 25). In criminal proceedings, the threshold reliability analysis has a constitutional dimension because the difficulties of testing hearsay evidence can threaten the accused's right to a fair trial (*Khelawon*, at paras. 3 and 47). Even when the trial judge is satisfied that the hearsay is necessary and sufficiently reliable, she has discretion to exclude this evidence if its prejudicial effect outweighs its probative value (*Khelawon*, at para. 49).

[25] In this case, the necessity of the re-enactment evidence is established because Thielen refused to testify. Thus, its admissibility rests on whether threshold reliability is met.

(2) Threshold Reliability

[26] To determine whether a hearsay statement is admissible, the trial judge assesses the statement's *threshold* reliability. Threshold reliability is established when the hearsay "is sufficiently reliable to overcome the dangers arising from the difficulty of testing it" (*Khelawon*, at para. 49). These dangers arise notably due to the absence of contemporaneous cross-examination of the hearsay declarant before the trier of fact (*Khelawon*, at paras. 35 and 48). In assessing threshold reliability, the trial judge must identify the specific hearsay dangers presented by the statement and consider any means of overcoming them (*Khelawon*, at paras. 4 and 49; *R. v. Hawkins*, [1996] 3 S.C.R. 1043, at para. 75). The dangers relate to the difficulties of assessing the declarant's perception, memory, narration, or sincerity, and should be

defined with precision to permit a realistic evaluation of whether they have been overcome.

[27] The hearsay dangers can be overcome and threshold reliability can be established by showing that (1) there are adequate substitutes for testing truth and accuracy (procedural reliability) or (2) there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability) (*Khelawon*, at paras. 61-63; *Youvarajah*, at para. 30).

[28] *Procedural* reliability is established when "there are adequate substitutes for testing the evidence", given that the declarant has not "state[d] the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination" (*Khelawon*, at para. 63). These substitutes must provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the hearsay statement (*Khelawon*, at para. 76; *Hawkins*, at para. 75; *Youvarajah*, at para. 36). Substitutes for traditional safeguards include a video recording of the statement, the presence of an oath, and a warning about the consequences of lying (*B. (K.G.)*, at pp. 795-96). However, some form of cross-examination of the declarant, such as preliminary inquiry testimony (*Hawkins*) or cross-examination of a recanting witness at trial (*B. (K.G.)*; *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764), is usually required (*R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517, at paras. 92 and 95). In this respect, I disagree with the Court of Appeal's categorical assertion that safeguards relevant to assessing procedural reliability are only "those in place when the statement is taken" (para. 30).

Some safeguards imposed at trial, such as cross-examination of a recanting witness before the trier of fact, may provide a satisfactory basis for testing the evidence.

[29] However, jury warnings about the dangers of hearsay evidence or *Vetrovec* testimony do not provide adequate substitutes for traditional safeguards. Instructing a jury on *how* to evaluate a statement that it lacks the *means* to evaluate does not address the hearsay dangers that underlie the exclusionary rule. Furthermore, *Vetrovec* warnings are designed to address concerns about a witness who is inherently untrustworthy, despite the opportunity to cross-examine in court. They are not tools for assessing the truth and accuracy of a hearsay statement in the absence of contemporaneous cross-examination.

[30] A hearsay statement is also admissible if *substantive* reliability is established, that is, if the statement is inherently trustworthy (*Youvarajah*, at para. 30; *R. v. Smith*, [1992] 2 S.C.R. 915, at p. 929). To determine whether the statement is inherently trustworthy, the trial judge can consider the circumstances in which it was made and evidence (if any) that corroborates or conflicts with the statement (*Khelawon*, at paras. 4, 62 and 94-100; *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298, at para. 55).

[31] While the standard for substantive reliability is high, guarantee "as the word is used in the phrase 'circumstantial guarantee of trustworthiness', does not require that reliability be established with absolute certainty" (*Smith*, at p. 930). Rather, the trial judge must be satisfied that the statement is "so reliable that

contemporaneous cross-examination of the declarant would add little if anything to the process" (*Khelawon*, at para. 49). The level of certainty required has been articulated in different ways throughout this Court's jurisprudence. Substantive reliability is established when the statement "is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken" (*Smith*, at p. 933); "under such circumstances that even a sceptical caution would look upon it as trustworthy" (*Khelawon*, at para. 62, citing Wigmore, at p. 154); when the statement is so reliable that it is "unlikely to change under cross-examination" (*Khelawon*, at para. 107; *Smith*, at p. 937); when "there is no real concern about whether the statement is true or not because of the circumstances in which it came about" (*Khelawon*, at para. 62); when the only likely explanation is that the statement is true (*U. (F.J.)*, at para. 40).

[32] These two approaches to establishing threshold reliability may work in tandem. Procedural reliability and substantive reliability are not mutually exclusive (*Khelawon*, at para. 65) and "factors relevant to one can complement the other" (*Couture*, at para. 80). That said, the threshold reliability standard always remains high — the statement must be sufficiently reliable to overcome the specific hearsay dangers it presents (*Khelawon*, at para. 49). For example, in *U. (F.J.)*, where the Court drew on elements of substantive and procedural reliability to justify the admission of a hearsay statement, both cross-examination of the recanting witness and corroborative evidence were required to meet threshold reliability, though neither on its own would have sufficed (see also *Blackman*, at paras. 37-52). I know of no

other example from this Court's jurisprudence of substantive and procedural reliability complementing each other to justify the admission of a hearsay statement. Great care must be taken to ensure that this combined approach does not lead to the admission of statements despite insufficient procedural safeguards and guarantees of inherent trustworthiness to overcome the hearsay dangers.

(3) Corroborative Evidence and Substantive Reliability

[33] With these principles in mind, I turn to the issue at the heart of this appeal: When and how can a trial judge rely on corroborative evidence to conclude that substantive reliability is established?

[34] The Crown submits that threshold reliability involves a consideration of all the corroborative evidence that supports the truthfulness of a statement, including evidence that does not implicate the accused, or directly confirm the disputed aspect of the statement. The Crown explains that this approach to corroboration is aligned with other areas of the law, including corroboration when assessing the ultimate reliability of hearsay statements, the ultimate reliability of unsavoury witness statements, and the threshold reliability of Mr. Big statements.

[35] In contrast, the respondent Bradshaw submits that the trial judge can only consider evidence that corroborates the *purpose* for which a hearsay statement is tendered, and notes that the re-enactment statement was tendered to implicate him in the murders.

[36] In my view, the Crown's position that "a uniform definition of confirmatory evidence" should be employed "at both the threshold and ultimate reliability stages" is untenable because it misconstrues the relationship between threshold and ultimate reliability (A.F., at para. 96). It also misconstrues the relationship between threshold reliability and probative value.

[37] In *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, this Court held that corroborative evidence could not be considered in assessing the threshold reliability of hearsay. This bright-line rule was created to ensure that the trial judge did not invade the province of the trier of fact by pre-determining a hearsay statement's ultimate reliability (para. 217).[1]

[38] *Khelawon* overturned *Starr* on this point. Charron J. explained that, in appropriate cases, corroborative or conflicting evidence can be considered in assessing threshold reliability (paras. 93-100). *Khelawon* established that "an item of evidence [that] goes to the trustworthiness of the statement . . . should no longer be excluded simply on the basis that it is corroborative in nature" (*Blackman*, at para. 55 (emphasis added)). But "[i]t is important to emphasize that *Khelawon* did not broaden the scope of the admissibility inquiry; it merely refocused it" (*Blackman*, at para. 54). While *Khelawon* overturned the prohibition on considering corroborative evidence in the admissibility inquiry, it reaffirmed the distinction between threshold and ultimate

[1] This rule was criticized for being antithetical to the flexible nature of the principled exception to hearsay (H. Stewart, "*Khelawon*: The Principled Approach to Hearsay Revisited" (2008), 12 *Can. Crim. L.R.* 95, at p. 105) and for leading to the exclusion of manifestly reliable hearsay evidence (S. Akhtar, "Hearsay: The Denial of Confirmation" (2005), 26 C.R. (6th) 46).

reliability (para. 50; *Blackman*, at para. 56).

[39] The distinction between threshold and ultimate reliability, while "a source of confusion", is crucial (*Khelawon*, at para. 50). Threshold reliability concerns admissibility, whereas ultimate reliability concerns reliance (*Khelawon*, at para. 3). When threshold reliability is based on the inherent trustworthiness of the statement, the trial judge and the trier of fact may both assess the trustworthiness of the hearsay statement. However, they do so for different purposes (*Khelawon*, at paras. 3 and 50). In assessing ultimate reliability, the trier of fact determines whether, and to what degree, the statement should be believed, and thus relied on to decide issues in the case (*Khelawon*, at para. 50; D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 35-36). This determination is made "in the context of the entirety of the evidence" including evidence that corroborates the accused's guilt or the declarant's overall credibility (*Khelawon*, at para. 3).

[40] In contrast, in assessing threshold reliability, the trial judge's preoccupation is whether in-court, contemporaneous cross-examination of the hearsay declarant would add anything to the trial process (*Khelawon*, at para. 49; see also H. Stewart, "*Khelawon*: The Principled Approach to Hearsay Revisited" (2008), 12 *Can. Crim. L.R.* 95, at p. 106). At the threshold stage, the trial judge must decide on the *availability* of competing explanations (substantive reliability) and whether the trier of fact will be in a position to choose between them by means of adequate substitutes for contemporaneous cross-examination (procedural reliability). For this reason,

where procedural reliability is concerned with whether there is a satisfactory basis to rationally *evaluate* the statement, substantive reliability is concerned with whether the circumstances, and any corroborative evidence, provide a rational basis to *reject* alternative explanations for the statement, other than the declarant's truthfulness or accuracy.

[41] In short, in the hearsay context, the difference between threshold and ultimate reliability is qualitative, and not a matter of degree, because the trial judge's inquiry serves a distinct purpose. In assessing substantive reliability, the trial judge does not usurp the trier of fact's role. Only the trier of fact assesses whether the hearsay statement should ultimately be relied on and its probative value.

[42] To preserve the distinction between threshold and ultimate reliability and to prevent the *voir dire* from overtaking the trial, "[t]here must be a distinction between evidence that is admissible on the *voir dire* to determine necessity and reliability, and the evidence that is admissible in the main trial" (Stewart, at p. 111; see also L. Lacelle, "The Role of Corroborating Evidence in Assessing the Reliability of Hearsay Statements for Substantive Purposes" (1999), 19 C.R. (5th) 376; *Blackman*, at paras. 54-57). As Charron J. explained in *Khelawon*, "the trial judge must remain mindful of the limited role that he or she plays in determining admissibility — it is crucial to the integrity of the fact-finding process that the question of ultimate reliability not be pre-determined on the admissibility *voir dire*" (para. 93). Similarly, she noted in *Blackman*: "The admissibility *voir dire* must

remain focused on the hearsay evidence in question. It is not intended, and cannot be allowed by trial judges, to become a full trial on the merits" (para. 57). Limiting the use of corroborative evidence as a basis for admitting hearsay also mitigates the risk that inculpatory hearsay will be admitted simply because evidence of the accused's guilt is strong. The stronger the case against the accused, the easier it would be to admit flawed and unreliable hearsay against him. The limited inquiry into corroborative evidence flows from the fact that, at the threshold reliability stage, corroborative evidence is used in a manner that is qualitatively distinct from the manner in which the trier of fact uses it to assess the statement's ultimate reliability. As Lederman, Bryant and Fuerst explain, at the threshold reliability stage,

> [t]he use of corroborative evidence should be directed to the reliability of the hearsay. Certain items of evidence can take on a corroborative character and be supportive of the Crown's theory when considered in the context of the evidence as a whole. Such evidence relates to the merits of the case rather than to the limited focus of the *voir dire* in assessing the trustworthiness of the statement and is properly left to the ultimate trier of fact.

(S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (4th ed. 2014), at §6.140)

[43] Thus, the Crown's argument that the approach to corroboration when assessing the ultimate reliability of *Vetrovec* testimony is analogous to the approach for assessing the threshold reliability of hearsay is also fundamentally flawed. Further, an unsavoury witness, unlike a hearsay declarant, is a witness at trial and can be cross-examined. The particular dangers posed by the absence of cross-examination

make it necessary to distinguish between the *Vetrovec* and hearsay approaches to corroborative evidence. As a result, I do not accept the Crown's submissions in this regard.

[44] In my view, the rationale for the rule against hearsay and the jurisprudence of this Court make clear that not all evidence that corroborates the declarant's credibility, the accused's guilt, or one party's theory of the case, is of assistance in assessing threshold reliability. A trial judge can only rely on corroborative evidence to establish threshold reliability if it shows, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement. If the hearsay danger relates to the declarant's sincerity, truthfulness will be the issue. If the hearsay danger is memory, narration, or perception, accuracy will be the issue.

[45] First, corroborative evidence must go to the truthfulness or accuracy of the *material aspects* of the hearsay statement (see *Couture*, at paras. 83-84; *Blackman*, at para. 57). Hearsay is tendered for the truth of its contents and corroborative evidence must go to the truthfulness or accuracy of the content of the hearsay statement that the moving party seeks to rely on. Because threshold reliability is about admissibility of evidence, the focus must be on the aspect of the statement that is tendered for its truth.[2] The function of corroborative evidence at the threshold

[2] Ensuring that corroborative evidence goes to the truthfulness or accuracy of the material aspects of the hearsay statement is particularly important when the hearsay statement is lengthy. In this case,

reliability stage is to mitigate the need for cross-examination, not generally, but *on the point* that the hearsay is tendered to prove.

[46] A similar approach was taken in restricting the type of corroborative evidence that can be relied on to establish the threshold reliability of Mr. Big statements. In *Hart*, Moldaver J. (writing for the majority) concluded that there was a "complete lack of confirmatory evidence" (para. 143), disregarding corroborative evidence that merely confirmed the accused's presence at the scene of the crime when it took place, because the Mr. Big statement was tendered to show that the accused killed his daughters, not that he was present at the scene of the crime. As Moldaver J. explained:

> The issue has always been whether the respondent's daughters drowned accidentally or were murdered. There was never any question that the respondent was present when his daughters entered the water. All of the objectively verifiable details of the respondent's confession (e.g., his knowledge of the location of the drowning) flow from his acknowledged presence at the time the drowning occurred. [para. 143]

Thus, in assessing the threshold reliability of Mr. Big statements, the trial judge considers only corroborative evidence that goes to the truthfulness or accuracy of the material aspects of the statement.

[47] Second, at the threshold reliability stage, corroborative evidence must

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for example, a 200-page transcript from the re-enactment video was given to the jury. If the trial judge were entitled to consider any evidence that corroborated *any* part of this statement in assessing its admissibility, the *voir dire* could become a trial within a trial (*Blackman*, at para. 57).

work in conjunction with the circumstances to overcome the *specific hearsay dangers* raised by the tendered statement. When assessing the admissibility of hearsay evidence, "the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility" (*Khelawon*, at para. 4). Thus, to overcome the hearsay dangers and establish substantive reliability, corroborative evidence must show that the material aspects of the statement are unlikely to change under cross-examination (*Khelawon*, at para. 107; *Smith*, at p. 937). Corroborative evidence does so if its combined effect, when considered in the circumstances of the case, shows that the *only likely explanation* for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement (see *U. (F.J.)*, at para. 40). Otherwise, alternative explanations for the statement that could have been elicited or probed through cross-examination, and the hearsay dangers, persist.

[48] In assessing substantive reliability, the trial judge must therefore identify alternative, even speculative, explanations for the hearsay statement (*Smith*, at pp. 936-37). Corroborative evidence is of assistance in establishing substantive reliability if it shows that these alternative explanations are unavailable, if it "eliminate[s] the hypotheses that cause suspicion" (S. Akhtar, "Hearsay: The Denial of Confirmation" (2005), 26 C.R. (6th) 46, at p. 56 (emphasis deleted)). In contrast, corroborative evidence that is "equally consistent" with the truthfulness and accuracy of the statement as well as another hypothesis is of no assistance (*R. v. R. (D.)*, [1996] 2 S.C.R. 291, at paras. 34-35). Adding evidence that is supportive of the truth of the

statement, but that is also consistent with alternative explanations, does not add to the statement's inherent trustworthiness.

[49] While the declarant's truthfulness or accuracy must be more likely than any of the alternative explanations, this is not sufficient. Rather, the fact that the threshold reliability analysis takes place on a balance of probabilities means that, based on the circumstances and any evidence led on *voir dire*, the trial judge must be able to rule out any plausible alternative explanations on a balance of probabilities.

[50] To be relied on for the purpose of rejecting alternative hypotheses for the statement, corroborative evidence must itself be trustworthy. Untrustworthy corroborative evidence is therefore not relevant to the substantive reliability inquiry (see *Khelawon*, at para. 108). Trustworthiness concerns are particularly acute when the corroborative evidence is a statement, rather than physical evidence (see Lacelle, at p. 390).

[51] The jurisprudence of this Court provides two examples of corroborative evidence that could be relied on to establish threshold reliability.

[52] In *R. v. Khan*, [1990] 2 S.C.R. 531, this Court held that a hearsay statement from a child regarding a sexual assault was admissible, notably because it was corroborated by a semen stain on the child's clothes (p. 548). The child alleged that she had been sexually assaulted at the doctor's office. She was only alone in the office for a brief period and "did not come into contact with any other male person

during [that] period" (p. 534). Given the semen stain and the circumstances of the case, the only likely hypothesis was that the child had not lied about or misperceived the assault. The semen stain directly responded to the hearsay dangers.

[53] *Khan* can be contrasted with *R. (D.)*, where this Court held that a child's hearsay regarding a sexual assault by her father was inadmissible, although there was evidence that supported her statement: bloodstained underpants. This corroborative evidence was consistent with more than one hypothesis, both the possibility that her brother had assaulted her and the possibility that her father had assaulted her, and thus was of no assistance in assessing threshold reliability (paras. 34-35).

[54] In *U. (F.J.)*, a hearsay statement was admissible in part because it was corroborated by a strikingly similar statement. The strikingly similar statement was capable of supporting the threshold reliability of the hearsay statement because the Court was able to rule out the possibilities that the similarity was purely coincidental, that the second declarant had heard the first statement and modeled her statement off of it, and that either statement was the result of collusion or outside influence. Importantly, Lamer C.J. was concerned with rejecting, not the hypothesis that the second statement was *in fact* based on the first, but the possibility that it *could have been* based on the first. He concluded that the only likely explanation for the similarity between the two statements was the truthfulness of the hearsay declarant (*U. (F.J.)*, at paras. 40 and 53).

[55] In contrast, the corroborative evidence in *Khelawon*, bruises and garbage

bags filled with clothes, was not capable of bolstering the threshold reliability of a hearsay statement regarding an assault. Charron J. explained that the bruises on the complainant's body could have been caused by a fall rather than an assault. And while the complainant had alleged that the accused had put his clothes in garbage bags, Charron J. reasoned that the complainant "could have filled those bags himself" (para. 107). Given that the corroborative evidence was consistent with many hypotheses, it did not show that the only likely explanation was the declarant's truthfulness about the assault.

[56] Clarifying when corroborative evidence can be relied on to establish substantive reliability is not a departure from the functional approach to the admissibility of hearsay. There is no bright-line rule restricting the type of corroborative evidence that a trial judge can rely on to determine that substantive reliability is established. In all cases, the trial judge must consider the specific hearsay dangers raised by the statement, the corroborative evidence as a whole, and the circumstances of the case, to determine whether the corroborative evidence (if any) can be relied on to establish substantive reliability.

[57] In sum, to determine whether corroborative evidence is of assistance in the substantive reliability inquiry, a trial judge should

1. identify the material aspects of the hearsay statement that are tendered for their truth;

2. identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case;

3. based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement; and

4. determine whether, given the circumstances of the case, the corroborative evidence led at the *voir dire* rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.

[58] With these principles in mind, I now turn to the trial judge's assessment of the threshold reliability of the re-enactment statement.

B. *Application*

[59] In concluding that the threshold reliability of the re-enactment statement was established, the trial judge relied on the fact that the statement was: (1) voluntary; (2) incriminating; (3) made after Thielen received legal advice; (4) a detailed, free-flowing narrative; and (5) corroborated by extrinsic evidence. As a result, he was satisfied that threshold reliability was established.

[60] I conclude that the trial judge erred in relying significantly on corroborative evidence that did not show, in the circumstances of the case, that the

only likely explanation was Thielen's truthfulness about the material aspect of the re-enactment statement. Given this error, the trial judge's admissibility ruling is not entitled to deference. This Court must therefore determine whether the hearsay re-enactment statement meets the reliability threshold. I conclude that it does not.

(1) The Trial Judge's Reliance on Corroborative Evidence

[61] The trial judge relied significantly on the existence of corroborative evidence to find that the re-enactment statement was admissible. In particular, he relied on

- forensic evidence that corroborated Thielen's detailed description of the murders (para. 45);
- Thielen's accurate description of the weather on the nights of the murders (para. 46);
- evidence of a conversation between Bontkes and Motola on the night Bontkes died (para. 47) (Motola was a third accomplice in Bontkes's death and pled guilty to manslaughter in separate proceedings.);
- evidence that Bradshaw may have been present when Motola and Thielen discussed their plan to kill Bontkes (para. 52);

- call records between one of the murder victims and Bradshaw on the night of one of the murders, and between Thielen and Bradshaw on the night of the other murder (para. 51); and

- Bradshaw's admissions at the Best Western and Bothwell Park (paras. 48-49).

[62] As I shall explain, this corroborative evidence is of no assistance in the threshold reliability inquiry.

[63] The first step in assessing the substantive reliability of a hearsay statement is identifying the material aspects of the statement. The re-enactment statement was tendered for the truth of Thielen's claim that Bradshaw participated in the murders. Given the purpose for which the statement was tendered, the material aspect of the statement was Thielen's assertion that Bradshaw participated in the murders.

[64] As to the specific hearsay dangers presented by the statement, a number of common hearsay dangers were not in play in this case. The accuracy of the statement is not at issue because it was video-recorded. While the difficulties of investigating a hearsay declarant's perception and memory are often dangers associated with hearsay evidence, these dangers are minimal in this case because the

statement was not tendered to provide details of how the murders unfolded, but rather to prove that Bradshaw participated in the murders. It is hardly plausible that Thielen would have been mistaken — or wrongly remembered — whether Bradshaw participated in the murders.

[65] Therefore, the specific hearsay danger presented by the re-enactment statement is the difficulty of testing Thielen's sincerity with regards to Bradshaw's participation in the murders. This danger is inherent in all hearsay statements due to the inability to test for and detect the hearsay declarant's insincerity through contemporaneous, in-court cross-examination. Additionally, in this case, there are serious reasons to be concerned that Thielen lied about Bradshaw's participation in the murders.

[66] First, Thielen gave inconsistent statements about Bradshaw's participation in the murders. In May 2010, Thielen told Cst. B. that he shot Lamoureux and Bontkes, and he did not implicate Bradshaw. When he met with the crime boss in July, Thielen implicated Bradshaw in the murders. When he was arrested, Thielen initially denied his own involvement in both murders. After the police told Thielen that he had been the target of a Mr. Big operation, he admitted that he had been involved in the murders and he implicated Bradshaw.

[67] Second, Thielen had a significant motive to lie about Bradshaw's participation in the murders. Like the hearsay declarant in *Youvarajah*, Thielen "had a strong incentive to minimize his role in the crime and to shift responsibility" to his

accomplice (para. 33). Thielen had a motive to implicate Bradshaw to reduce his own culpability, particularly given his admissions to Cst. B. Although Thielen was charged with the first degree murder of Lamoureux and Bontkes, he ultimately pled guilty to second degree murder. Thielen's motive to lie is relevant in assessing the reliability of his hearsay statement (*Blackman*, at para. 42).

[68] Third, Thielen was a *Vetrovec* witness. In the trial judge's words:

> . . . there is already considerable evidence of Mr. Thielen's unsavoury character before the jury. He has been described by a number of witnesses as a drug dealer, a thug, an enforcer and a murderer. He is clearly a person about whom a strong *Vetrovec* warning is appropriate. [para. 60 (CanLII)]

[69] Given that a *Vetrovec* witness cannot be trusted to tell the truth, even under oath (*R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 3), establishing that hearsay evidence from a *Vetrovec* witness is inherently trustworthy will be extremely challenging. However, there is no blanket prohibition on admitting hearsay from *Vetrovec* witnesses. In all cases, the trial judge must assess whether the hearsay dangers have been overcome. That said, the strong *Vetrovec* warning indicates that the dangers presented by the hearsay statement here are particularly severe.

[70] The third step in assessing a hearsay statement's substantive reliability is considering alternative explanations for the hearsay statement that arise from the particular circumstances of the case. Given the hearsay dangers presented by the re-enactment statement, an alternative explanation is that Thielen lied about Bradshaw's

participation in the murders.

[71] With this in mind, corroborative evidence will only assist in establishing the substantive reliability of the re-enactment statement if it shows, when considered in the circumstances of the case, that the only likely explanation is that Thielen was truthful about Bradshaw's involvement in the murders. When the hearsay danger is sincerity, substantive reliability is only established when the circumstances and corroborative evidence show that the possibility that the declarant lied is substantially negated, that "even a sceptical caution would look upon [the statement] as trustworthy" (Wigmore, at p. 154; *Khelawon*, at para. 62; *Couture*, at para. 101). Corroborative evidence or circumstances showing that the statement is inherently trustworthy are required to rebut the presumption of inadmissibility.

[72] The forensic evidence, weather evidence, and evidence of a conversation between Bontkes and Motola did not implicate Bradshaw in the murders. This evidence is of no assistance in determining whether Thielen was being truthful about Bradshaw's involvement in the murders. The fact that Thielen accurately described the way the murders unfolded and the weather on the nights of the murders does not mitigate the danger that he lied about Bradshaw's participation. As an accomplice, Thielen was present at the scenes of the crimes and was well positioned to fabricate a story implicating Bradshaw (see *R. v. Smith*, 2009 SCC 5, [2009] 1 S.C.R. 146, at para. 15; *R. v. Salah*, 2015 ONCA 23, 319 C.C.C. (3d) 373, at para. 116).

[73] The remaining corroborative evidence relied on by the trial judge was

probative of Bradshaw's involvement in the murders. It will be for the trier of fact to determine whether or not this evidence increases the likelihood that Bradshaw is guilty. The call records show that Bradshaw may have spoken to Lamoureux and Thielen on the evenings in question, and the evidence of Bradshaw's presence when the plan to kill Bontkes was discussed shows that Bradshaw may have been aware of this plan. However, this evidence, viewed in the circumstances, did not assist in effectively ruling out the alternative explanation for the re-enactment statement — the danger that Thielen lied about Bradshaw's involvement in the murders.

[74] Finally, the recorded conversations at the Best Western Hotel and Bothwell Park provide direct evidence of Bradshaw's involvement in the murders. However, as I shall explain, there are concerns about the trustworthiness of these statements. As mentioned above, corroborative evidence must itself be trustworthy to be relied on to establish the threshold reliability of a hearsay statement (see *Khelawon*, at para. 108).

[75] When Thielen was the target of a Mr. Big operation, undercover officers encouraged him to meet up with Bradshaw to clarify their respective roles in the murders. On July 21, 2010, Thielen and Bradshaw met in a room at the Best Western Hotel. Their conversation was recorded. The first eight minutes of the recorded conversation are inaudible because Bradshaw and Thielen were in the bathroom, while the tap was running. Cst. B. called Thielen to get him to leave the bathroom so the conversation could be captured. Once Bradshaw and Thielen moved into the main

room, Bradshaw said that he had shot Bontkes and participated in both murders.

[76] A few days later, Thielen and Bradshaw met at Bothwell Park. Their conversation was recorded again. During their meeting, Bradshaw discussed their unsuccessful attempt to kill Bontkes, before Bontkes was actually murdered in March 2009.

[77] While this evidence provides some evidence of guilt, it does not assist, for several reasons, in effectively ruling out the possibility that Thielen lied about Bradshaw's involvement in the murders.

[78] The Best Western and Bothwell Park evidence was collected in a Mr. Big operation. Undercover officers were orchestrating the circumstances to obtain an admission from Thielen and then from Bradshaw. As the trial judge explained, the Best Western and Bothwell Park "meetings were set up by Constable B. with Mr. Thielen's cooperation, during the course of the Mr. Big operation, in an endeavour to elicit evidence of Mr. Bradshaw's possible participation in the murders of Ms. Lamoureux and Mr. Bontkes" (para. 43). Indeed, Cst. B. explained that he "wanted Mr. Thielen to get . . . the truth from Mr. Bradshaw" (examination in chief, A.R., vol. V, at p. 134) and that he gave Thielen instructions on what was required during his conversation with Bradshaw at the Best Western Hotel.

[79] In Mr. Big operations, parties believe they are dealing with a criminal organization. They are often induced and threatened. As this Court noted in *Hart*:

"Suspects confess to Mr. Big during pointed interrogations in the face of powerful inducements and sometimes veiled threats — and this raises the spectre of unreliable confessions" (para. 5). The Mr. Big operation raises concerns about Thielen's motivation and role in these conversations, and the trustworthiness of Bradshaw's statements at the Best Western and Bothwell Park.

[80] As well, the initial part of the Best Western conversation was inaudible because Thielen and Bradshaw were in the bathroom and a tap was running. This raises questions about what followed. As I have said, the trial judge is required to consider alternative, even speculative, explanations that could account for the hearsay statement (*Smith* (1992), at pp. 936-37). Indeed, while this evidence was not before the trial judge at the time of his ruling, Bradshaw subsequently testified that, while the tap was running, Thielen asked him to lie and say that he had been involved in Lamoureux and Bontkes's murders.

[81] Furthermore, in the Bothwell Park conversation, Bradshaw primarily implicated himself in the attempted murder of Bontkes, rather than in Bontkes's actual murder.

[82] Of course, as the accused's admissions, the recording of Bradshaw's own words are admissible against him quite independently of whether Thielen's re-enactment video is admitted. Indeed, Bradshaw's admissions at the Best Western and Bothwell Park were admitted into evidence for the jury's consideration. That is not challenged on appeal.

[83] However, these admissions are not of such a nature to justify the admission of Thielen's highly suspect hearsay statements implicating Bradshaw. They do not, when considered in the circumstances and with the other evidence led at the *voir dire*, "substantially negate the possibility that the [hearsay] declarant was untruthful" about Bradshaw's involvement in the murders (*Smith* (1992), at p. 933). Bradshaw's Best Western admission does not, in the circumstances, demonstrate that Thielen's statement would be unlikely to change under cross-examination (*Khelawon*, at para. 107; *Smith* (1992), at p. 937).

[84] In *U. (F.J.)*, this Court held that "instances of statements so strikingly similar as to bolster their reliability will be rare" (para. 45). Lamer C.J. explained that a similar statement cannot bolster the reliability of a hearsay statement unless it is unlikely that "[t]he second declarant knew of the contents of the first statement, and based his or her statement in whole or in part on this knowledge" and unlikely that the similarity is due to outside influence (para. 40). Thielen was present for Bradshaw's Best Western and Bothwell Park admissions, and could have based his re-enactment statement on this knowledge. Furthermore, outside influence cannot be rejected as a possible explanation for Bradshaw's Best Western and Bothwell Park admissions. Indeed, according to Cst. B.'s testimony, he played a role in orchestrating the admissions. The Best Western and Bothwell Park statements were therefore of no assistance in establishing the inherent trustworthiness of the re-enactment statement.

[85] The evidence led at the admissibility *voir dire* as corroborative of

Thielen's statement is unlike the semen stain in *Khan*, or the strikingly similar statement in *U. (F.J.)*. When considered in the circumstances of the case, this evidence does not show that the only likely explanation for the statement was Thielen's truthfulness about Bradshaw's involvement in the murders. Taken as a whole, this evidence therefore did not assist in establishing threshold reliability. While much of the evidence relied on by the trial judge was probative of Bradshaw's guilt, and thus could be considered by the trier of fact in the trial on the merits, none of it was of assistance in establishing the threshold reliability of the re-enactment statement. Furthermore, as noted above, the evidence and circumstances here showed that there were serious reasons to be concerned that Thielen lied.

(2) Threshold Reliability of the Re-enactment Statement

[86] Given the trial judge's flawed approach to corroborative evidence, this Court must determine whether the threshold reliability of the hearsay re-enactment statement is nonetheless established. Are the serious hearsay dangers presented by the re-enactment statement overcome?

[87] To respect the role of the trier of fact in assessing trustworthiness, I consider first the statement's procedural reliability (*Khelawon*, at para. 92). There were few means for the trier of fact to determine whether Thielen lied about Bradshaw's participation in the murders. While the accuracy of the reporting of the statement is not at issue in this case because it was video-taped, Thielen was not cross-examined at the time the statement was taken or subsequently. Thielen's

statement was not taken under oath and he was not warned of the consequences of lying before the statement was taken. Most importantly, he was not available to be cross-examined at trial. The trier of fact evidently did not possess a "sufficient substitute basis for testing the evidence" in the absence of cross-examination (*Khelawon*, at para. 105).

[88] The trial judge considered "possible safeguards that [could] be put in place by the Crown and the court to overcome [the hearsay] dangers" (para. 19). He explained that Thielen's inconsistencies could be put into evidence and that the Crown had agreed to call the police officers to whom Thielen gave the different statements, in order to allow the defence to cross-examine them on these inconsistencies (para. 59). He also noted that a strong *Vetrovec* warning would be given (para. 60).

[89] Putting Thielen's inconsistencies into evidence did not provide the jury with a sufficient substitute basis for evaluating the truth of the re-enactment statement. And while cross-examining the *recipient* of a hearsay statement may be helpful if there are concerns about the recipient's credibility or reliability (*Blackman*, at para. 50), there were no such concerns in this case. As the Criminal Lawyers' Association of Ontario (an intervener) notes, "where there is no doubt about what was actually said or under what circumstances — if the statement is video-taped, for instance — then cross-examination of the recipient does nothing to help assess whether the *content* of the hearsay is true" (I.F., at para. 32 (emphasis in original)).

Furthermore, as explained above, jury warnings about the dangers of hearsay evidence and *Vetrovec* testimony do little to support the statement's procedural reliability. Jury warnings do not provide an adequate substitute for the traditional safeguards. They are no substitute for other conditions of admissibility. Rules of evidence, such as the rule against hearsay, protect trial fairness and the integrity of the trial process by deeming certain types of evidence presumptively inadmissible.

[90] Because there were few tools available for testing the truth and accuracy of the re-enactment statement, it could only be admitted if the circumstances in which it was made and corroborative evidence, if any, "substantially negate[d] the possibility that the declarant was untruthful" (*Smith* (1992), at p. 933).

[91] The trial judge found that the statement was reliable because it was voluntary, made after Thielen had received legal advice, and was a "free-flowing narrativ[e]". He also relied on the fact that it was incriminating. He reasoned that Thielen put himself at risk, even in the prison system, by implicating himself and others in the murders (para. 40).

[92] However, these circumstances "while relevant, in essence simply point to an absence of factors that, if present, would detract from an otherwise trustworthy statement" (*Couture*, at para. 101). They do not provide a circumstantial guarantee of trustworthiness. Furthermore, while Thielen incriminated himself in the murders in the re-enactment video, he had already done so in his statements to police following his arrest, and during the Mr. Big operation. And while he may have put himself at

risk in the prison system by implicating Bradshaw, he nonetheless benefited from the opportunity of reduced criminal liability: he pled guilty to the lesser charge of second degree murder. Thielen clearly had a significant motive to lie about Bradshaw's involvement in the murders. The Court of Appeal rightfully noted that "[t]he [trial] judge did not sufficiently address the issues that would detract from the truthfulness of Mr. Thielen's statements, including his considerable motive to lie to extricate himself from his admissions to Cst. B. that he committed first degree murder, not once, but twice" (para. 37).

[93] Finally, as discussed above, the corroborative evidence relied on by the trial judge was of no assistance in establishing threshold reliability.

[94] The hearsay danger raised by the re-enactment evidence, namely the inability to investigate Thielen's sincerity about Bradshaw's participation, is particularly difficult to overcome in this case. Thielen had a motive to lie about Bradshaw's involvement in the murders and he initially did not implicate Bradshaw in the murders. Thielen is also a *Vetrovec* witness, a witness who cannot be trusted due to his unsavoury character. There are few tools available to the trier of fact to test Thielen's sincerity. The circumstances in which the statement came about, and the evidence led at the *voir dire*, do not substantially negate the possibility that Thielen lied about Bradshaw's participation in the murders.

[95] This is not a case where the hearsay "presents minimal dangers and its *exclusion*, rather than its admission, would impede accurate fact finding" (*Khelawon*,

at para. 2 (emphasis in original)). Rather, admitting the re-enactment statement would undermine the truth-seeking process and trial fairness. Hearsay is presumptively *inadmissible* and the trial judge erred in finding that this presumption was rebutted.

V. Conclusion

[96] I conclude that the trial judge erred in admitting the re-enactment statement into evidence. The Crown failed to establish the threshold reliability of this statement on a balance of probabilities.

[97] I would dismiss the appeal. I agree with the British Columbia Court of Appeal that the convictions be set aside and a new trial ordered.

The reasons of Moldaver and Côté JJ. were delivered by

MOLDAVER J. (dissenting) —

I. Overview

[98] At issue in this appeal is the admissibility of a video re-enactment[3] of the events surrounding the murders of Laura Lamoureux and Marc Bontkes in March 2009. In the re-enactment, which occurred in August 2010, some 17 months after the murders, Roy Thielen describes for the police how he and the respondent, Robert

[3] In these reasons, Mr. Thielen's hearsay re-enactment refers to both the visual demonstrations and verbal statements he made in the video to describe how the murders and related events took place.

Bradshaw, carried out the murders together. After Mr. Thielen refused to testify at Mr. Bradshaw's trial, the trial judge admitted the re-enactment under the principled approach to hearsay evidence.

[99] My colleague, Karakatsanis J., concludes that the trial judge erred in doing so. She reaches this conclusion on the basis of a restrictive new test that departs from the functional approach to threshold reliability which this Court has endorsed in its modern jurisprudence.

[100] With respect, I disagree with my colleague's approach and her conclusion. I acknowledge that Mr. Thielen's re-enactment was not problem-free and that hearsay dangers are generally more pronounced when a declarant is not available to be cross-examined. However, this was an unusual case, in that there was exceptionally powerful corroborative evidence, including surreptitiously recorded conversations in which Mr. Bradshaw admitted his involvement in the two murders. In addition, the trial judge adopted a number of procedural safeguards which placed the jury in a position to critically evaluate the impugned evidence. These included the limited admission of prior inconsistent statements taken by police officers along with the opportunity to cross-examine them, strict cautionary instructions to the jury and wide latitude given to defence counsel to canvass the same points in his closing submissions that he would have canvassed had he been able to cross-examine Mr. Thielen.

[101] In conjunction, these factors — powerful corroborative evidence and

procedural safeguards — were capable of satisfying the test for threshold reliability. The principled approach to hearsay should not stand in the way of the truth-seeking function of a trial where the impugned evidence is shown to be trustworthy and the jury has the tools it needs to critically evaluate its ultimate reliability. This was the conclusion of the trial judge, who was uniquely positioned to make this determination. In my view, his ruling admitting the video re-enactment was amply supported by the record and error-free. I see no basis in fact or law to interfere with it.

[102] The trial judge's decision to reject a defence application to tender another hearsay statement by Mr. Thielen which did not implicate Mr. Bradshaw is also entitled to deference. I would uphold it.

[103] Accordingly, I would allow the appeal, set aside the judgment of the British Columbia Court of Appeal ordering a new trial and restore Mr. Bradshaw's convictions for the first degree murders of Ms. Lamoureux and Mr. Bontkes.

II. Analysis

[104] The modern approach governing the admissibility of hearsay evidence is the principled approach. Under this approach, hearsay evidence can be admitted where it is necessary and where it meets the test for threshold reliability. It is uncontested that Mr. Thielen's refusal to testify at trial satisfies the necessity criterion. The focus of this appeal is on whether Mr. Thielen's re-enactment meets the test for threshold reliability.

The Test for Threshold Reliability

[105] Hearsay evidence is presumptively inadmissible primarily because of the difficulty in testing its reliability. There is always a risk that a witness may misperceive the facts, wrongly remember them, narrate events in a misleading or incomplete manner, or make an intentionally false assertion. When a statement is made in court, traditional safeguards — such as the presence of the declarant in the courtroom and cross-examination — protect against the danger of falsehoods or inaccuracies going undetected by the trier of fact. Without the declarant being present in court and subjected to contemporaneous cross-examination, the trier of fact may be unable to detect mistakes, exaggerations or deliberate falsehoods: *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520, at paras. 31-32; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 2.

[106] The extent to which the reliability of hearsay evidence may be difficult to assess varies according to context. In certain circumstances, the challenges in assessing the declarant's perception, memory, narration or sincerity and the dangers arising from this will be sufficiently overcome to meet the test for threshold reliability: *R. v. Devine*, 2008 SCC 36, [2008] 2 S.C.R. 283, at para. 22; *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298, at para. 35; *Khelawon*, at para. 61.

[107] The principled approach to hearsay recognizes that threshold reliability can be met in three ways: (1) where the statement has sufficient features of substantive reliability; (2) where the statement has adequate features of procedural

reliability; or (3) where the statement does not satisfy either of the first two ways, but incorporates features of both which, in combination, justify its admission. As I will explain, this case engages the third way and provides this Court with an opportunity to clarify its operation for the first time.

[108] First, substantive reliability in this context refers to a statement's degree of trustworthiness. Features of substantive reliability include the circumstances in which the statement was made and the existence of extrinsic evidence capable of corroborating or contradicting it: *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720, at para. 30; *Khelawon*, at para. 62; *Blackman*, at para. 35; *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517, at para. 80. In the absence of procedural safeguards, these features of substantive reliability will, on their own, satisfy the threshold reliability requirement where they show that there is "no real concern about a statement's truth and accuracy": *Couture*, at paras. 98 and 100; *Devine*, at para. 22; *Khelawon*, at para. 62.[4] For example, in *R. v. Khan*, [1990] 2 S.C.R. 531, features of substantive reliability justified the admission of a three-and-a-half-year-old child's hearsay statement describing a sexual act, in that the statement was made spontaneously and was powerfully corroborated by a semen stain found on her clothing.

[109] Second, threshold reliability may be established where there are adequate features of procedural reliability, namely, procedural safeguards in place when the

[4] While this is clearly a high standard, it does not require the trial judge to be convinced to a point of certainty that the statement is true, otherwise the difference between threshold and ultimate reliability, which this Court has consistently maintained, would be lost (see paras. 113-16 below).

statement is made or at trial that permit the trier of fact to assess the statement's ultimate reliability: *Youvarajah*, at para. 30; *Khelawon*, at para. 63; *Blackman*, at para. 35; *Couture*, at para. 80. In the absence of features of substantive reliability indicating a statement's trustworthiness, threshold reliability will be satisfied if these procedural safeguards, on their own, demonstrate that without contemporaneous cross-examination of a witness in court, a hearsay statement's "truth and accuracy can nonetheless be sufficiently tested" by the trier of fact: *Khelawon*, at para. 63; *Devine*, at para. 22; *Couture*, at para. 80. Where features of procedural reliability *alone* are relied on, some form of cross-examination of the declarant has generally been required to satisfy the test for threshold reliability. For example, courts have held that adequate substitutes for testing truth and accuracy are present in preliminary hearing testimony (see *R. v. Hawkins*, [1996] 3 S.C.R. 1043) and prior inconsistent statements that are video-taped and taken under oath where the declarant has recanted but remains available to be cross-examined at trial (see *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740).

[110] As Charron J. explained in *Khelawon*, characterizing these procedural safeguards as factors which indicate a statement's threshold *reliability* is "somewhat of a misnomer" (para. 80). These tools for testing hearsay evidence do not enhance the reliability of the statement, but rather ensure that the trier of fact is sufficiently equipped to evaluate the ultimate reliability of the statement: see also D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at p. 138.

[111] Finally, threshold reliability may be established where the statement has adequate features of *both* substantive and procedural reliability. These two categories that inform threshold reliability are not mutually exclusive: *Youvarajah*, at para. 30; *Khelawon*, at para. 66; *Devine*, at para. 22; *Blackman*, at para. 35; *Couture*, at paras. 80 and 99. Rather, features of procedural reliability and substantive reliability may, in combination, satisfy threshold reliability: *Couture*, at para. 99; *R. v. Hamilton*, 2011 ONCA 399, 271 C.C.C. (3d) 208, at para. 156. In *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764, the Court applied this approach, drawing on features of both substantive and procedural reliability to justify the admission of a hearsay statement (para. 53).

[112] Thus, a statement that is not admissible under the first two principal ways of establishing threshold reliability may still be admitted under this third way. Where a statement has a sufficient level of trustworthiness, relative to the strength of the procedural safeguards for the trier of fact to evaluate its ultimate reliability, the statement is safe to admit. Put another way, "[s]o long as [the hearsay statement] can be assessed and accepted by a reasonable trier of fact, then the evidence should be admitted": Paciocco and Stuesser, at p. 134.

[113] It is important to keep in mind that threshold reliability is distinct from ultimate reliability. The trial judge does not need to be satisfied that the hearsay statement is true for it to meet the threshold reliability requirement under any of the three ways set out above. As with the common law tests for Mr. Big statements and expert evidence, the reliability of a hearsay statement need not be established *to a*

point of certainty before it can be admitted: *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544, at para. 98; *R. v. Abbey*, 2009 ONCA 624, 246 C.C.C. (3d) 301, at para. 89. Otherwise, the trier of fact's role of determining the ultimate reliability of a hearsay statement will have been usurped.

[114] On several occasions, this Court has discussed the danger of conflating threshold and ultimate reliability. In *Khelawon*, Charron J. stated, at para. 50:

> It is important that the trier of fact's domain not be encroached upon at the admissibility stage. If the trial is before a judge and jury, it is crucial that questions of ultimate reliability be left for the jury — in a criminal trial, it is constitutionally imperative. If the judge sits without a jury, it is equally important that he or she not prejudge the ultimate reliability of the evidence before having heard all of the evidence in the case. Hence, a distinction must be made between "ultimate reliability" and "threshold reliability". Only the latter is inquired into on the admissibility *voir dire*. [Emphasis added.]

This cautionary note was echoed in *Blackman*, at para. 56: "It is essential to the integrity of the fact-finding process that the question of ultimate reliability not be pre-determined on the admissibility *voir dire*: see *Khelawon*, at para. 93."

[115] In this regard, I agree with the observations of Watt J.A. in *R. v. Carroll*, 2014 ONCA 2, 304 C.C.C. (3d) 252, at para. 111, that the party tendering hearsay

> need not eliminate all possible sources of doubt about the perception, memory or sincerity of the declarant. All that was required in this case was that the circumstances in which the statements were made and any relevant extrinsic evidence provided the trier of fact with the means to critically evaluate the honesty and accuracy of the declarant . . . .

[Citations omitted.]

[116] In other words, as with expert evidence and Mr. Big confessions, the trial judge is simply tasked with deciding "the threshold question of 'whether the evidence is worthy of being heard by the jury'": *Hart*, at para. 98, quoting *Abbey*, at para. 89.

[117] I am satisfied that the re-enactment in the present case was admissible under the third way of establishing threshold reliability. As I will explain, there was powerful corroborative evidence indicating the statement's trustworthiness and a number of procedural safeguards that provided the jury with the tools it needed to evaluate its truth and accuracy. With respect, I believe that in reaching a different conclusion, my colleague has departed from the functional approach to threshold reliability by: (1) unduly restricting the extrinsic evidence that a court can consider when assessing a statement's substantive reliability; and (2) adopting a narrow view of the procedural safeguards available at trial that can equip the jury with the tools it needs to assess the ultimate reliability of a statement.

(1) <u>The Extrinsic Evidence That a Court Can Consider When Assessing Substantive Reliability</u>

[118] My colleague maintains that "at the threshold reliability stage, corroborative evidence is used in a manner that is qualitatively distinct from the manner in which the trier of fact uses it to assess the statement's ultimate reliability" (para. 42). In her view, "[a] trial judge can only rely on corroborative evidence to

establish threshold reliability if it shows, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement" (para. 44).

[119] Respectfully, my colleague's test gives rise to two difficulties. First, her test would replace the functional approach that this Court has repeatedly endorsed, with a restrictive test that unnecessarily complicates the analysis and discards crucial information for evaluating threshold reliability. The functional approach emphasizes that there is no bright-line distinction between factors that inform threshold and ultimate reliability. Rather, the inquiry is focused on whether the extrinsic evidence addresses hearsay dangers by providing information about whether the statement is trustworthy:

> In each case, the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility.
>
> . . .
>
> . . . Relevant factors should not be categorized in terms of threshold and ultimate reliability. Rather, the court should adopt a more functional approach . . . and focus on the particular dangers raised by the hearsay evidence sought to be introduced and on those attributes or circumstances relied upon by the proponent to overcome those dangers.

(*Khelawon*, at paras. 4 and 93; see also para. 55.)

[120] My colleague's approach instead creates a "threshold test within the threshold test", which is

> subject to the same criticisms which arise from the [absolute] exclusion of corroborating or conflicting evidence. The categorizing or labelling of evidence that is suitable for including in the *decision-making process* of hearsay admissibility is neither necessary nor desirable. [Emphasis in original.]

(S. Akhtar, "Hearsay: The Denial of Confirmation" (2005), 26 C.R. (6th) 46, at p. 60)

[121] Second, in applying her approach, my colleague parses the analysis by examining whether each individual piece of corroborative evidence demonstrates that the "only likely explanation" is the declarant's truthfulness. This ignores the reality that even if an individual piece of extrinsic evidence does not satisfy my colleague's requirement on its own, it may nonetheless work in conjunction with other extrinsic evidence or features of substantive reliability to satisfy the test for threshold reliability (see *R. v. McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.), at pp. 278-79, points 4 and 5, on the nature of corroborative evidence in general). Yet according to her test, for a piece of corroborative evidence to make its way onto the evidentiary scale for threshold reliability purposes, it must effectively be independently capable of tipping the scale. This restrictive test fails to look at the picture as a whole and discards corroborative evidence that could play an important role in satisfying threshold reliability.

[122] That said, I acknowledge that it may be necessary for the trial judge to limit the scope of extrinsic evidence that can be considered in a hearsay *voir dire*. As Paciocco and Stuesser note (at p. 134): "There is concern, however, that the *voir dire* on the admissibility of the hearsay evidence could well overtake the trial. . . . The

difficulty is where to draw the line and the reality [is] that <u>there is no fixed line</u>" (emphasis added). I agree that such concerns must be addressed on a case-by-case basis, which is consistent with the functional approach to the admissibility of hearsay endorsed in *Khelawon*: see *R. v. R. (T.)*, 2007 ONCA 374, 85 O.R. (3d) 481, at para. 19; *R. v. Lowe*, 2009 BCCA 338, 274 B.C.A.C. 92, at para. 78. In my opinion, the line should be drawn where the trial judge is of the view that the probative value of certain corroborative evidence is tenuous and outweighed by its prejudicial effect in prolonging and complicating the proceedings — in other words, where the bang is not worth the buck. Trial judges should be trusted to make this determination and exercise restraint when considering extrinsic evidence to ensure the trial proceedings are not derailed by the *voir dire*: *Blackman*, at para. 57.

(2) <u>The Role of Safeguards Implemented at Trial in Establishing Procedural Reliability</u>

[123] As Charron J. held in *Khelawon*, "the optimal way of testing evidence adopted by our adversarial system is to have the declarant state the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination" (para. 63). It follows that where no meaningful cross-examination is possible, trial judges should be particularly cautious when determining the admissibility of a hearsay statement. However, where there are adequate substitutes for these traditional safeguards, "common sense tells us that we should not lose the benefit of the evidence": *Khelawon*, at para. 63. A trial judge may have procedural safeguards at his or her disposal that can provide the trier of fact with the tools needed to evaluate the

ultimate reliability of hearsay evidence.

[124] In this case, the Court of Appeal held that the trial judge erred in considering procedural safeguards that were implemented at trial in evaluating the threshold reliability of the re-enactment. According to the Court of Appeal, only safeguards in existence at the time of the statement could be considered:

> The guarantee of trustworthiness and accuracy at the threshold test does not arise as a result of anything a judge or the Crown at trial can do. Safeguards are those in place when the statement is taken, for example, placing the person under oath, warning them of the consequences of lying under oath and so on, but that is not the situation here. The judge looked at safeguards that could be imposed at trial, which do not assist in ascertaining threshold reliability. [Emphasis added; para. 30.]

[125] I agree with the Crown that safeguards that support procedural reliability include those which can be implemented at trial. In my view, there is no principled distinction between safeguards in place at the time the hearsay statement was made and safeguards available at trial. Both enhance the ability of the trier of fact to critically evaluate the evidence.

[126] This is well established in the jurisprudence. For example, where a recanting declarant is available to be cross-examined at trial on a prior statement, this significantly enhances the trier of fact's ability to evaluate its reliability: *Khelawon*, at para. 66; *Devine*, at para. 19; *Couture*, at para. 92; *B. (K.G.)*, at pp. 795-96. In addition, the cross-examination of a third party who witnessed the declarant's demeanour may provide an added procedural safeguard implemented at trial: *U.*

(F.J.), at para. 32; *B. (K.G.)*, at p. 792.

[127] There are also other tools that can be implemented at trial to assist the jury in evaluating a hearsay statement. As this case illustrates, jury cautions, the limited admission of prior inconsistent statements that contradict the hearsay statement, requiring the Crown to call the police officers who took prior inconsistent statements as witnesses so that they can be cross-examined by defence counsel, and permitting enhanced leeway for defence counsel during closing submissions may also enable the trier of fact to test a statement's truthfulness and accuracy. The trial judge is uniquely positioned to adapt and implement these measures based on the specific circumstances of the case.

[128] My colleague does not consider or address several safeguards referred to above upon which the trial judge relied. In particular, she rejects the viability of jury instructions as a procedural safeguard, asserting that "[i]nstructing a jury on *how* to evaluate a statement that it [the jury] lacks the *means* to evaluate does not address the hearsay dangers that underlie the exclusionary rule" (para. 29 (emphasis in original)). In my respectful view, this statement oversimplifies the issue.

[129] Jury instructions can be a *means* of assisting the jury with the evaluation of a hearsay statement. Like cross-examination, instructions can draw a jury's attention to evidentiary concerns, which ameliorates hearsay dangers by helping the jury assess the reliability of a statement: see *R. v. Goodstoney*, 2007 ABCA 88, 218 C.C.C. (3d) 270, at paras. 58 and 92; *R. v. Blackman* (2006), 84 O.R. (3d) 292 (C.A.),

at paras. 81-87, aff'd 2008 SCC 37, [2008] 2 S.C.R. 298. For example, an instruction cautioning a jury about a declarant's motive to fabricate and a suggestion of a motive to fabricate put to a witness in cross-examination can both alert a jury to a concern regarding sincerity, which helps it assess whether the statement is reliable. Further, jury instructions include a caution to resolve any doubt in favour of the accused.

[130] It goes without saying that cross-examination is a superior means of testing evidence because it allows the jury to observe how a witness responds — be it a denial, an admission or an explanation. However, in setting out the potential dangers of a hearsay statement, jury instructions are capable of enhancing, to a limited extent, the procedural reliability of the statement. In this case, to be clear, the instructions were only one feature of a package of safeguards adopted by the trial judge to put the jury in a position whereby it could critically evaluate the ultimate reliability of the re-enactment.

[131] Ultimately, my colleague's unwillingness to consider the various procedural safeguards relied upon by the trial judge in this case leads her to conclude that, because the hearsay statement does not have sufficient features of substantive reliability, it cannot be admitted. With respect, this skirts the third way of establishing threshold reliability — the one applied by the trial judge in this case — in which features of substantive and procedural reliability may, in conjunction, justify the admission of a hearsay statement.

[132] I now turn to the issue of whether the trial judge erred in admitting the re-

enactment under this third way.

III. Application to the August 2, 2010 Re-enactment

A. *The Hearsay Dangers Raised by the Re-enactment*

[133] In this case, the primary hearsay danger raised by the re-enactment was the possibility that Mr. Thielen was lying about Mr. Bradshaw's involvement in the murders. Mr. Thielen made prior inconsistent statements and he was an accomplice in both murders. The concern that the jury could not assess Mr. Thielen's sincerity was therefore a particularly acute hearsay danger.

[134] The challenges of testing Mr. Thielen's memory and perception also created hearsay dangers, given his drug abuse at the time of the events and the nearly 17 months that had elapsed between the murders and the re-enactment. My colleague suggests that Mr. Thielen's sincerity was the sole danger in issue, dismissing Mr. Thielen's memory and perception concerns as "minimal" (para. 64). In my view, this is not supported by the record. During oral submissions on the *voir dire*, defence counsel specifically referred to memory and perception concerns that he said detracted from the re-enactment's reliability. In doing so, he did not characterize these as weak or minimal. Rather, he stated:

> Now, I also want to highlight to you some of the other overriding factors that you have to consider in assessing threshold reliability, and those are that Mr. Thielen has a long-term substance abuse problem. His

> statement are replete with references to being foggy, to having no recollection, all of which he attributes to drug use and, I might say, the fact is that he's giving this video re-enactment 17 months after the fact. [Emphasis added.]

(A.R., vol. VII, at p. 147)

In my view, Mr. Bradshaw's trial counsel was in a better position than this Court to assess whether it was "plausible" that Mr. Thielen's memory of Mr. Bradshaw's role in the killings was inaccurate. In light of defence counsel having raised these concerns, the trial judge can hardly be faulted for responding to them.

[135] As I will explain, however, these hearsay dangers — sincerity along with memory and perception — were sufficiently overcome by features of both substantive and procedural reliability that permitted the trier of fact to evaluate the reliability of the re-enactment.

B. *The Substantive Reliability of the Re-enactment*

[136] The substantive reliability of the re-enactment was significantly enhanced by both powerful extrinsic evidence that corroborated its content and the circumstances in which it took place. I acknowledge that these features of substantive reliability, on their own, were insufficient to justify the admission of the re-enactment under the first way of meeting threshold reliability. That said, they went a long way toward establishing the trustworthiness of the re-enactment. In my view, this attenuated the importance of cross-examination and the relative strength of the

procedural safeguards needed to meet the third way of establishing threshold reliability.

(1) The Powerful Corroborative Evidence

[137] Mr. Thielen's re-enactment was corroborated by three separate groups of evidence: (a) surreptitiously recorded conversations with Mr. Bradshaw, in which Mr. Bradshaw admitted his involvement in the murders; (b) circumstantial evidence implicating Mr. Bradshaw in the murders; and (c) forensic evidence from the crime scenes confirming Mr. Thielen's account of the details of the murders. As stated, this corroborative evidence must be examined as a whole, not assessed on a piecemeal basis. Considered cumulatively, this evidence provides powerful support for the trustworthiness of Mr. Thielen's re-enactment.

(a) *The Recorded Conversations*

[138] This case is unusual, in that the most compelling corroborative evidence comes from Mr. Bradshaw's own admissions. As noted by my colleague, two surreptitiously recorded conversations with Mr. Thielen "provide direct evidence of Bradshaw's involvement in the murders" (para. 74).

(i) The July 21, 2010 Conversation

[139] The first recorded conversation took place approximately 16 months after

the two murders at a local hotel on July 21, 2010. It followed Mr. Thielen's meeting earlier that day with "Mr. Big", during which Mr. Thielen implicated both himself and Mr. Bradshaw in the two murders. In the meeting with Mr. Big, Mr. Thielen was told by undercover officers posing as members of a criminal organization to discuss the murders with Mr. Bradshaw in order to ensure there were no loose ends that needed to be brought to Mr. Big's attention.

[140] The first eight minutes or so of the conversation between Mr. Thielen and Mr. Bradshaw at the hotel were not captured because they were in a washroom together and their discussion was muffled by the sound of running water. After an undercover officer called Mr. Thielen on his phone, Mr. Bradshaw and Mr. Thielen left the washroom and the conversation continued in the hotel room where it could be heard. Neither Mr. Thielen nor Mr. Bradshaw knew they were being recorded. During this conversation, Mr. Bradshaw admitted to being present during the murder of Ms. Lamoureux (who went by the moniker "Double 'D'"):

> Thielen: <u>'Kay, remember like my first one, Double 'D'?</u>
>
> Bradshaw: <u>Uh-hm.</u>
>
> Thielen: Right? When you parked, right. Is there anybody that could have seen me?
>
> Bradshaw: Houses.
>
> Thielen: What?
>
> Bradshaw: The houses around us.
>
> Thielen: Right.

Bradshaw:	And they said they saw a white Acura leaving.
Thielen:	Exactly.
Bradshaw:	<u>Right, we were in the black Cobalt.</u>
Thielen:	. . . there's nothing I touched, right?
Bradshaw:	No, that's a tactic.
Thielen:	That's a tactic?
Bradshaw:	Yeah. That's what I think. My personal opinion. 'Cause if they had anything fuckin', (knocking sound) [video shows Bradshaw knocking on wooden table] like that —
Thielen:	Yeah.
Bradshaw:	-pff-
Thielen:	There's nothing man. [Emphasis added.]

(A.R., vol. XII, at pp. 51-52)

[141] Later, Mr. Bradshaw seemingly agreed that he and Mr. Thielen did not have a plan for murdering Ms. Lamoureux. He described how Ms. Lamoureux called him to purchase drugs and he picked up Mr. Thielen before the murder:

Bradshaw:	. . . Before I picked you up. I think you were just getting ready weren't you?
Thielen:	Yeah, well we didn't-
Bradshaw:	. . .
Thielen:	-really hatch a plan.
Bradshaw:	. . .

Thielen: We didn't really have that one planned did we? It was just kinda on a whim remember?

Bradshaw: Maybe-

Thielen: You went-

Bradshaw: -and she called me-

Thielen: -you went, you went and sold her dope and then she wanted to trade it back.

Bradshaw: Yeah.

Thielen: And then, 'cause I wasn't with you went and met her and you picked me up from somewhere out in the area.

Bradshaw: Okay. [Emphasis added.]

(A.R., vol. XII, at pp. 60-61)

This was consistent with Mr. Thielen's re-enactment. It was also corroborated by logs on Ms. Lamoureux's phone, which was recovered from the crime scene and showed several calls with Mr. Bradshaw immediately prior to the murder.

[142] Mr. Bradshaw implicated himself in the murder of Mr. Bontkes as well. He described how he and Mr. Thielen had worn gloves and waited for Michelle Motola (Mr. Bradshaw's then girlfriend) to drive up with Mr. Bontkes, which corresponds with Mr. Thielen's re-enactment. He also told Mr. Thielen that Ms. Motola did not see who shot Mr. Bontkes. Ms. Motola thought the shooter was Mr. Thielen, when it fact it was Mr. Bradshaw:

Thielen: On the second one, did we touch the van?

Bradshaw:	No, we had gloves on the whole time.
Thielen:	‘Kay.
Bradshaw:	As soon as got out of the car, gloves. And then we pulled the piece out. Cleaned all the shells off. Put everything back together and waited. And then there’s fuckin’ . . .
Thielen:	But Michelle didn’t do the last . . . did she?
Bradshaw:	She was there, but she didn’t see shit. She didn’t see what happened, she thought it was you. She didn’t even know it was me.
Thielen:	Okay.
Bradshaw:	So, she’s fuckin’, even if she wanted to, she couldn’t even tell it straight, because of that advantage because she was (smacking sound) we were over here, right? She’s sitting her like this and this . . . everything’s going on over here. She doesn’t know. She doesn’t know anything for sure. [Emphasis added.]

(A.R., vol. XII, at pp. 52-53)

[143] Mr. Bradshaw also discussed their actions after the murders:

Thielen:	Where were we before that? Where were we after that?
Bradshaw:	My house.
Thielen:	And before, at your house, right?
Bradshaw:	All my house.
Thielen:	Both times?
Bradshaw:	Both. Before and after. We stashed the thing in my house, took all the shit, you fuckin’ left with it. You walked over to the fuckin’ . . .

Thielen:	And then I came back and got it later.
Bradshaw:	Yeah.
Thielen:	. . . got rid of it, right?
Bradshaw:	. . . the pieces that were missing were my shoes and I burned them personally. [Emphasis added.]

(A.R., vol. XII, at p. 53)

[144] Finally, the two discussed the investigations and potential sources of evidence regarding the two murders:

Thielen:	Have you talked to anybody about it?
Bradshaw:	Nah.
Thielen:	Nobody?
Bradshaw:	Nothing.
Thielen:	Just absolutely nobody, so if-
Bradshaw:	No.
Thielen:	-it's anybody yapping their gums it's Michelle?
Bradshaw:	That's it. But people have been saying that I killed Double 'D' since it happened.
Thielen:	I know, I know, I've been-
Bradshaw:	. . .
Thielen:	-hearing so many things, I heard-
Bradshaw:	. . .
Thielen:	-stories about it in jail.

Bradshaw:	-about me, blah, blah, blah. Fuckin' everybody's saying . . . whatever, that's hearsay. That doesn't make a fuckin' difference . . . to nothing . . . anyone that even has a half fuckin' I know, is Michelle. The only one. <u>Because she knows for a fact who was there, that's it.</u> And it can only be one or the other.
Thielen:	On the one, on the one, that's it.
Bradshaw:	<u>Yeah, only on that one. Right? She doesn't know shit about the first one.</u>
Thielen:	And so after both of them we went to your house?
Bradshaw:	<u>Uh-hm. No, not after the first one.</u>
Thielen:	Where'd we go?
Bradshaw:	<u>I think we went to your house after the first one.</u>
Thielen:	And you just dropped me off? And you kept goin' on right?
Bradshaw:	<u>I think I was working.</u>
Thielen:	Yeah.
Bradshaw:	Yeah.
Thielen:	Okay. So, we're not gonna say nothing about this? Not gonna talk to nobody about this?
Bradshaw:	I'm not sweating it to be honest. [Emphasis added.]

(A.R., vol. XII, at pp. 55-56)

(ii) <u>The July 23, 2010 Conversation</u>

[145] The second conversation took place two days later at Bothwell Park on July 23, 2010. Undercover officers posing as members of a criminal organization again instructed Mr. Thielen that he needed to speak to Mr. Bradshaw about the

murders, particularly with respect to a "dry run" that had preceded the murder of Mr. Bontkes. This dry run involved Ms. Motola picking up Mr. Bontkes and taking him for a drive, while Mr. Bradshaw pretended to be unconscious in the back seat and Mr. Thielen hid under a jacket across the back seat floor with a firearm. The plan to kill Mr. Bontkes on that occasion failed because, in Mr. Bradshaw's words, "[i]t was my fault 'cause I was supposed to string him up and then you were supposed to put the bitch on him . . . . And I didn't do that" (the "bitch" being the gun they had at the time) (A.R., vol. XII, at p. 76).

[146] Because this conversation centres more on the dry run of the murder of Mr. Bontkes, it is somewhat less compelling in corroborating Mr. Bradshaw's involvement in the actual murders than the hotel conversation. Nevertheless, Mr. Bradshaw's admitted participation in the dry run strongly supports his motive for the killing of Mr. Bontkes. In addition, Mr. Bradshaw did refer to the murders themselves, mentioning the ongoing police investigation and suggesting that if the police had any evidence, they would have already acted:

> Thielen: So, I just, I'm trying to go through everything because how much dope I was on back then, I'm so fuzzy with a lot of shit, man. I thought I was-
>
> Bradshaw: Even better.
>
> Thielen: No, it's not even better because I-
>
> Bradshaw: Why?
>
> Thielen: -I'm goin' through stuff . . . trying to figure out what the hell needs to be fixed here. So we don't get popped,

	right.
Bradshaw:	You could fly through a polygraph on that. If you don't know . . .
Thielen:	Yeah, I would never, I would never do a polygraph in my life, obviously I'm uh, I'm just trying to figure what is missing and what can be put against us, right, so that we-
Bradshaw:	<u>Honestly, like I said I think as long as . . . I think the, the rest of it is fuckin' snap shut tight. I think if there was anything left it would have already been done immediately. They wouldn't have waited so long, they're, they're playing the drum, that's all they're doin'.</u> [Emphasis added.]

(A.R., vol. XII, at p. 80)

[147] Mr. Bradshaw later added that no one would have seen Ms. Motola pick up Mr. Bontkes prior to the murder and the only witnesses who could have seen them on the night of Mr. Bontkes's murder was a construction crew they drove past after the murder took place:

Bradshaw:	<u>And when she went to go see him, it was just her and then you, so . . . no other eyeballs on that one, the only other thing, the only other people that saw us together was a construction crew.</u>
Thielen:	What construction crew?
Bradshaw:	Construction crew . . . remember that? You went south on 192, down to 32.
Thielen:	And there was a construction crew there?
Bradshaw:	There was a construction worker on 32. We came across 32, hit 176, came up 176 and the car died. Remember?

Thielen:	On that day?
Bradshaw:	. . . that was that night.
Thielen:	No that was the night it all went down. We left and . . . phone call . . . someone . . . sources . . . fuck off. Um . . .
Bradshaw:	Personally, I think, like I said, I think it's fuckin' smooth. You know if I didn't even know you guys at that time, you know, we met at the bar talking maybe a month or so later, whatever. You know, everybody's fuzzy enough . . . no one can say for sure, right. That's what I'm talking about. (Chuckles) You know, especially with her. [Emphasis added.]

(A.R., vol. XII, at p. 82)

It is apparent that "her" referred to Ms. Motola — who was also present for the killing of Mr. Bontkes — as the two went on to discuss how the police had approached her. The police investigation also confirmed that a construction crew was working in the area at the relevant time.

[148] Reading these two conversations in their entirety, there can be no doubt that Mr. Thielen and Mr. Bradshaw were implicitly — and at times overtly — discussing their joint involvement in the two murders. This provides powerful corroborative evidence that significantly enhances the substantive reliability of the re-enactment by alleviating concerns about Mr. Thielen's sincerity.

[149] For my colleague, however, these conversations provide "no assistance" in establishing substantive reliability (para. 84) — a remarkable proposition that no one advanced in the proceedings below or before this Court. In her view, Mr.

Thielen’s truthfulness is not the only likely explanation for the conversations — a conclusion which rests squarely on her second-guessing the trial judge’s factual assessment of the conversations and speculating about “outside influence” as a “possible explanation” for them (para. 84).

[150] My colleague makes two points in this regard. First, she maintains that the trial judge did not account for the reduced reliability of Mr. Bradshaw’s statements because they were “collected in a Mr. Big operation” (para. 78). With respect, calling these “Mr. Big” statements is a misnomer. Mr. Bradshaw was not the subject of the Mr. Big operation. He believed he was speaking to an accomplice, not to a member of a criminal organization in circumstances involving the type of inducements or implied threats that characterize Mr. Big operations: *Hart*, at paras. 5 and 58-60. The rationales for exercising special caution with Mr. Big confessions therefore simply do not apply. On the contrary, I agree with the trial judge that the fact that these conversations were surreptitiously recorded while both Mr. Thielen and Mr. Bradshaw believed they were privately discussing the details of the murders, as accomplices, significantly enhanced their reliability (ruling on *voir dire* No. 1, 2012 BCSC 2025, at para. 44 (CanLII)). Any motive for Mr. Bradshaw to falsely implicate himself in such circumstances is mere fancy.

[151] Second, my colleague expresses concern that “the initial part [the first eight minutes] of the Best Western conversation was inaudible because Thielen and Bradshaw were in the bathroom and a tap was running” (para. 80). In her opinion, this

raises questions about the trustworthiness of the recording.

[152] I disagree. Neither individual knew that they were being recorded. It stretches the bounds of credulity and common sense to think that this initial part of the conversation could explain away the incriminating admissions made by Mr. Bradshaw in the audible part of the conversation. How one could reasonably infer that during these eight minutes, Mr. Bradshaw may have been influenced and prepared to falsely recite his participation in the two murders escapes me. It is clear from the transcript that Mr. Bradshaw was, at times, leading the conversation and volunteering details about the murders without any prompting on Mr. Thielen's part. Unlike my colleague, I do not believe it is appropriate to consider Mr. Bradshaw's trial testimony — that, during these eight minutes, Mr. Thielen asked him to pretend that he had been involved in the murders — in assessing the substantive reliability of the re-enactment. Mr. Bradshaw testified after the re-enactment was admitted and therefore his testimony was not before the trial judge at the time of his ruling. Furthermore, the jury clearly rejected Mr. Bradshaw's testimony that he was lying about his involvement in the murders at Mr. Thielen's request.

[153] If these conversations do not qualify as corroborative evidence supporting a hearsay statement's substantive reliability, then I am at a loss to know what would. Even on the basis of my colleague's restrictive test, they clearly qualify. The only plausible — and certainly the "only likely" — explanation for Mr. Bradshaw's admissions was that he participated in the two murders. It follows, in my view, that

the trial judge did not err in relying on Mr. Bradshaw's admissions as powerful corroboration of the truthfulness of Mr. Thielen's re-enactment.

(b) *The Circumstantial Evidence Implicating Mr. Bradshaw in the Murders*

[154] The Crown also led circumstantial evidence implicating Mr. Bradshaw in the murders.

[155] Indeed, there are telephone records that connect Mr. Bradshaw to both murders on the nights in question. These records establish a number of calls between Mr. Bradshaw and Ms. Lamoureux on the night she was murdered. Several of these calls took place immediately prior to the murder. This corroborates Mr. Thielen's account of Mr. Bradshaw luring her into a set-up under the ruse of a drug transaction before Mr. Thielen shot her.

[156] Similarly, on the night Mr. Bontkes was killed, telephone records show a number of calls between Mr. Bradshaw and Mr. Thielen, Mr. Thielen and Ms. Motola, and Ms. Motola and Mr. Bontkes — which was the last call registered on Mr. Bontkes's cell phone. This is consistent with Mr. Thielen's account that all three of them participated in the killing.

(c) *The Forensic Evidence From the Crime Scenes Investigation*

[157] In my view, forensic evidence from the crime scenes investigation, which

corroborates the details of Mr. Thielen's description of the murders, provides additional support for the trustworthiness of the re-enactment. The trial judge noted that this forensic evidence included: ". . . where and how the shootings occurred, the number of shots fired, the fact the same gun was used, the positioning of the bodies of Ms. Lamoureux and Mr. Bontkes, the presence and position of the van at High Knoll Park . . ." (ruling on *voir dire* No. 1, at para 45).

[158] This evidence responds to the memory and perception concerns raised by defence counsel. It alleviated the risk that Mr. Thielen's drug abuse and/or the passage of time made his account inaccurate.

[159] In my view, this evidence also addressed Mr. Thielen's overall sincerity. Assessing a declarant's sincerity in a hearsay statement, like assessing the credibility of a witness, is not a mathematical exercise. Where extrinsic evidence corroborates or contradicts the contents of a statement, this affects the statement's overall reliability. If the details of Mr. Thielen's account were belied by the forensic evidence, this would cast further doubt on his sincerity. On the other hand, the corroboration of the details of his account by forensic evidence enhances the substantive reliability of the re-enactment.

[160] I acknowledge that in view of Mr. Thielen's status as an accomplice, the forensic evidence is not as compelling in this case as the corroborative evidence which directly implicated Mr. Bradshaw in the murders: see *Youvarajah*, at para. 62; *R. v. Smith*, 2009 SCC 5, [2009] 1 S.C.R. 146, at para. 15. However, I agree with

counsel for the intervener British Columbia Civil Liberties Association that this forensic evidence is relevant and should not be taken off the table.

(2) The Circumstances of the Re-enactment

[161] Beyond the powerful corroborative evidence, there are also other features of the re-enactment that enhance its substantive reliability. The statement was voluntary and detailed, and it was provided after Mr. Thielen received legal advice. It was also delivered in a free-flowing narrative, without any leading questions from the police (ruling on *voir dire* No. 1, at paras. 40-41). Although not under oath, it was made to police officers while Mr. Thielen was under arrest in circumstances which, viewed objectively, would have underscored the importance of telling the truth: *B. (K.G.)*, at p. 792; *R. v. Adjei*, 2013 ONCA 512, 309 O.A.C. 328, at para. 45.

[162] In addition, Mr. Thielen's motives for participating in the re-enactment with police were important to consider because of the concerns regarding his sincerity. As recognized by this Court in *Blackman*, at para. 42:

> There is no doubt that the presence or absence of a motive to lie is a relevant consideration in assessing whether the circumstances in which the statements came about provide sufficient comfort in their truth and accuracy to warrant admission. It is important to keep in mind, however, that motive is but one factor to consider in the determining of threshold reliability, albeit one which may be significant depending on the circumstances. The focus of the admissibility inquiry in all cases must be, not on the presence or absence of motive, but on the particular dangers arising from the hearsay nature of the evidence. [Emphasis added.]

[163] In my view, the fact that Mr. Thielen's re-enactment went against his own interests is significant in this regard. It directly implicated him in both murders and could be used to incriminate him. It also implicated Ms. Motola, whom he considered to be a "sister". Moreover, he was aware that, in re-enacting the two murders for the police, he was putting himself at risk in the prison system: ". . . what I'm asked to do here is take the biggest step of my life and bring down a whole bunch of people and you know what else, that's gonna put me at risk for the rest of my life" (A.R., vol. XV, at p. 169). Given the unlikelihood that Mr. Thielen would willingly make a false statement prejudicial to his own interests, this provides further support that the re-enactment is trustworthy.

[164] My colleague takes a different view of Mr. Thielen's motivations for re-enacting the murders. She asserts that Mr. Thielen's statement was not actually made against his interests because he had previously incriminated himself to police and in the Mr. Big operation. She also takes the position that Mr. Thielen had a "significant motive to lie" to gain "the opportunity of reduced criminal liability", citing the fact that he pled guilty to two counts of second degree murder (para. 92).

[165] I disagree with both of these assertions. First, the fact that Mr. Thielen had previously implicated himself in both murders to police does not change the fact that the re-enactment was made against his interests. The police clearly wanted to collect as much information as possible from Mr. Thielen and the re-enactment provided detailed and cogent evidence that could be used against him.

[166] Second, the suggestion that Mr. Thielen was seeking leniency is purely speculative. There is no evidence of any inducements or assurances made by the police prior to Mr. Thielen's re-enactment. Indeed, the police rejected Mr. Thielen's requests to see his girlfriend, receive a name change, and be incarcerated in a faraway prison. The fact that Mr. Thielen ultimately pled guilty to second degree murder does not detract from the reliability of his previously made statement. We have no information to suggest that the plea offer had anything to do with his participation in the re-enactment. Indeed, we do not know if the same plea offer was made to Mr. Bradshaw before his trial.

[167] Furthermore, the theory that Mr. Thielen fabricated Mr. Bradshaw's involvement to shift responsibility away from himself is belied by the facts. Mr. Thielen did not minimize his own role in the killings or shift the primary responsibility to Mr. Bradshaw for the murder of Ms. Lamoureux. Instead, he admitted to pulling the trigger himself. Additionally, in my view, Mr. Thielen's prior statement to Mr. Big on July 21, 2010, in which he implicated Mr. Bradshaw in the murders, rebuts any purported motive on Mr. Thielen's part to fabricate Mr. Bradshaw's involvement during the re-enactment. Mr. Thielen had no motive to lie about Mr. Bradshaw's involvement to Mr. Big. Rather, it was against Mr. Thielen's interest to implicate Mr. Bradshaw when speaking to Mr. Big. At that time, Mr. Thielen believed his role in the organization was in jeopardy because of the ongoing police investigation. This jeopardy was only enhanced by implicating another person in the murders, which could further complicate matters for Mr. Big. Mr. Big

repeatedly emphasized that Mr. Thielen had to be honest about the murders to maintain his role in the organization, telling him:

> . . . lie to everybody else, but we don't lie to each other here. And uh, and guys that get found out for lying or fuckin' uh, screwing me around are gone. . . .
>
> . . .
>
> . . . if I find out at anytime as we go along that anything you tell me right now is wrong or it's bullshit or it's a lie, and again I'm not sayin' that it is . . . but I want to be up front . . . then I'm washing my hands of you.

(A.R., vol. XVIII, at pp. 66 and 88-89)

[168] The fact that Mr. Thielen told Mr. Big about Mr. Bradshaw's involvement well before he had any motive to fabricate indicates that he was telling the truth when he re-enacted the two murders for police: see *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272, at para. 5; *Couture*, at paras. 83 and 127-28; *Goodstoney*, at paras. 69-71.

[169] In sum, the substantive reliability of the re-enactment was significantly enhanced by a combination of:

(1) Extrinsic corroborative evidence, including: surreptitiously recorded conversations of Mr. Bradshaw admitting to his involvement in the two murders; circumstantial evidence implicating Mr. Bradshaw in the murders; and forensic evidence from the crime scenes confirming the details of the murders as described by Mr. Thielen.

(2) Circumstantial indicia of trustworthiness, including: the fact that the re-enactment was voluntary and free flowing; that it was contrary to Mr. Thielen's interest, in that he did not attempt to shift blame to Mr. Bradshaw but instead implicated himself in two counts of first degree murder; and that Mr. Thielen's alleged motivation to fabricate was rebutted by his prior consistent statement to Mr. Big.

C. *The Procedural Reliability of the Re-enactment*

[170] In this case, the jury had the benefit of several substitutes for the traditional safeguards relied on for testing evidence. As my colleague acknowledges, the fact the re-enactment was video-taped ensures an accurate record of the statement and enhances the ability of the jury to observe and evaluate it. In addition, the trial judge took a number of steps to ensure the jury was in a position where it could assess and weigh the reliability of the hearsay statement. These safeguards included the following: requiring the Crown to call officers who were present for the re-enactment and prior inconsistent statements so that defence counsel could cross-examine them on any inconsistencies and any reduced plea offers or inducements made to Mr. Thielen; the limited admission of prior inconsistent statements made by Mr. Thielen to help assess his credibility; and wide latitude for defence counsel to discuss Mr. Thielen's possible motives and challenge the ultimate reliability of the re-enactment in closing submissions.

[171] Further, the trial judge provided detailed cautions to help the jury identify

and evaluate the strengths and weaknesses of the re-enactment. Before the video re-enactment was played for the jury, the trial judge provided a mid-trial instruction that told the jury the following:

> That evidence is hearsay evidence, and is not usually permitted as evidence in a court of law. The reason it is not permitted is because the individual who is offering the evidence is not appearing in the witness box, and testifying and subjecting himself to cross-examination, cross-examination which might reveal lies, inconsistencies, motive for making up a story and so forth. So you will need to consider the weight ultimately that you are going to attach to the evidence that you are about to hear this morning.
>
> Now, that is particularly important because in this case, the person who is offering that evidence is subject to a special warning, and you will hear more about this from me in my final instructions to you on the law. Mr. Thielen, you have heard other witnesses testify, is not only an unsavoury character, having regard to his background in drugs and the drug culture in Langley and Surrey. He has been described as an enforcer. He is certainly of unsavoury character in that regard. You have also and will hear -- I think you have heard that he pled guilty to the second degree murder of Ms. Lamoureux and Mr. Bontkes.
>
> You will recall when I gave you some opening instructions, I set out some things you should consider when you decide whether or not to believe a witness. Well, you should consider those things when you assess what Mr. Thielen is about to say. <u>But in addition, I must warn you that you should be extremely cautious in accepting Mr. Thielen's testimony. I must caution you it is dangerous to rely on that testimony alone. The reasons are Mr. Thielen has admitted to participation in the commission of the offence. As I've said, he has an unsavoury reputation. He's admitted and pled guilty to a criminal conviction. Mr. Thielen may well have some motive other than the pursuit of truth. All of these things you will need to consider.</u> [Emphasis added.]

(A.R., vol. VIII, at pp. 2-3)

[172] In the jury charge at the close of trial, the trial judge thoroughly and repeatedly cautioned the jurors about Mr. Thielen's re-enactment and instructed them

on how to evaluate it. This included the following key excerpts:

> As I explained during in the trial, this evidence [Thielen's re-enactment] was placed before you without the usual testing of evidence by cross-examination, and that you must therefore be very cautious in determining the reliability of the evidence.
>
> . . .
>
> In this case Mr. McMurray was not able to cross-examine Mr. Thielen on the things he said or did in the enactment. He was unable to test Mr. Thielen's memory, credibility, motive of or for the things said and done during the re-enactment. You did not have the opportunity to observe the demeanour of Mr. Thielen in the witness box as he gave his evidence.
>
> Furthermore, the statements Mr. Thielen gave to [Cst. D.] were not given under oath. As a result of all that you should not place the statement of Mr. Thielen on the same footing as the statement of a witness who testifies under oath in the courtroom. You should treat Mr. Thielen's out-of-court statement with special care and, after considering it with all the evidence in this case, give it the weight you think it deserves.
>
> . . .
>
> . . . In addition, however, I must warn you that you should be extremely cautious in accepting some or any of his testimony. It is dangerous for you to rely on his evidence alone. There are a number of grounds upon which you may question whether his evidence is reliable: Thielen admitted he participated in the commission of the two offences with which Mr. Bradshaw is charged. He plead guilty to second degree murder of Ms. Lamoureux and Mr. Bontkes.
>
> Thielen admitted to an extensive history of criminal conduct, including the attempted murder of Sigurdson. He has an unsavoury reputation. He has given prior inconsistent statements, that is, in his statement particularly to [Cpl. G.] on March the 18th, when he said he had not seen Lamoureux for two months; and to [Cst. B.] on the drive from Edmonton to Calgary. Mr. Thielen might have some motive other than the pursuit of truth in giving his testimony.
>
> The last and most important ground is that of course Mr. Thielen's evidence was not tested by cross-examination. A person who

> participated in the commission of an offence would be in a particularly good position to concoct a story that falsely implicates the accused. All that person would need to do is tell a truthful story that could be confirmed easily, and falsely add to it an allegation the accused was also a participant.
>
> . . .
>
> . . . In this case Thielen made statements to the police that tend to show Mr. Bradshaw was involved in committing the offences you are trying. You should consider those statements with particular care because Thielen may have been more concerned about protecting himself than about telling the truth. [Emphasis added.]

(A.R., vol. I, at pp. 73, 82-83, 85-86 and 96)

[173] In my view, the opportunity to observe Mr. Thielen in the re-enactment video and the numerous procedural safeguards adopted by the trial judge, including these instructions, placed the jury in a position to identify and critically evaluate each of the frailties of the re-enactment that my colleague identifies. To assume that the jury was incapable of following these instructions and appreciating the frailties of this evidence betrays the time-honoured trust and confidence our justice system places in juries. In *R. v. Corbett*, [1988] 1 S.C.R. 670, this Court emphasized the need to "trust the good sense of the jury" in determining what evidence it may hear (p. 691). This point was put succinctly by Donald J.A. in *R. v. Carroll*, 1999 BCCA 65, 118 B.C.A.C. 219, at para. 41:

> Juries are often required to find facts from a melange of evidence. It is not uncommon for cross-examination to use prior statements of several kinds: police statements, testimony given in a previous trial, an inquest or a preliminary inquiry. We have to trust juries to use their common sense in sifting the evidence and to follow the guidance offered by the trial judge. [Emphasis added.]

[174] I share the sentiment expressed by L'Heureux-Dubé J. in dissent in *R. v. Noël*, 2002 SCC 67, [2002] 3 S.C.R. 433, at para. 145, that courts should trust juries to make proper use of admissible evidence or risk "demean[ing] the jury by suggesting that they are incapable of properly dealing with [the] evidence. Our faith in the jury system is a hollow one if such an attitude is allowed to prevail."

D. *Final Balancing*

[175] In this case, I am satisfied and agree with the trial judge that the re-enactment met the test for threshold reliability on the basis of strong features of substantive reliability, supplemented by sufficient features of procedural reliability. The trial judge was uniquely positioned to make this determination. And, contrary to my colleague's assertions, his analysis discloses no legal error. As a result, his ruling is entitled to deference.

[176] In *Youvarajah*, Karakatsanis J. explained the rationale for this deference (at para. 31):

> The admissibility of hearsay evidence, such as the prior inconsistent statement in this case, is a question of law. Of course, the factual findings that go into that determination are entitled to deference and are not challenged in this case. As well, a trial judge is well placed to assess the hearsay dangers in a particular case and the effectiveness of any safeguards to assist in overcoming them. Thus, absent an error in principle, the trial judge's determination of threshold reliability is entitled to deference: [*Couture*], at para. 81. [Emphasis added.]

[177] In *Blackman*, Charron J. made a similar observation (at para. 36):

> The trial judge is well placed to determine the extent to which the hearsay dangers of a particular case are of concern and whether they can be sufficiently alleviated. Accordingly, the trial judge's ruling on admissibility, if informed by correct principles of law, is entitled to deference.

[178] Ultimately, the trial judge made a difficult call in a close case. It must be emphasized that he was in the best position to make that call based on his assessment of the trustworthiness of the evidence and the jury's ability to evaluate it. Contrary to my colleague's assertions, the trial judge's reasons for admitting the re-enactment were free from error and, as I have endeavoured to demonstrate, were well supported by the record. Indeed, he followed the functional approach that has been repeatedly endorsed by this Court.

[179] I agree with the comments of the Court of Appeal for Ontario in *R. v. S. (S.)*, 2008 ONCA 140, 232 C.C.C. (3d) 158, at paras. 29-30:

> Trial judges cannot consult rules akin to mathematical formulas to tell them how much weight to give to each of the factors. The assessment is case-specific. Different judges will reasonably assign more or less weight to each of the particular factors in any given case.
>
> As long as the trial judge addressed the factors germane to the reliability of the hearsay statement, did not fall into any material misapprehension of the evidence relevant to those factors, and made a reasonable assessment of the weight to be assigned to those factors, this court should not redo the weighing process, but should defer to the trial judge's weighing of those factors. [Emphasis added.]

[180] Respectfully, in my view, it is not the role of this Court to second guess the trial judge's reasonably exercised judgment from a position far removed from the trial setting. Doing so betrays both the deference owed to trial judges and the trust and confidence placed in juries to follow instructions and use their common sense and reason to evaluate evidence. As a result, I would uphold the trial judge's ruling that the re-enactment was admissible.

IV. Application to the May 15, 2010 Statement

[181] Since I have concluded that the re-enactment was admissible, I must address Mr. Bradshaw's alternative argument that the trial judge erred in refusing to admit a prior statement by Mr. Thielen given on May 15, 2010, for the truth of its contents.

[182] That statement occurred during a road trip from Edmonton to Calgary that Mr. Thielen took with an undercover office as part of the Mr. Big operation. Their conversation in the car was audio-recorded. During the trip, Mr. Thielen told the undercover officer that he killed Ms. Lamoureux by himself and killed Mr. Bontkes with the assistance of Ms. Motola. He made no mention of any involvement by Mr. Bradshaw.

[183] The May 15, 2010 statement shares the same hearsay dangers as the re-enactment. However, as I will explain, this statement has a number of distinguishing features that add to its frailties and support the trial judge's decision to refuse to admit

it for the truth of its contents.

[184] First, it is significant that the statement was not video-recorded. This prevents the jury from observing Mr. Thielen's demeanour and reduces its ability to assess his credibility.

[185] Second, Mr. Thielen's motives were entirely different in this context. He had a strong incentive to exaggerate his individual involvement and responsibility for the murders in order to impress his perceived peer in the criminal underworld: *Hart*, at paras. 68-69. Moreover, the statement cannot be characterized as being against his interests because Mr. Thielen admitted his involvement to an associate, not to the police. Unlike the re-enactment, these circumstances of the May 15, 2010 statement cast doubt over Mr. Thielen's sincerity.

[186] Third, this May 15, 2010 statement was strongly contradicted by extrinsic evidence which suggests that it was untruthful. For example, Mr. Thielen stated that after he shot Mr. Bontkes in the head and body, Ms. Motola shot him again in the groin area. This version of events was directly contradicted by forensic evidence which showed Mr. Bontkes was not shot in his groin area. Mr. Thielen's omission of any mention of Mr. Bradshaw is also directly contradicted by Mr. Bradshaw's own admissions of involvement in his recorded conversations with Mr. Thielen described above.

[187] The trial judge considered the relevant factors and applied the correct test

in finding this statement to be inadmissible for its truth. As indicated, his ruling is entitled to deference. Accordingly, I would not interfere. I say this mindful of the fact that the trial judge may relax the rules of evidence for hearsay tendered by the accused in order to prevent a miscarriage of justice: *R. v. Post*, 2007 BCCA 123, 217 C.C.C. (3d) 225, at paras. 89-90; *R. v. Tash*, 2013 ONCA 380, 306 O.A.C. 173, at para. 89; *R. v. Kimberley* (2001), 56 O.R. (3d) 18 (C.A.), at para. 80. Accepting this principle, I note that this statement was put before the jury as a prior inconsistent statement for the purpose of evaluating Mr. Thielen's credibility in the re-enactment. Indeed, defence counsel made reference to it in his closing address and submitted to the jury that it was true. As a result, even if the trial judge did err in refusing to admit it for the truth of its contents, I do not think it caused significant prejudice or resulted in a miscarriage of justice that would warrant appellate intervention.

V. Conclusion

[188] For these reasons, I conclude the trial judge did not err in admitting Mr. Thielen's re-enactment and refusing to admit his May 15, 2010 statement for the truth of its contents. In my respectful view, there is no reason to send this case back for a second trial. Mr. Bradshaw had a fair trial before a properly instructed jury that was well positioned to critically evaluate the reliability of the re-enactment. Accordingly, I would allow the appeal and restore Mr. Bradshaw's two convictions for first degree murder.

Appeal dismissed, MOLDAVER *and* CÔTÉ JJ. *dissenting.*

Solicitor for the appellant: Attorney General of British Columbia, Vancouver.

Solicitors for the respondent: Fowler and Smith Law, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Hunter Litigation Chambers, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association of Ontario: Louis P. Strezos & Associate, Toronto; Henein Hutchison, Toronto.

29750

Supreme Court of Canada | Cour suprême du Canada

05 122 055

Sameer Mapara	Sameer Mapara
- v. -	- c. -
Her Majesty the Queen	Sa Majesté la Reine
- and -	- et -
Attorney General of Canada and Attorney General of Ontario (B.C.) (29750)	Procureur général du Canada et Procureur général de l'Ontario (C.-B.) (29750)
CORAM: The Right Honourable Beverley McLachlin, P.C. The Honourable Mr. Justice Bastarache The Honourable Mr. Justice Binnie The Honourable Mr. Justice LeBel The Honourable Mr. Justice Fish The Honourable Madam Justice Abella The Honourable Madam Justice Charron	CORAM: La très honorable Beverley McLachlin, c.p. L'honorable juge Bastarache L'honorable juge Binnie L'honorable juge LeBel L'honorable juge Fish L'honorable juge Abella L'honorable juge Charron
Appeal heard: December 16, 2004	Appel entendu: Le 16 décembre 2004
Judgment rendered: April 27, 2005	Jugement rendu: Le 27 avril 2005
Reasons for judgment by: The Right Honourable Beverley McLachlin, P.C.	Motifs de jugement : La très honorable Beverley McLachlin, c.p.
Concurred in by: The Honourable Mr. Justice Bastarache The Honourable Mr. Justice Binnie The Honourable Madam Justice Abella The Honourable Madam Justice Charron	Souscrivent à l'avis de la très honorable Beverley McLachlin, c.p. : L'honorable juge Bastarache L'honorable juge Binnie L'honorable juge Abella L'honorable juge Charron
Concurring reasons by: The Honourable Mr. Justice LeBel	Motifs concordants : L'honorable juge LeBel
Concurred in by: The Honourable Mr. Justice Fish	Souscrit à l'avis de l'honorable juge LeBel : L'honorable juge Fish

Counsel at hearing:

For the appellant:
Gil D. McKinnon, Q.C.
Tom Arbogast
Letitia Sears

For the respondent:
John M. Gordon

For the intervener Attorney General of Canada:
Robert W. Hubbard
Marion V. Fortune-Stone

For the intervener Attorney General of Ontario:

Jamie Klukach
Susan Magotiaux

Avocats à l'audience:

Pour l'appelant :
Gil D. McKinnon, c.r.
Tom Arbogast
Letitia Sears

Pour l'intimée :
John M. Gordon

Pour l'intervenant Procureur général du Canada :
Robert W. Hubbard
Marion V. Fortune-Stone

Pour l'intervenant Procureur général de l'Ontario :
Jamie Klukach
Susan Magotiaux

Citations	Références
B.C.C.A.: (2003), 179 B.C.A.C. 92, 295 W.A.C. 92, 180 C.C.C. (3d) 184, [2003] B.C.J. No. 452 (QL), 2003 BCCA 131.	C.A. C.-B. : (2003), 179 B.C.A.C. 92, 295 W.A.C. 92, 180 C.C.C. (3d) 184, [2003] B.C.J. No. 452 (QL), 2003 BCCA 131.
B.C.S.C.: February 6, 2001 (verdict).	C.S.C.-B.:Le 6 février 2001 (verdict).

CITATION

Before publication in the S.C.R., this judgment should be cited using the neutral citation: *R. v. Mapara*, 2005 SCC 23. Once the judgment is published in the S.C.R., the neutral citation should be used as a parallel citation: *R. v. Mapara*, [2005] x S.C.R. xxx, 2005 SCC 23.

RÉFÉRENCE

Avant la publication de ce jugement dans le R.C.S., il faut utiliser sa référence neutre : *R. c. Mapara*, 2005 CSC 23. Après sa publication dans le R.C.S., la référence neutre sera utilisée comme référence parallèle : *R. c. Mapara*, [2005] x R.C.S. xxx, 2005 CSC 23.

r. *v*. mapara

Sameer Mapara *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Canada and Attorney General of Ontario *Interveners*

Indexed as: R. *v*. Mapara

Neutral citation: 2005 SCC 23.

File No.: 29750.

2004: December 16; 2005: April 27.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ.

on appeal from the court of appeal for british columbia

Criminal law — Evidence — Admissibility — Hearsay — Co-conspirator's exception – Double hearsay – Whether co-conspirator's exception to hearsay rule meets requirements of principled approach to hearsay — Whether double hearsay

evidence of co-conspirator lacked necessity or reliability in circumstances of this case and ought to have been excluded.

Criminal law — Evidence — Admissibility — Interception of communications — Three-way communication — Named person in wiretap authorization initiating phone call with third party — Named person and accused alternately speaking with third party during call — Authorization requiring police to stop listening when named person not party to communication — Whether intercepts of telephone conversation between accused and third party should have been excluded – Whether named person still party to communication.

The accused and his co-conspirators, including B, W and C, were charged with first degree murder. The victim was shot to death in the accused's car lot. The Crown alleged that the accused's part in the conspiracy was to lure the victim to the lot. At the accused's trial, B testified that prior to the murder, W had told him that the accused had a job for them. The Crown's evidence also included an intercepted phone call between W and C, a target named in the wiretap authorization. During the call, C and the accused spoke alternately with W. At the same time, the accused received a call on his own phone from the victim and the accused's side of the conversation was picked up by the wiretap. He told the victim to meet him at the lot in 15 minutes and then informed W about this arrangement. Although the authorization required the monitor not to listen if C was not a party to the call, the trial judge held that C had never ceased to be a party to this call and admitted the wiretap evidence. The accused was convicted of first degree murder and the Court of Appeal upheld the conviction.

Held: The appeal should be dismissed. The co-conspirator's evidence and the wiretap evidence were admissible.

Per **McLachlin** C.J. and Bastarache, Binnie, Abella and Charron JJ.: Even when it applies to double hearsay, the co-conspirator's exception to the hearsay rule as set out in *Carter* meets the necessity and reliability requirements of the principled approach to hearsay and should not be set aside or altered. Necessity arises from the combined effect of the non-compellability of a co-accused, the undesirability of trying co-conspirators separately, and the evidentiary value of contemporaneous declarations made in furtherance of a conspiracy. Reliability is satisfied by the *Carter* rule. The two-step *Carter* approach allows the trier of fact to consider a co-conspirator's hearsay statement made in furtherance of the conspiracy only after he or she has found (1) beyond a reasonable doubt, that the conspiracy existed and (2), based only on direct evidence against the accused, that the accused was probably a member of it. The *Carter* approach does not simply amount to corroborating the statement in issue but provides circumstantial indicators of reliability. This approach is fair to accused persons and allows effective prosecutions of conspiracies. It also avoids the delays and difficulties in trial procedure that would arise if, with respect to admissibility, the necessity and reliability of particular pieces of hearsay evidence were to be decided on a case-by-case basis. Finally, the accused did not establish that B's testimony constitutes one of those rare or exceptional cases where evidence falling within a valid exception to the hearsay rule does not, in the peculiar circumstances of the case, contain the indicia of necessity and reliability necessary for the admission of hearsay evidence. The frailties in B's evidence go to its ultimate weight and the trial judge properly charged the jury on this aspect.

There is no basis to interfere with the lower courts' finding that the phone call initiated by C, the named person in the authorization, was a three-way conversation involving C, the accused and W. Since C never ceased to be a party to the conversation, the police did not exceed the terms of the authorization. In the circumstances of this case, the conduct of the police in monitoring the communication between the accused and W cannot be characterized as a deliberate and unreasonable breach of the authorization.

Per **LeBel** and Fish JJ.: While the principled approach must continue to play a significant role in the application of the co-conspirator's exception to the hearsay rule, it cannot be taken for granted that the essential indicia of reliability will always be present in such case. The first two stages of the *Carter* process do provide some circumstantial indicators of reliability, but too many deficiencies in that process may permit mistaken or untruthful hearsay to be admitted into evidence. The *Carter* process is also ill suited to accounting for all the different types of situations arising out of joint ventures in a criminal context. These concerns, as well as the dangers of hearsay and the need to avoid unfairness and wrongful convictions, call for a contextual approach to the application of the co-conspirator's exception. The process should provide sufficient flexibility to the trial judge to assess whether, in the particular factual context, a hearsay declaration possesses sufficient indicia of reliability and necessity.

The admissibility of co-conspirator's hearsay evidence should thus be determined according to the principled approach when the evidence was obtained or given in circumstances that raise serious concerns or suspicions as to reliability or necessity. A standard of serious concerns or suspicions recognizes that the traditional

exceptions normally suffice but does not limit the application of the principled approach to the most exceptional cases. A *voir dire* to assess the hearsay evidence will remain the exception and will be required only when an accused raises serious and real concerns based on concrete and particularized reasons or with a specific evidentiary basis. These concerns are drawn from the circumstances in which the declaration was made. The evidence should be provisionally admitted when tendered and if serious concerns or suspicions are raised, then a *voir dire* into its admissibility under the principled approach should be held before the case is left with the trier of fact. Where an accused is unable to raise any serious or suspicious concerns, the trier of fact will apply the *Carter* steps at the end of trial. In this case, the accused has not established that B's hearsay evidence raised serious concerns as to its reliability.

Cases Cited

By McLachlin C.J.

Applied: *R. v. Carter*, [1982] 1 S.C.R. 938; *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40; **referred to:** *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Chang* (2003), 173 C.C.C. (3d) 397; *R. v. Evans*, [1993] 3 S.C.R. 653.

By LeBel J.

Applied: *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40; **discussed:** *R. v. Carter*, [1982] 1 S.C.R. 938; **referred to:** *R. v. Pilarinos* (2002) 2 C.R. (6th) 273, 2002 BCSC 855; *R. v. Chang* (2003), 173 C.C.C. (3d) 397; *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Hawkins*, [1996]

3 S.C.R. 1043; *R. v. Ticknovich* (2003), 343 A.R. 243, 2003 ABQB 854; *R. v. Duncan*, [2002] 1 C.R. (6th) 265; *R. v. Hape*, [2002] O.J. No. 168 (QL).

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 24(2).

Authors Cited

Archibald, Bruce P. "The Canadian Hearsay Revolution: Is Half a Loaf Better Than No Loaf at All?" (2000), 25 *Queen's L.J.* 1.

Goode, Matthew R. *Criminal Conspiracy in Canada*. Toronto: Carswell, 1975.

Layton, David. "*R. v. Pilarinos*: Evaluating the Co-conspirators or Joint Venture Exception to the Hearsay Rule" (2002), 2 C.R. (6th) 293.

Paciocco, David M., and Lee Stuesser. *The Law of Evidence*, 3rd ed. Toronto: Irwin Law, 2002.

Sopinka, John, Sidney N. Lederman and Alan W. Bryant. *The Law of Evidence in Canada*, 2nd ed. Toronto: Butterworths, 1999.

Stewart, Hamish. "Hearsay after *Starr*" (2002), 7 *Can. Crim. L.R.* 5.

Stuart, Don. *Canadian Criminal Law: A Treatise*, 4th ed. Scarborough, Ont.: Carswell, 2001.

Whitzman, Stephen. "Proof of Conspiracy: The Co-conspirator's Exception to the Hearsay Rule" (1985-86), 28 *Crim. L.Q.* 203.

APPEAL from a judgment of the British Columbia Court of Appeal (Donald, Saunders and Low JJ.A.) (2003), 179 B.C.A.C. 92, 295 W.A.C. 92, 180 C.C.C. (3d) 184, [2003] B.C.J. No. 452 (QL), 2003 BCCA 131, upholding the accused's conviction for first degree murder. Appeal dismissed.

Gil D. McKinnon, Q.C., *Tom Arbogast* and *Letitia Sears*, for the appellant.

John M. Gordon, for the respondent.

Robert W. Hubbard and *Marion V. Fortune-Stone*, for the intervener the Attorney General of Canada.

Jamie Klukach and *Susan Magotiaux*, for the intervener the Attorney General of Ontario.

Solicitor for the appellant: Gil D. McKinnon, Vancouver.

Solicitor for the respondent: Ministry of the Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Ministry of the Attorney General of Ontario, Toronto.

SUPREME COURT OF CANADA

SAMEER MAPARA

- v. -

HER MAJESTY THE QUEEN

- and -

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ONTARIO

CORAM: The Chief Justice and Bastarache, Binnie,
LeBel, Fish, Abella and Charron JJ.

THE CHIEF JUSTICE —

I. Introduction

1 On October 7, 1998, Vikash Chand was shot seven times while changing a licence plate in the car lot of Rags to Riches Motor Cars, owned by the appellant, Mapara. Five people were charged with Chand's murder: the appellant, who was alleged to have lured Chand to the place of execution; Chow, who was alleged to have financed the killing and getaway; Shoemaker, who is alleged to have done the killing;

Binahmad, the getaway driver who testified for the Crown; and Wasfi, who the Crown alleged organized the killing.

2 The appellant and Mr. Chow were tried jointly by judge and jury. They were convicted of first degree murder. Their appeals to the Court of Appeal of British Columbia were dismissed: (2003), 179 B.C.A.C. 92, 2003 BCCA 131. They now appeal to this Court. These are the reasons on Mapara's appeal.

3 Mr. Mapara raises two grounds of appeal in this Court. First, he argues that Binahmad's evidence of a discussion incriminating him in the planning of the murder should have been rejected as unreliable double hearsay evidence. Second, he argues that wiretap evidence against him taken shortly before the murder did not fall within the terms of the authorization and should not have been admitted at trial.

4 I conclude that neither argument can succeed, and would dismiss the appeal.

A. *Admissibility of Binahmad's Evidence of His Conversation with Wasfi*

5 Binahmad testified that sometime around late September 1997 he met with Wasfi at a Petro Canada gas station, where Wasfi told Binahmad that "the little guy", who Binahmad understood to be Mapara, had a job for them. In the appellant's submission, this was important evidence. It was one of two main items of evidence that Mapara had been involved in the planning of Chand's murder; the other evidence against Mapara related to the allegation that he had lured Chand to the Rags to Riches

lot to be killed. The Crown replies that the evidence of the conversation with Wasfi was unimportant since evidence that Mapara lured Chand to his death alone made Mapara's conviction for first degree murder inevitable.

6 In the appellant's submission, this was also unreliable evidence, being the double hearsay evidence of a co-conspirator who had reason to lie. Indeed, one aspect of this testimony was plainly false – Binahmad must have been mistaken as to the date of the conversation, since Wasfi was in prison at that time. The Crown replies that Binahmad's error as to the date was before the jury, and that the trial judge told the jury about the limited circumstances in which they could accept the evidence and properly warned the jury against the inherent unreliability of the evidence of co-conspirators like Binahmad.

7 The central issue, however, is not the importance or ultimate reliability of the evidence, but its admissibility. The appellant concedes that under the law as it presently stands, the evidence was admissible under an exception to the hearsay rule known as the co-conspirators' exception, which permits reception of evidence of what co-conspirators say out of court in furtherance of the conspiracy. This is known as the *Carter* rule, after this Court's decision in *R. v. Carter*, [1982] 1 S.C.R. 938. The appellant argues that this rule should be set aside or altered to make Binahmad's evidence of the conversation with Wasfi inadmissible.

8 The co-conspirators' exception to the hearsay rule may be stated as follows: "Statements made by a person engaged in an unlawful conspiracy are receivable as admissions as against all those acting in concert if the declarations were

made while the conspiracy was ongoing and were made towards the accomplishment of the common object" (J. Sopinka, S. N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 303). Following *Carter*, co-conspirators' statements will be admissible against the accused only if the trier of fact is satisfied beyond a reasonable doubt that a conspiracy existed and if independent evidence, directly admissible against the accused, establishes on a balance of probabilities that the accused was a member of the conspiracy.

9 The appellant mounts several attacks on this rule as it applies to double hearsay evidence. His first argument is that it is unconstitutional because it denies an accused person's right under s. 7 of the *Canadian Charter of Rights and Freedoms* to make full answer and defence. The appellant was entitled to cross-examine not only Binahmad on the statement, but Wasfi, the hearsay declarant of the statement that "the little guy" had a job for them, it is submitted. The inability to cross-examine Wasfi breached the appellant's right to full answer and defence, and the *Carter* rule as it applies to double hearsay is therefore unconstitutional.

10 I cannot accede to this argument. First, it was not presented in the courts below, and the appellant was refused leave to state a constitutional question by order of Bastarache J. on September 8, 2004. Second, on the substance of the matter, the argument adds little to the appellant's main contention that the co-conspirators' exception, as it applies to double hearsay, should be revisited by this Court. I now turn to this argument.

11 The appellant's second argument is that this Court should revisit the co-conspirators' exception to the hearsay rule in light of the principled approach to the hearsay rule set out in *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40. He submits that *Starr* requires that all hearsay evidence, even if it falls within a traditional exception, be both necessary (in the sense that other sources of the evidence are not available) and reliable. The evidence here at issue is not reliable, and therefore should not have been received.

12 This argument over-simplifies and distorts the principled approach to hearsay evidence set out in cases such as *R. v. Khan*, [1990] 2 S.C.R. 531, and *Starr*. These cases seek to reconcile the traditional approach to hearsay evidence with the principles that lie behind it.

13 The traditional rule is that all hearsay evidence is inadmissible, unless it falls within one of the exceptions to the hearsay rule. The party tendering hearsay evidence must fit it within one of the traditional categories. This rule has served well for centuries and continues to serve as a practical guide for the admissibility of hearsay evidence. However, as with most category-based rules, in some cases the results may appear arbitrary.

14 This occasional arbitrariness was highlighted by the principled analysis of the hearsay rule and its exceptions developed by the American scholar Wigmore almost a century ago. Wigmore pointed out that the reasons for excluding hearsay evidence in general is that it is not the best evidence (direct evidence would be better), and it may be unreliable (it was not given under oath and cannot be tested by cross-

examination). However, if these two defects are alleviated, hearsay evidence may be admitted. This, Wigmore opined, explains how most of the exceptions to the hearsay rule developed. The evidence is necessary, in that the person who made the hearsay statement is not readily available. And it is reliable, in the sense that something about it provides a circumstantial guarantee of trustworthiness. For these reasons, judges began to admit it. Their decisions were followed in other cases. Gradually, an exception emerged and became a fixed rule. Once fixed, however, the rule became rigid and could, in some cases, exclude evidence which should have been received having regard to the underlying criteria of necessity and reliability. It could also occasionally lead to the admission of evidence which should be excluded, judged by these criteria. This in turn could impede the search for the truth or unfairly prejudice the accused person.

15 The principled approach to the admission of hearsay evidence which has emerged in this Court over the past two decades attempts to introduce a measure of flexibility into the hearsay rule to avoid these negative outcomes. Based on the *Starr* decision, the following framework emerges for considering the admissibility of hearsay evidence:

a. Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.

b. A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the

principled approach. The exception can be modified as necessary to bring it into compliance.

c. In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.

d. If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a voir dire.

(See generally D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at pp. 95-96.)

16 Admissibility of evidence is determined on the basis of "threshold reliability" provided by circumstantial indicators of reliability. The issue of "ultimate reliability" is for the trier of fact, in this case the jury.

17 The appellant invokes the second and third propositions set out above. His main argument is that the co-conspirators' exception to the hearsay rule does not accord with the fundamental criteria that underlie the exceptions to the hearsay rule, necessity and reliability. Alternatively, the question arises whether this is one of those "rare cases" where hearsay evidence falling within an exception to the hearsay rule should not be admitted because it lacks the necessary indicia of necessity and reliability.

18 I first address the appellant's main argument – the co-conspirators' exception to the hearsay rule does not reflect the necessary indicia of necessity and reliability. In *R. v. Chang* (2003), 173 C.C.C. (3d) 397, the Ontario Court of Appeal, *per* O'Connor A.C.J.O. and Armstrong J.A., rejected this argument. The criterion of necessity poses little difficulty. As stated in *Chang*, "necessity will arise from the combined effect of the non-compellability of a co-accused declarant, the undesirability of trying alleged co-conspirators separately, and the evidentiary value of contemporaneous declarations made in furtherance of an alleged conspiracy" (para. 105).

19 The criterion of reliability requires closer scrutiny. The appellant raises the concern that co-conspirators' statements tend to be inherently unreliable because of the character of the declarants and the suspicious activities in which they are engaged.

20 A preliminary issue arises at this stage. The federal Crown argues that the co-conspirators' exception is not grounded in a concern for reliability, but rests rather on the reasoning that once it is established that the people concerned were involved in the same conspiracy, then the statements of one are admissions against all. Thus, "the rationale for the rule in Canada was grounded in principles governing admissions by party litigants": *Chang*, at para. 82. This exception is grounded in "a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all": *R. v. Evans*, [1993] 3 S.C.R. 653, *per* Sopinka J., at p. 664. Sopinka J. went on to suggest that circumstantial guarantees of trustworthiness are irrelevant to the party admissions exception to the hearsay rule:

> The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements.

It follows on this reasoning that if the appellant was a co-conspirator with the witness, Binahmad, the appellant cannot be heard to complain that what he said to Binahmad was unreliable. Similarly, it is argued, he cannot complain about the unreliability of what a third co-conspirator, Wasfi, said to Binahmad. They were all plotting together, and what each says can be used against the other. Having entered into a criminal conspiracy, the accused cannot in his defence rely on its very criminality and the unreliability of his co-conspirators.

21 The unique doctrinal roots of the co-conspirators' exception to the hearsay rule cannot be denied. However, as noted in *Chang*, "the fact that the co-conspirators' rule is grounded in those principles does not alter the fact that a statement that becomes admissible under the *Carter* process is hearsay and concerns about unreliability are very real" (para. 85). In this sense, the directive of *Starr* that the traditional exceptions should be examined for conformity with necessity and reliability remains pertinent.

22 I return, therefore, to the question of whether the co-conspirators' exception to the hearsay rule possesses sufficient circumstantial indicators of reliability. The *Carter* process allows the jury to consider a hearsay statement by a co-conspirator in furtherance of the conspiracy only after it has found (1) that the

conspiracy existed beyond a reasonable doubt and (2) that the accused was probably a member of the conspiracy, by virtue only of direct evidence against him.

23 The appellant argues that *Carter* cannot satisfy the reliability requirement because it amounts to using corroborating evidence to bolster the reliability of hearsay declarations against the accused, contrary to *Starr*, *per* Iacobucci J., at para. 217.

24 I do not agree. The question is whether the first two stages of the *Carter* process provide circumstantial indicators of reliability that do not amount to simply corroborating the statements in issue. In my view, they do. Proof that a conspiracy existed beyond a reasonable doubt and that the accused probably participated in it does not merely corroborate the statement in issue. Rather, it attests to a common enterprise that enhances the general reliability of what was said in the course of pursuing that enterprise. It is similar in its effect to the *res gestae* exception to the hearsay rule, where surrounding context furnishes circumstantial indicators of reliability. The concern is not with whether a particular statement is corroborated, but rather with circumstantial indicators of reliability.

25 The evidence under the first two stages of *Carter* is not inherently corroborative of the hearsay statement, in the sense of confirming the truth of its contents. Indeed the evidence establishing the conspiracy and the accused's probable participation may conflict with the hearsay evidence subsequently adduced. More often than not, the trier of fact will find corroboration, rather than conflict, in the direct evidence implicating the accused. However, this ultimate use of the evidence should not be confused with its initial role in establishing threshold reliability. Here it is

relevant with respect to the context of the hearsay evidence, and not to its contents. The use of the *Carter* approach in the present inquiry thus stays within the boundaries of threshold reliability, as explained in *Starr*.

26 In addition to these preliminary conditions, the final *Carter* requirement, i.e., only those hearsay statements made in furtherance of the conspiracy can be considered, provides guarantees of reliability in the more immediate circumstances under which the statement is made. "In furtherance" statements "have the reliability-enhancing qualities of spontaneity and contemporaneity to the events to which they relate" (*Chang*, at paras. 122-23). They have *res gestae* type qualities, being "the very acts by which the conspiracy is formulated or implemented and are made in the course of the commission of the offence" (*Chang*, at para. 123). This "minimizes the motive and opportunity for contrivance" (*Chang*, at para. 124). The characters' doubtful reputation for veracity is not a factor at this stage of the analysis. Rather, it is to be taken into account by the jury when assessing the ultimate reliability of such characters' statements.

27 In sum, the conditions of the *Carter* rule provide sufficient circumstantial guarantees of trustworthiness necessary to permit the evidence to be received.

28 This conclusion makes practical sense. First, the rule does not operate unfairly to accused persons. Indicia of reliability exist. In this way, unreliable evidence that is likely to mislead the jury can be excluded. It remains open to the accused to cross-examine the deponent, call contrary evidence, and argue the unreliability of the co-conspirators' evidence before the jury. Moreover, it is not

unfair to expect people who enter into criminal conspiracies to accept that if they are charged, the evidence of their co-conspirators about what they said in furtherance of the conspiracy may be used against them. Finally, the hearsay rule is supplemented by the discretion of the trial judge to exclude evidence where its prejudicial effect outweighs its probative value, discussed below.

29 Second, the rule allows the Crown to effectively prosecute criminal conspiracies. It would become difficult and in many cases impossible to marshal the evidence of criminal conspiracy without the ability to use co-conspirators' statements of what was said in furtherance of the conspiracy against each other. To deprive the Crown of the right to use double hearsay evidence of co-conspirators as to what they variously said in furtherance of the conspiracy would mean that serious criminal conspiracies would often go unpunished.

30 Finally, to modify the *Carter* rule would increase delay and difficulties in trial procedure. Any approach that requires the trial judge to scrutinize the necessity and reliability of particular pieces of hearsay evidence in deciding its admissibility would undermine the efficiency of the traditional categories of exceptions to the hearsay rule and increase the number of *voir dire*. As stated in *Chang*:

> We are concerned that conspiracy trials, many of which are already complicated, may become more so if every time the Crown seeks to introduce co-conspirators' declarations, the trial judge is required to hold a *voir dire* to determine if there is compliance with the principled approach. We do not anticipate that will be the case. A *voir dire* addressing the principled approach should be the exception. It will only be required when an accused is able to point to evidence raising serious and real concerns about reliability emerging from the circumstances in which a declaration was made, which concerns will not be adequately

> addressed by use of the *Carter* approach. As a general rule, the presumption that evidence that meets the *Carter* requirements also meets the principled approach should obviate the need for a *voir dire*. [para. 132]

The appellant suggests simply that we make the *Carter* rule inapplicable to double hearsay evidence. However, the underlying rationale for doing so is that all hearsay evidence, even if it falls under an established exception, must be rejected if that particular piece of evidence does not meet the concerns of necessity and reliability. This implies a case-by-case vetting more resembling the ultimate reliability inquiry that is for the jury, than the threshold reliability inquiry relevant to admissibility.

31 I conclude that the co-conspirators' exception to the hearsay rule meets the requirements of the principled approach to the hearsay rule and should be affirmed.

32 The appellant also asks us to change the *Carter* rule to require the first two elements to be determined by the trial judge, rather than the jury, on the ground that allowing the jury to decide these elements renders the exception operationally unfair. While courts may adjust common law rules incrementally to avoid apparent injustice, they do so only where there is clear indication of a need to change the rule in the interests of justice. That is not established in this case. Indeed, the appellant's suggestion was considered and rejected in *Carter* precisely because of the danger that the jury might confuse the direct and the hearsay evidence against the accused and rely on the latter to convict the accused. The Court concluded that the three-stage approach was better suited to bring home to the jury the need to find independent evidence of the accused's participation in conspiracy. I would not accede to this request.

33 I conclude that the *Carter* rule stands and that the evidence in question was not excluded by the hearsay rule.

34 This leaves for consideration the argument that even if the co-conspirators' exception to the hearsay rule satisfies the need for indicia of necessity and reliability, this is one of those rare cases where evidence falling within a valid exception to the hearsay rule should nevertheless not be admitted because the required indicia of necessity and reliability are lacking in the particular circumstances of the case. The same considerations that lead to the conclusion that the co-conspirators' exception to the hearsay rule satisfies the requirements for indicia of necessity and reliability, are applicable here. Necessity is established, in the absence of direct evidence from the co-accused declarants. Indicia of reliability are found in the requirements of the *Carter* rule for a conspiracy proved beyond a reasonable doubt, membership of the accused in it on a balance of probability, and the rule that only statements made in furtherance of the conspiracy are admitted. It therefore becomes difficult to conclude that evidence falling under the *Carter* rule would lack the indicia of reliability and necessity required for the admission of hearsay evidence on the principled approach. In all but the most exceptional cases the argument is spent at the point where an exception to the hearsay rule is found to comply with the principled approach to the hearsay rule.

35 Is this such a case? Certainly there are frailties in the evidence of the co-conspirator. Wasfi arguably had a motive to lie, namely a desire to falsely implicate the appellant, so Binahmad would think the appellant's money would be used in the killing. According to the appellant, Wasfi had his own reasons to have Chand killed, namely to obtain vengeance for the alleged rape of his girlfriend and to eliminate a

debt. He implicated the appellant because Binahmad knew he himself could not finance the contract killing. Finally, the evidence showed that Wasfi was in jail at the time when Binahmad testified that the discussion took place.

36 These concerns, with the exception of the discrepancy as to the date of the conversation, do not go beyond concerns already addressed in the analysis of whether the co-conspirators' exception complies with the principled approach to the hearsay rule. They are characteristic of any conspiracy. Any weaknesses go to the ultimate weight of the evidence, which is for the jury to decide. Nor does Binahmad's error on when the conversation took place merit rejection of the evidence. This problem is one of ultimate reliability that the jury can decide. The trial judge reminded the jury in his charge about this difficulty, in the context of highlighting the defence position that both Wasfi and Binahmad were completely unreliable characters.

37 It follows that the appellant has not established that the evidence to which he objects constitutes one of those "rare cases" where evidence falling within a valid exception to the hearsay rule fails, in the peculiar circumstances of the case, to satisfy the indicia of necessity and reliability necessary for the admission of hearsay evidence.

B. *Admissibility of Call No. 79*

38 This phone call was initiated by Mr. Chow who called Mr. Wasfi, then handed over the phone to the appellant. After a brief exchange with Wasfi, the appellant returned the phone to Chow, who spoke with Wasfi for most of the remainder of the call, except for the very last part when the appellant comes back to talk to Wasfi.

During this last interval, the appellant received a phone call from Mr. Chand and the appellant's side of the conversation with Chand was picked up by the wiretap. The intercept recorded the appellant telling the victim to meet him at the Rags to Riches lot in 15 minutes. When that call terminated, the appellant returned to his conversation with Wasfi and told him about this fortunate arrangement.

39 The appellant argues that the interception of his communications during this call was unlawful, as it exceeded the terms of the authorization. Mr. Chow was named as a target in the authorization and his interception was therefore lawful. The call was being manually monitored. The authorization required the police to stop listening when Mr. Chow was not a party to the communication. Thus the issue is whether Chow continued to be a party to the conversation after the appellant took the cell phone from Chow. If the appellant had borrowed Chow's phone and called Wasfi, there is no doubt that the obligation to cease the interception would have been triggered. However, Chow initiated the call to Wasfi and both courts below found that he never ceased to be a party to the conversation, i.e., this was a three-way communication throughout, rather than a series of separate communications. Furthermore, as the respondent points out, the appellant himself characterized the call as a three-way conversation in cross-examination.

40 The appellant's case depends on this fundamental determination, which is of a factual nature. On the evidence before us, there is no basis to interfere with the findings in the courts below.

41 Given the relatively short duration of the call and the frequency with which the conversation moved back and forth between Chow, Mapara and Wasfi, it seems reasonable for the monitor listening to it to expect that Chow was constantly present in the background and likely to intervene in the conversation at any time. Practically speaking, it is difficult to say at which point they should have determined that Chow was no longer a party to the conversation, which became a communication solely between Mapara and Wasfi. I would not characterize the police conduct in monitoring this call as deliberate and unreasonable. Even if it could be said with regard to the very last part of the call, for instance, when Chow does not come back on the line, that there was an unlawful interception, this would not constitute a violation of sufficient seriousness to engage an inquiry under s. 24(2) of the *Charter* into whether the conduct brought the administration of justice into disrepute.

II. Conclusion

42 I would dismiss the appeal and affirm the decision of the Court of Appeal.

SUPREME COURT OF CANADA

SAMEER MAPARA

- v. -

HER MAJESTY THE QUEEN

- and -

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ONTARIO

CORAM: The Chief Justice and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ.

LeBel J. —

43 I have read the reasons of Chief Justice McLachlin. Although I agree with her opinion on the admissibility of call No. 79 and with the proposed disposition of this case, I differ from her with respect to the interaction of the co-conspirator's exception to the hearsay rule and the principled approach set out in *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40.

A. *The Principled Approach to Hearsay Evidence – its Relevance*

44 In *Starr*, our Court held that evidence falling within a traditional exception to the hearsay rule is presumptively admissible and that the exceptions should be interpreted in a manner consistent with the requirements of the principled approach: necessity and reliability (paras. 212-13). It was also recognized that, in spite of the application of an exception to the hearsay rule, evidence can be excluded in rare circumstances if it does not meet the principled approach's requirements of necessity and reliability (para. 214). Moreover, *Starr* does not differentiate between the types of hearsay exceptions. It appears therefore that all hearsay exceptions may potentially be subject to the requirements of the principled approach to the hearsay rule. This includes the co-conspirator's exception to hearsay, regardless of whether this exception is justified on the basis of the principles of agency, *res gestae* or admissions: see *R. v. Pilarinos* (2002), 2 C.R. (6th) 273, 2002 BCSC 855, at para. 68. The concern about the admission of unreliable evidence and the resulting impact on trial fairness must take priority: *R. v. Chang* (2003), 173 C.C.C. (3d) 397 (Ont. C.A.), at para. 86.

45 The requirements of the principled approach must continue to play a significant role in the application of the co-conspirator's exception as set out in *R. v. Carter*, [1982] 1 S.C.R. 938. To hold otherwise would seem to be incompatible with our Court's efforts over the last two decades to reshape the law of evidence as applicable to hearsay to temper the rigidity of the traditional hearsay rules. In this respect, Lamer C.J. emphasized in *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764, at para. 21, that, "[a]s the goal of our modifications of the principles governing hearsay has been to end the rigid artifice of pigeon-hole exceptions, it is important that new criteria remain

flexible". Reliability and necessity have thus become the predominant criteria governing the admissibility of hearsay evidence.

46 Also, one has to bear in mind that, in developing the principled approach to the hearsay rule, our Court has been concerned with the potentially prejudicial effects of the intrinsic dangers of hearsay evidence, namely the absence of oath and cross-examination, and the inability of the trier of fact to assess the demeanour of the declarant: see *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at p. 787; *R. v. Hawkins*, [1996] 3 S.C.R. 1043, at paras. 74-75; *Starr*, at paras. 200 and 212. The existence of these dangers offers further justification for maintaining indicia of reliability and necessity as part of the analysis regarding the admissibility of hearsay statements under an established exception such as the co-conspirator rule.

47 Trial fairness and the principles of fundamental justice also militate in favour of considering these indicia in a manner that offers sufficient flexibility. As the majority said in *Starr*:

> This is particularly true in the criminal context given the "fundamental principle of justice, protected by the *Charter*, that the innocent must not be convicted": *R. v. Leipert*, [1997] 1 S.C.R. 281, at para. 24, quoted in *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 71. It would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception. [para. 200]

48 Courts have generally recognized that the co-conspirator's exception to the hearsay rule is subject to the requirements of the principled approach, or that the

presumptive validity of the co-conspirator's evidence can be displaced in particular circumstances: see *R. v. Ticknovich* (2003), 343 A.R. 243, 2003 ABQB 854, at paras. 30-31; *R. v. Duncan* (2002), 1 C.R. (6th) 265 (Man. Prov. Ct.), at paras. 59-67; *Pilarinos*, at para. 68. It is interesting to note as well that in *Chang*, the Ontario Court of Appeal, despite its restrictive view of the application of the principled approach to the co-conspirator's exception, recognized that there may be occasions when the circumstances surrounding the making of a particular statement raise such serious suspicions about its reliability that the court will exclude the evidence even though it may comply with the co-conspirator rule: *Chang*, at para. 125.

49 Many commentators have also pointed out the unreliability of evidence that falls within the co-conspirator's exception to the hearsay rule: M. R. Goode, *Criminal Conspiracy in Canada* (1975), at p. 252; S. Whitzman, "Proof of Conspiracy: The Co-conspirator's Exception to the Hearsay Rule" (1985-86), 28 *Crim. L.Q.* 203, at p. 205; D. Stuart, *Canadian Criminal Law: A Treatise* (4th ed. 2001), at p. 682; H. Stewart, "Hearsay after *Starr*" (2002), 7 *Can. Crim. L.R.* 5, at pp. 15-16; D. Layton, "*R. v. Pilarinos*: Evaluating the Co-conspirators or Joint Venture Exception to the Hearsay Rule" (2002), 2 C.R. (6th) 293, at p. 303; B. P. Archibald, "The Canadian Hearsay Revolution: Is Half a Loaf Better Than No Loaf at All?" (2000), 25 *Queen's L.J.* 1, at p. 49.

50 Because of this unreliability, both the courts and the commentators have raised serious concerns as to whether the procedure mandated by *Carter* meets the requirements of the principled approach. The following are among the chief concerns that have been raised. First, the reliability of a hearsay statement is not necessarily

bolstered if it was made in a joint venture. The existence of a joint venture does not uniformly lead to an increased probability that the declarant's statement is accurate: see Layton, at pp. 303-4. As Bennett J. wrote in *Pilarinos*, at para. 66:

> Juriansz J. [in *R. v. Hape*, [2002] O.J. No. 168 (QL) (S.C.J.)] appears to conclude that if the stages of *Carter* are met, then a circumstantial guarantee of trustworthiness exists. This may be the result in some cases, but it will certainly not be the result in all cases, and it cannot be taken as a given. The *Carter* test provides safeguards for the accused, but that does not necessarily equate with the hearsay statement being accompanied by a circumstantial guarantee of trustworthiness.

51 Second, insofar as the *Carter* process requires the trier of fact to look at corroborative evidence, it is in conflict with the principled approach to the hearsay rule as developed in *Starr*. The proof of a conspiracy derived from the first and second stages of *Carter*, although not inherently corroborative of the hearsay statement, will sometimes allow certain statements to be taken into account that are external to the immediate surrounding circumstances of those statements. The co-conspirator rule may thus run counter to the position of the majority in *Starr*, at para. 217, where it was held that only evidence that concerns the circumstances of the statement itself may be taken into consideration. See also *Duncan*, at para. 54.

52 Third, the *Carter* process does not allow the declarant's motive to lie, which will in some circumstances be relevant to the determination of threshold reliability, to be taken into consideration. Members of a criminal conspiracy often have motives to lie, especially given that criminal success is not achieved through meticulous fidelity to the truth: see Layton, at p. 304. Conspirators may wish to understate their own involvement and emphasize the role of their partners in crime in the hope of being

shown leniency or gaining a personal advantage. In this respect, the agency theory for the co-conspirator rule might very well minimize the likelihood that a co-conspirator would misrepresent the intention of the others, although it should not be assumed that it will unfailingly do so. Even *res gestae*-type qualities do not implicitly and invariably provide sufficient safeguards.

53 Thus, it cannot be taken for granted that the essential indicia of reliability will always be present in the case of the co-conspirator's exception to the hearsay rule. Although the first two stages of the *Carter* process do provide some circumstantial indicators of reliability, too many deficiencies in that process may allow mistaken or untruthful hearsay declarations to be admitted in evidence. The *Carter* process is also ill suited to accounting for all the different types of situations arising out of joint ventures in a criminal context.

54 These concerns, as well as the dangers of hearsay and the need to avoid unfairness and wrongful convictions, call for a contextual approach to the application of the co-conspirator's exception to the hearsay rule. The process should provide sufficient flexibility to the trial judge to assess whether, in the particular factual context, a hearsay declaration possesses sufficient indicia of reliability and necessity.

55 In her reasons in this case, the Chief Justice finds that the *Carter* rule alone provides sufficient circumstantial guarantees of trustworthiness and accords with the fundamental criteria of necessity and reliability. In light of the above, I disagree with that conclusion. In my view, the *Carter* process does not in itself provide sufficient safeguards.

B. *Application of the Principled Approach*

56 The admissibility of evidence based on the co-conspirator's exception should be determined according to the principled approach to the hearsay rule when the circumstances in which the evidence was obtained or given raise real and serious concerns as to reliability or necessity. In such circumstances, the trial judge should be required to scrutinize the evidence to ensure that it meets the criteria of the principled approach: *Chang*, at para. 127. There is a need to depart from the *Carter* process and allow careful scrutiny where the theoretical justification for the co-conspirator's exception collides with the facts or circumstances of the case. The rationale for the exception has then been displaced and the trier of fact must avoid relying on that evidence when following the *Carter* process: see the comments made by L'Heureux-Dubé J. in *Starr*, at para. 57, although I disagree with the assertion that an exception will be challenged only when there are "facts generally applicable to a class of persons" which weaken the theoretical justification of an exception to hearsay.

57 In her reasons, the Chief Justice recognizes that in "the most exceptional cases" the exception to hearsay might not comply with the principled approach to the hearsay rule. This is too high a threshold. The principled approach cannot be curtailed to a point where it allows for untruthful and mistaken hearsay declarations to be admitted under a rule that fails to attain its objectives. Instead, the Court should adopt another standard that will provide sufficient guarantees of reliability and preserve the efficiency of trials while ensuring trial fairness.

58 The standard of serious concerns or suspicions is not as restrictive as the solution proposed by the majority in this case. It recognizes that the traditional hearsay exceptions will normally suffice, but it does not limit the application of the principled approach solely to the "most exceptional ones". The serious concerns or suspicions standard better responds to the concerns raised in *Starr* as to the reliability of evidence tendered under a traditional exception to the hearsay rule even if only in "rare" cases (para. 214).

59 Circumstances of strong suspicion could be present where there are clear indications that a statement could not have been made, that it was intended to mislead or that the declarant lied, or that coercion or inducements were used to obtain the statement. However, this list is not exhaustive.

60 I wish to stress that a *voir dire* to assess hearsay evidence of co-conspirators on the basis of the principled approach will remain the exception. It will be required only when a party raises real and serious concerns about necessity or reliability by providing concrete and particularized reasons, or by pointing to a specific evidentiary basis for the alleged concerns. Those concerns will have to emerge from the circumstances in which a declaration was made or is being tendered: *Chang*, at para. 132. The burden of raising such concerns is borne by the party opposing the admission of the statement.

61 A difficult question arises as to when the principled approach to the hearsay rule should be followed. Generally, the admissibility of evidence is determined when it is tendered, subject to the discretion of a trial judge to require assurances by counsel

that the criteria for admissibility will ultimately be satisfied. A problem arises here because, as we know, the *Carter* process takes place at the end of the trial when the trier of fact is called upon to assess the evidence. It has been suggested in some cases that the principled approach should be followed at the conclusion of all the evidence (*Duncan*, at para. 65; *Pilarinos*, at para. 70) or at the point where the *Carter* steps are proven (*R. v. Hape*, [2002] O.J. No. 168 (QL) (S.C.J.), at para. 15). I prefer an approach that provides sufficient flexibility to the trial judge to determine the appropriate time to hold a *voir dire* while ensuring that it is held before *Carter* is applied at the end of the trial. Therefore, I am of the opinion that the trial judge has the discretion to determine when a *voir dire* is necessary to screen a declaration against the necessity or reliability criteria, as long as it is held before the case is left with the trier of fact: see *Chang*, at para. 130.

62 Thus, the evidence should be provisionally admitted when tendered. The principled approach will come into play if a party satisfies its burden to raise serious concerns or suspicions as to reliability or necessity. If the trial judge finds that the burden is met, then a *voir dire* should be held to determine whether or not the hearsay declaration meets the requirements of the principled approach. Where a party is unable to raise any serious concerns or suspicions, the trier of fact will apply the *Carter* steps as usual at the end of trial.

63 The approach highlighted above will help to achieve a balance between the efficiency and the fairness of the trial process. In addition, public confidence is less likely to be diminished by the admission of mistaken and untruthful statements as a result of the mechanical application of an inflexible method. Such a compromise

becomes necessary when fundamental principles of justice are at stake and there is a risk of wrongful conviction.

64 On the facts of this case, I agree with my colleagues that the appellant has not established that the evidence to which he objects raises serious and real concerns as to its reliability. Had it been known at the relevant time, the fact that Wasfi was in jail when his discussion with Binahmad allegedly occurred might well have changed my conclusion. However, that fact was not discovered until after the *voir dire* held by Oppal J. into the admissibility of Binahmad's evidence: A.R., Vol. IX, at p. 1541. As to the presence in this case of motives to lie, they are not sufficient in my view to raise serious concerns. I therefore agree with the Chief Justice on the disposition of this case.

r. *c*. mapara

Sameer Mapara *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général du Canada et procureur général de l'Ontario *Intervenants*

Répertorié : R. *c*. Mapara

Référence neutre : 2005 CSC 23.

N° du greffe : 29750.

2004 : 16 décembre; 2005 : 27 avril.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Fish, Abella et Charron.

en appel de la cour d'appel de la colombie-britannique

Droit criminel — Preuve — Admissibilité — Ouï-dire — Exception relative aux coconspirateurs — Ouï-dire double — L'exception relative aux coconspirateurs respecte-t-elle les exigences de la méthode raisonnée applicable en matière de

ouï-dire? — Est-ce qu'en l'espèce la preuve par double ouï-dire émanant d'un coconspirateur ne présentait pas les conditions requises en matière de fiabilité ou de nécessité et aurait dû être écartée?

Droit criminel — Preuve — Admissibilité — Interception de communications — Échange à trois — Appel téléphonique à un tiers initié par une personne nommée dans l'autorisation d'écoute électronique — Cette personne et l'accusé parlent tour à tour avec le tiers durant l'appel — Selon l'autorisation, les policiers devaient cesser d'écouter lorsque la personne nommée dans l'autorisation ne participait pas à la conversation — Les portions de la conversation téléphonique au cours desquelles l'accusé et le tiers parlaient ensemble auraient-elles dû être écartées? — La personne nommée dans l'autorisation continuait-elle d'être partie à la communication?

L'accusé et ses coconspirateurs, y compris B, W et C, ont été inculpés de meurtre au premier degré. La victime a été abattue dans le terrain de voitures de l'accusé. Le ministère public a prétendu que le rôle de l'accusé dans le complot avait constitué à attirer la victime à cet endroit. Au cours du procès de l'accusé, B a témoigné que, avant le meurtre, W lui avait dit que l'accusé avait un travail pour eux. La preuve du ministère public incluait également l'enregistrement d'un appel téléphonique entre W et C, ce dernier étant nommé comme cible dans l'autorisation d'écoute électronique. Durant l'appel, C et l'accusé ont tour à tour parlé avec W. Toujours durant l'appel, l'accusé a reçu, sur son propre téléphone, un coup de fil de la victime et les propos de l'accusé ont été interceptés. L'accusé a dit à la victime de le rencontrer dans 15 minutes sur le terrain de voitures et il a ensuite informé W de cet arrangement. Suivant l'autorisation, le policier qui surveillait l'interception devait

cesser d'écouter lorsque C n'était pas partie à l'appel, mais le juge du procès a conclu que C n'avait jamais cessé d'être partie à l'appel et il a admis la preuve fondée sur l'écoute électronique. L'accusé a été déclaré coupable de meurtre au premier degré et la Cour d'appel a confirmé la déclaration de culpabilité.

Arrêt : Le pourvoi est accueilli. La preuve émanant du coconspirateur et la preuve fondée sur l'écoute électronique étaient admissibles.

La juge en chef **McLachlin** et les juges Bastarache, Binnie, Abella et Charron : Même lorsqu'elle est appliquée au ouï-dire double, l'exception relative aux coconspirateurs énoncée dans l'arrêt *Carter* satisfait aux exigences en matière de fiabilité et de nécessité de la méthode d'analyse raisonnée de la règle du ouï-dire et elle ne devrait pas être écartée ou modifiée. La nécessité résulte de l'effet conjugué de la non-contraignabilité d'un coaccusé, de l'inopportunité de juger séparément des coconspirateurs et de la valeur probante de déclarations concomitantes faites en vue d'un complot. Il y a fiabilité lorsque la règle énoncée dans l'arrêt *Carter* est respectée. L'approche en deux étapes de cet arrêt permet au juge des faits de prendre en considération une déclaration relatée faite par un coconspirateur en vue du complot seulement après avoir conclu (1) que le complot a eu lieu hors de tout doute raisonnable, et (2) que l'accusé y a probablement participé vu uniquement la preuve directe retenue contre lui. La méthode *Carter* fournit des indicateurs circonstanciels de fiabilité qui ne font pas que corroborer les déclarations en question. Cette méthode ne cause pas d'injustice aux accusés et elle permet des poursuites efficaces dans les cas de complots. Elle permet également d'éviter les délais et les difficultés d'ordre procédural qui surgiraient au cours de l'instruction si, pour décider de l'admissibilité de certains éléments de preuve par ouï-dire, le juge devait se prononcer au cas par cas

sur leur nécessité et leur fiabilité. Enfin, l'accusé n'a pas établi que le témoignage de B constitue l'un des cas rares ou exceptionnels où la preuve relevant d'une exception valide à la règle du ouï-dire ne présente pas, eu égard aux circonstances particulières de l'espèce, les indices de nécessité et de fiabilité requis pour l'admissibilité de la preuve par ouï-dire. Les lacunes du témoignage de B influent sur sa valeur probante ultime et le juge du procès a donné des directives adéquates au jury à cet égard.

Rien ne justifie de modifier la conclusion des juridictions inférieures selon laquelle l'appel téléphonique commencé par C, la personne nommée dans l'autorisation d'écoute électronique, était un échange à trois, à savoir C, l'accusé et W. Comme C n'a jamais cessé d'être partie à la conversation, les policiers n'ont pas dérogé aux conditions de l'autorisation. Dans les circonstances de l'espèce, la conduite du policier qui surveillait l'appel entre l'accusé et W ne saurait être qualifiée de violation délibérée et déraisonnable de l'autorisation.

Les juges **LeBel** et Fish : Bien que la méthode d'analyse raisonnée doive continuer à jouer un rôle important dans l'application de l'exception relative aux coconspirateurs applicable en matière de ouï-dire, on ne saurait tenir pour acquis que les indices essentiels de fiabilité sont présents dans tous les cas où cette exception est invoquée. Les deux premières étapes de la méthode *Carter* offrent effectivement des indicateurs circonstanciels de fiabilité, mais cette méthode comporte trop de failles créant un risque d'admission en preuve de déclarations relatées erronées ou mensongères. Elle ne permet pas non plus de prendre en compte tous les types de situations susceptibles de se produire dans une entreprise commune criminelle. Ces préoccupations, ainsi que les dangers du ouï-dire et la nécessité d'éviter des condamnations injustes et erronées, commandent une approche contextuelle en matière

d'application de l'exception relative aux coconspirateurs. La démarche doit être suffisamment souple pour permettre au juge du procès de déterminer si, d'après les faits de l'espèce, une déclaration relatée présente des indices suffisants de fiabilité et de nécessité.

L'admissibilité d'un élément de preuve au titre de l'exception relative aux coconspirateurs doit donc être déterminée selon la méthode d'analyse raisonnée de la règle du ouï-dire lorsque les circonstances dans lesquelles la preuve ou le témoignage a été obtenu ou recueilli, selon le cas, soulève des préoccupations et des doutes sérieux du point de vue de la nécessité ou de la fiabilité. La norme des préoccupations et des doutes sérieux reconnaît que les exceptions traditionnelles à la règle du ouï-dire suffiront normalement, mais elle ne limite pas l'application de la méthode d'analyse raisonnée aux seuls cas très exceptionnels. La tenue d'un voir-dire pour apprécier la preuve par ouï-dire demeurera l'exception et ne sera requise que dans les cas où l'accusé soulève des préoccupations sérieuses et réelles quant à la nécessité ou à la fiabilité en apportant des raisons concrètes et détaillées ou en étayant ces préoccupations sur des éléments de preuve précis. Ces préoccupations doivent ressortir des circonstances dans lesquelles la déclaration a été faite. L'élément de preuve devrait être provisoirement admis lorsqu'il est présenté et, si des préoccupations et des doutes sérieux sont soulevés, il y alors lieu de tenir un voir-dire pour décider de son admissibilité au regard de la méthode raisonnée avant que l'affaire ne soit soumise au juge des faits. Dans les cas où l'accusé est incapable de soulever des préoccupations et des doutes sérieux, le juge des faits appliquera, à la fin du procès, les étapes prévues par l'arrêt *Carter*. En l'espèce, l'accusé n'a pas établi que la preuve par ouï-dire émanant de B soulevait des préoccupations et des doutes sérieux quant à sa fiabilité.

Jurisprudence

Citée par la juge en chef McLachlin

Arrêts appliqués : *R. c. Carter*, [1982] 1 R.C.S. 938; *R. c. Starr*, [2000] 2 R.C.S. 144, 2000 CSC 40; **arrêts mentionnés :** *R. c. Khan*, [1990] 2 R.C.S. 531; *R. c. Chang* (2003), 173 C.C.C. (3d) 397; *R. c. Evans*, [1993] 3 R.C.S. 653.

Citée par le juge LeBel

Arrêt appliqué : *R. c. Starr*, [2000] 2 R.C.S. 144, 2000 CSC 40; **arrêt analysé :** *R. c. Carter*, [1982] 1 R.C.S. 938; **arrêts mentionnés :** *R. c. Pilarinos* (2002) 2 C.R. (6th) 273, 2002 BCSC 855; *R. c. Chang* (2003), 173 C.C.C. (3d) 397; *R. c. U. (F.J.)*, [1995] 3 R.C.S. 764; *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740; *R. c. Hawkins*, [1996] 3 R.C.S. 1043; *R. c. Ticknovich* (2003), 343 A.R. 243, 2003 ABQB 854; *R. c. Duncan*, [2002] 1 C.R. (6th) 265; *R. c. Hape*, [2002] O.J. No. 168 (QL).

Lois et règlements cités

Charte canadienne des droits et libertés, art. 7, 24(2).

Doctrine citée

Archibald, Bruce P. « The Canadian Hearsay Revolution: Is Half a Loaf Better Than No Loaf at All? » (2000), 25 *Queen's L.J.* 1.

Goode, Matthew R. *Criminal Conspiracy in Canada*. Toronto : Carswell, 1975.

Layton, David. « *R. v. Pilarinos*: Evaluating the Co-conspirators or Joint Venture Exception to the Hearsay Rule » (2002), 2 C.R. (6th) 293.

Paciocco, David M., and Lee Stuesser. *The Law of Evidence*, 3rd ed. Toronto : Irwin Law, 2002.

Sopinka, John, Sidney N. Lederman and Alan W. Bryant. *The Law of Evidence in Canada*, 2nd ed. Toronto : Butterworths, 1999.

Stewart, Hamish. « Hearsay after *Starr* » (2002), 7 *Rev. can. D.P.* 5.

Stuart, Don. *Canadian Criminal Law: A Treatise*, 4th ed. Scarborough, Ont. : Carswell, 2001.

Whitzman, Stephen. « Proof of Conspiracy: The Co-conspirator's Exception to the Hearsay Rule » (1985-86), 28 *Crim. L.Q.* 203.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Donald, Saunders et Low) (2003), 179 B.C.A.C. 92, 295 W.A.C. 92, 180 C.C.C. (3d) 184, [2003] B.C.J. No. 452 (QL), 2003 BCCA 131, qui a confirmé la condamnation de l'accusé pour meurtre au premier degré. Pourvoi rejeté.

Gil D. McKinnon, c.r., *Tom Arbogast* et *Letitia Sears*, pour l'appelant.

John M. Gordon, pour l'intimée.

Robert W. Hubbard et *Marion V. Fortune-Stone*, pour l'intervenant le procureur général du Canada.

Jamie Klukach et *Susan Magotiaux*, pour l'intervenant le procureur général de l'Ontario.

Procureur de l'appelant : Gil D. McKinnon, c.r., Vancouver.

Procureur de l'intimée : Ministère du Procureur général de la Colombie-Britannique, Vancouver.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario : Ministère du Procureur général de l'Ontario, Toronto.

Traduction

COUR SUPRÊME DU CANADA

SAMEER MAPARA

- c. -

SA MAJESTÉ LA REINE

- et-

PROCUREUR GÉNÉRAL DU CANADA et PROCUREUR GÉNÉRAL DE L'ONTARIO

CORAM : La Juge en chef et les juges Bastarache, Binnie, LeBel, Fish, Abella et Charron

LA JUGE EN CHEF —

I. Introduction

1 Le 7 octobre 1998, Vikash Chand a été atteint de sept balles alors qu'il changeait une plaque d'immatriculation dans le terrain de voitures de Rags to Riches Motor Cars, propriété de l'appelant, Mapara. Cinq personnes ont été accusées du meurtre de Chand : l'appelant, qui aurait attiré Chand sur le lieu d'exécution; Chow, qui aurait financé le meurtre et la fuite; Shoemaker, qui aurait exécuté le meurtre;

Binahmad, le conducteur du véhicule utilisé pour la fuite et témoin à charge; et Wasfi qui, selon le ministère public, aurait organisé le meurtre.

2 L'appelant et M. Chow ont subi leur procès conjointement devant juge et jury. Ils ont été reconnus coupables de meurtre au premier degré. Leurs appels devant la Cour d'appel de la Colombie-Britannique ont été rejetés : (2003), 179 B.C.A.C. 92, 2003 BCCA 131. Ils se pourvoient maintenant devant la Cour. Voici les motifs de notre jugement sur le pourvoi de l'appelant Mapara.

3 M. Mapara invoque deux moyens à l'appui de son pourvoi. Premièrement, il soutient que le témoignage de Binahmad au sujet d'une discussion l'incriminant pour la planification du meurtre aurait dû être rejeté parce qu'il s'agit d'une preuve par double ouï-dire non fiable. Deuxièmement, il fait valoir que la preuve incriminante obtenue par écoute électronique peu avant le meurtre n'était pas visée par l'autorisation et n'aurait pas dû être admise au procès.

4 Je conclus qu'aucun des deux arguments ne saurait être retenu et je suis d'avis de rejeter le pourvoi.

A. *Admissibilité du témoignage de Binahmad au sujet de sa conversation avec Wasfi*

5 Binahmad a témoigné que, vers la fin septembre 1997, il a rencontré Wasfi à une station service Petro Canada, où celui-ci lui a dit que [TRADUCTION] « le petit homme », qui, d'après ce qu'il a compris, était Mapara, avait un travail pour eux. Selon l'argumentation de l'appelant, il s'agissait là d'une preuve importante. C'était l'un des deux principaux éléments de preuve indiquant que Mapara avait été impliqué

dans la planification du meurtre de Chand; l'autre élément de preuve contre Mapara concernait l'allégation qu'il avait attiré Chand sur le terrain de voitures de Rags to Riches pour qu'il y soit assassiné. Le ministère public répond que la preuve de la conversation avec Wasfi n'avait pas d'importance puisque la preuve que Mapara a attiré Chand vers sa mort rendait, à elle seule, inévitable la condamnation de Mapara pour meurtre au premier degré.

6 Selon l'argumentation de l'appelant, ce témoignage était lui aussi non fiable puisqu'il s'agissait d'une preuve par double ouï-dire émanant d'un coconspirateur qui avait des raisons de mentir. En fait, un aspect de ce témoignage était tout simplement faux – Binahmad a dû se tromper sur la date de la conversation, car Wasfi était en prison à ce moment-là. Le ministère public répond que l'erreur de Binahmad quant à la date était soumise à l'appréciation du jury et que le juge du procès a exposé aux jurés les circonstances restreintes dans lesquelles ils pouvaient accepter la preuve et les a mis en garde, comme il se devait, contre la non-fiabilité inhérente au témoignage de coconspirateurs comme Binahmad.

7 Toutefois, la question centrale n'est pas l'importance ou la fiabilité ultime de la preuve, mais son admissibilité. L'appelant concède que, en l'état actuel du droit, la preuve était admissible en vertu d'une exception à la règle du ouï-dire, dite exception relative aux coconspirateurs, qui permet de recevoir en preuve les déclarations extrajudiciaires faites par des coconspirateurs en vue du complot. Il s'agit de la règle *Carter*, qui tire son nom de l'arrêt *R. c. Carter*, [1982] 1 R.C.S. 938. L'appelant avance qu'il y a lieu d'écarter ou de modifier cette règle pour rendre inadmissible le témoignage de Binahmad au sujet de sa conversation avec Wasfi.

8 L'exception relative aux coconspirateurs peut s'énoncer ainsi : [TRADUCTION] « Les déclarations d'une personne impliquée dans un complot illicite sont recevables à titre d'aveux contre toutes les parties au complot si elles ont été faites pendant que se tramait le complot et en vue de la réalisation l'objectif commun » (le juge Sopinka, S. N. Lederman et A. W. Bryant, *The Law of Evidence in Canada* (2e éd. 1999), p. 303). Selon l'arrêt *Carter*, les déclarations des coconspirateurs seront admissibles contre l'accusé uniquement si le juge des faits est convaincu hors de tout doute raisonnable qu'un complot a eu lieu et si une preuve indépendante, directement admissible contre l'accusé, établit selon la prépondérance des probabilités que l'accusé y a participé.

9 L'appelant conteste en plusieurs points cette règle telle qu'elle s'applique à la preuve par double ouï-dire. Son premier argument porte que la règle est inconstitutionnelle parce qu'elle prive l'accusé du droit à une défense pleine et entière que lui garantit l'article 7 de la *Charte canadienne des droits et libertés*. L'appelant prétend qu'il avait le droit de contre-interroger non seulement Binahmad relativement à sa déclaration, mais aussi Wasfi, l'auteur des propos rapportés selon lesquels « le petit homme » avait un travail pour eux. L'impossibilité de contre-interroger Wasfi porte atteinte au droit de l'appelant à une défense pleine et entière, et la règle *Carter* telle qu'elle s'applique au double ouï-dire est donc inconstitutionnelle.

10 Je ne peux accepter cet argument. Premièrement, il n'a pas été présenté devant les cours d'instance inférieure, et l'appelant s'est vu refuser, par ordonnance du juge Bastarache en date du 8 septembre 2004, l'autorisation de formuler une question constitutionnelle. Deuxièmement, sur le fond de la question, l'argument n'ajoute guère à la prétention principale de l'appelant, à savoir que l'exception relative aux

coconspirateurs, telle qu'elle s'applique au double ouï-dire, devrait être réexaminée par la Cour. Je vais maintenant examiner cet argument.

11 Le second argument de l'appelant porte que la Cour devrait revoir l'exception relative aux coconspirateurs selon la méthode d'analyse raisonnée de la règle du ouï-dire qui est énoncée dans *R. c. Starr*, [2000] 2 R.C.S. 144, 2000 CSC 40. L'arrêt *Starr* exige, selon lui, que toute preuve par ouï-dire, même si elle relève d'une exception traditionnelle, soit à la fois nécessaire (en ce sens qu'il n'existe pas d'autres sources de preuve disponibles) et fiable. La preuve en l'espèce n'est pas fiable et n'aurait donc pas dû être admise.

12 Cet argument simplifie à l'excès et déforme la méthode d'analyse raisonnée de l'admissibilité de la preuve par ouï-dire telle qu'elle est énoncée notamment dans *R. c. Khan*, [1990] 2 R.C.S. 531, et *Starr*. Ces arrêts s'efforcent de concilier le traitement traditionnel réservé à la preuve par ouï-dire avec les principes qui la sous-tendent.

13 Selon la règle traditionnelle, toute preuve par ouï-dire est inadmissible, sauf si elle relève d'une des exceptions à la règle du ouï-dire. La partie soumettant une telle preuve doit la faire entrer dans une des catégories traditionnelles. Cette règle s'est révélée efficace pendant des siècles et continue de servir de guide pratique pour juger de l'admissibilité de la preuve par ouï-dire. Toutefois, comme pour la plupart des règles fondées sur des catégories, les résultats peuvent parfois paraître arbitraires.

14 Cet arbitraire occasionnel a été mis en lumière par l'analyse raisonnée de la règle du ouï-dire et de ses exceptions, élaborée par le juriste américain Wigmore il

y a près d'un siècle. L'auteur a indiqué qu'en général, la preuve par ouï-dire est exclue parce que ce n'est pas la meilleure preuve (une preuve directe serait préférable) et qu'elle risque de pas être digne de foi (le témoignage n'a pas été fait sous serment et ne peut être soumis au contre-interrogatoire). Cependant, si ces deux défauts sont atténués, la preuve par ouï-dire est admissible. C'est ainsi, affirme Wigmore, que sont nées la plupart des exceptions à la règle du ouï-dire. La preuve est nécessaire du fait que la personne qui a fait la déclaration relatée n'est pas aisément disponible. Et elle est fiable, en ce sens qu'elle fournit une garantie circonstancielle de fiabilité. Pour ces raisons, des juges ont commencé à l'admettre. Leurs décisions ont été suivies dans d'autres affaires. Graduellement, une exception est apparue et a été érigée en règle de droit. Cependant, une fois érigée, la règle est devenue rigide et pouvait, dans certains cas, exclure une preuve qui aurait dû être admise au regard des critères sous-jacents de nécessité et de fiabilité. Elle pouvait aussi occasionnellement mener à l'admission d'une preuve qui aurait dû être exclue selon ces critères. Cette règle pouvait ainsi entraver la recherche de la vérité ou porter injustement préjudice à l'accusé.

15 La méthode d'analyse raisonnée de l'admissibilité de la preuve par ouï-dire, qu'a développée la Cour depuis une vingtaine d'années, tente de conférer une certaine souplesse à la règle du ouï-dire pour éviter ces conséquences négatives. Il convient d'appliquer le cadre d'analyse suivant, tiré de *Starr*, pour déterminer l'admissibilité de la preuve par ouï-dire :

> a) La preuve par ouï-dire est présumée inadmissible à moins de relever d'une exception à la règle du ouï-dire. Les exceptions traditionnelles continuent présomptivement de s'appliquer.

b) Il est possible de contester une exception à l'exclusion du ouï-dire au motif qu'elle ne présenterait pas les indices de nécessité et de fiabilité requis par la méthode d'analyse raisonnée. On peut la modifier au besoin pour la rendre conforme à ces exigences.

c) Dans de « rares cas », la preuve relevant d'une exception existante peut être exclue parce que, dans les circonstances particulières de l'espèce, elle ne présente pas les indices de nécessité et de fiabilité requis.

d) Si la preuve par ouï-dire ne relève pas d'une exception à la règle d'exclusion, elle peut tout de même être admissible si l'existence d'indices de fiabilité et de nécessité est établie lors d'un voir-dire.

(Voir, de façon générale, D. M. Paciocco et L. Stuesser, *The Law of Evidence* (3e éd. 2002), p. 95-96.)

16 L'admissibilité de la preuve est déterminée en fonction d'un « seuil de fiabilité » établi par des indicateurs circonstanciels de fiabilité. La question de la « fiabilité ultime » relève du juge des faits, en l'occurrence le jury.

17 L'appelant invoque la première et la troisième propositions établies ci-dessus. Il soutient principalement que l'exception relative aux coconspirateurs n'est pas conforme aux critères fondamentaux qui sous-tendent les exceptions à la règle du ouï-dire, à savoir la nécessité et la fiabilité. Subsidiairement, il s'agit de savoir si nous sommes en l'espèce en présence de l'un des « rares cas » où la preuve par ouï-dire

relevant d'une exception à la règle du ouï-dire ne saurait être admise faute des indices de nécessité et de fiabilité requis.

18 Examinons d'abord l'argument principal de l'appelant : l'exception relative aux coconspirateurs ne présente pas les indices de nécessité et de fiabilité requis. Dans *R. c. Chang* (2003), 173 C.C.C. (3d) 397, le juge en chef adjoint O'Connor et le juge Armstrong ont rejeté cet argument. Le critère de la nécessité pose peu de difficultés. Comme il est mentionné dans *Chang*, [TRADUCTION] « la nécessité résultera de l'effet conjugué de la non-contraignabilité d'un coaccusé auteur de la déclaration, de l'inopportunité de juger séparément les coconspirateurs présumés et de la valeur probante de déclarations concomitantes faites en vue d'un complot reproché » (par. 105).

19 Le critère de la fiabilité exige un examen plus approfondi. L'appelant prétend que les déclarations des coconspirateurs sont intrinsèquement non dignes de foi en raison de la moralité de leurs auteurs et des activités suspectes dans lesquelles ils sont impliqués.

20 Une question préliminaire se pose à ce stade. Le ministère public prétend que l'exception relative aux coconspirateurs n'est pas fondée sur une question de fiabilité, mais repose plutôt sur le raisonnement selon lequel, une fois établie la participation des personnes concernées au même complot, les déclarations de l'une constituent alors des aveux contre toutes. Ainsi, [TRADUCTION] « la raison d'être de la règle au Canada trouve son origine dans les principes régissant les aveux des parties » : *Chang*, par. 82. Cette exception ne repose pas « sur les mêmes motifs que d'autres exceptions à la règle du ouï-dire. En fait, on peut se demander si la preuve

constitue réellement du ouï-dire » : *R. c. Evans*, [1993] 3 R.C.S. 653, p. 664, le juge Sopinka. Le juge Sopinka a ajouté que les garanties circonstancielles de fiabilité ne sont pas pertinentes quant à l'exception à la règle du ouï-dire en matière d'aveux d'une partie :

> L'effet pratique de cette distinction doctrinale est qu'au lieu de chercher des garanties circonstancielles indépendantes de fiabilité, il suffit de présenter la preuve contre une partie. L'admissibilité de cette preuve repose sur la théorie du système contradictoire voulant que les déclarations antérieures d'une partie peuvent être admises contre la partie qui ne peut se plaindre de la non-fiabilité de ses propres déclarations.

Il découle de ce raisonnement que, si l'appelant a conspiré avec le témoin Binahmad, il ne saurait prétendre que ce qu'il lui a dit n'était pas digne de foi. De même, soutient-on, il ne peut invoquer la non-fiabilité des propos qu'un troisième coconspirateur, Wasfi, a tenus à Binahmad. Ils complotaient tous ensemble, et ce que chacun déclare peut être utilisé contre les autres. Ayant formé un complot criminel, l'accusé ne peut, pour sa défense, s'appuyer sur sa criminalité même et la non-fiabilité de ses coconspirateurs.

21 Les assises doctrinales particulières de l'exception relative aux coconspirateurs ne peuvent être niées. Toutefois, comme il a été mentionné dans *Chang*, [TRADUCTION] « le fait que la règle relative aux coconspirateurs est fondée sur ces principes ne change rien au fait qu'une déclaration qui devient admissible selon la méthode *Carter* demeure du ouï-dire et que les risques de non-fiabilité sont bien réels » (par. 85). En ce sens, la directive énoncée dans *Starr* selon laquelle les exceptions traditionnelles devraient répondre aux critères de nécessité et de fiabilité demeure pertinente.

22 Je reviens donc à la question de savoir si l'exception relative aux coconspirateurs comporte des indicateurs circonstanciels de fiabilité suffisants. La méthode *Carter* permet au jury de prendre en considération une déclaration relatée faite par un coconspirateur en vue du complot seulement après avoir conclu : (1) que le complot a eu lieu hors de tout doute raisonnable; (2) que l'accusé y a probablement participé vu uniquement la preuve directe retenue contre lui.

23 L'appelant fait valoir que la règle *Carter* ne satisfait pas à l'exigence de fiabilité parce que cela équivaut à utiliser une preuve corroborante pour renforcer la fiabilité de déclarations rapportées par ouï-dire contre l'accusé et ce, contrairement à l'arrêt *Starr*, le juge Iacobucci, par. 217.

24 Je ne suis pas de cet avis. La question est de savoir si les deux premières étapes de la méthode *Carter* fournissent des indicateurs circonstanciels de fiabilité qui ne font pas que corroborer les déclarations en question. À mon sens, la réponse est affirmative. En effet, la preuve qu'un complot a eu lieu hors de tout doute raisonnable et que l'accusé y a probablement participé ne vient pas simplement corroborer la déclaration en question. Elle atteste plutôt de l'existence d'une entreprise commune qui renforce la fiabilité générale des propos échangés au cours de la réalisation de cette entreprise. Son effet est comparable à l'exception de la *res gestae* à la règle du ouï-dire, c'est-à-dire le cas où des indicateurs circonstanciels de fiabilité ressortent du contexte. Il s'agit non pas de savoir si une déclaration particulière est corroborée, mais plutôt s'il existe des indicateurs circonstanciels de fiabilité.

25 Selon les deux premiers volets de la méthode dégagée dans l'arrêt *Carter*, la preuve ne corrobore pas intrinsèquement la déclaration relatée, dans le sens où elle

confirmerait la véracité de son contenu. En fait, la preuve établissant le complot et la participation probable de l'accusé peut entrer en conflit avec la preuve par ouï-dire présentée ultérieurement. Le plus souvent, le juge des faits trouvera corroboration plutôt que conflit dans la preuve directe incriminant l'accusé. Toutefois, il ne faut pas confondre cette utilisation ultime de la preuve avec son rôle initial dans l'établissement du seuil de fiabilité. En l'espèce, cette utilisation est pertinente quant au contexte de la preuve par ouï-dire, et non quant à son contenu. Le recours à la méthode *Carter* dans le présent débat demeure ainsi dans les limites du seuil de fiabilité, qui est expliqué dans *Starr.*

26 Outre ces conditions préliminaires, l'exigence ultime de la méthode *Carter*, à savoir que seules les déclarations relatées faites en vue de l'exécution du complot peuvent être prises en considération, fournit des garanties de fiabilité dans les circonstances plus immédiates de la déclaration. Les déclarations faites « en vue de quelque chose » [TRADUCTION] « sont fiables du fait de leur spontanéité et de leur contemporanéité par rapport aux événements visés » (*Chang*, par. 122-123). Elles s'apparentent à des *res gestae* en ce qu'elles correspondent [TRADUCTION] « aux actes mêmes par lesquels le complot est conçu ou exécuté, et sont faites au cours de la perpétration de l'infraction » (*Chang*, par. 123). Cela [TRADUCTION] « diminue l'importance du mobile et les possibilités de manigances » (*Chang*, par. 124). La réputation douteuse des accusés quant à la véracité de leurs dires n'est pas un facteur à considérer à ce stade de l'analyse. Elle n'entre en jeu que lorsque le jury apprécie la fiabilité ultime des déclarations de telles personnes.

27 En somme, les conditions posées par la règle *Carter* fournissent les garanties circonstancielles de fiabilité nécessaires pour permettre l'admission de la preuve.

28 Cette conclusion est sensée sur le plan pratique. Premièrement, la règle ne cause pas d'injustice aux accusés. Des indices de fiabilité existent. Ainsi, une preuve non fiable qui est susceptible d'induire le jury en erreur peut être exclue. Il demeure loisible à l'accusé de contre-interroger le déposant, de présenter une preuve contraire et de soutenir devant le jury la non-fiabilité du témoignage des coconspirateurs. De plus, il n'est pas déraisonnable de s'attendre à ce que les participants à des complots criminels acceptent, s'ils sont accusés, de voir utilisé contre eux le témoignage de leurs coconspirateurs relativement à ce qu'ils ont dit en vue du complot. Enfin, comme nous le verrons plus loin, la règle du ouï-dire est complétée par le pouvoir discrétionnaire du juge du procès d'exclure la preuve si son effet préjudiciable l'emporte sur sa valeur probante.

29 Deuxièmement, la règle permet au ministère public d'intenter des poursuites efficaces dans les cas de complots criminels. Il deviendrait difficile, voire souvent impossible d'obtenir la preuve d'un complot criminel sans la possibilité d'utiliser contre chacun les déclarations des coconspirateurs sur les propos échangés en vue du complot, dans les cas où elles constituent du double ouï-dire. Priver le ministère public du droit d'utiliser la preuve par double ouï-dire à l'égard des coconspirateurs relativement à ce qu'ils ont dit en vue du complot signifierait que de graves complots criminels demeureraient souvent impunis.

30 Enfin, modifier la règle *Carter* augmenterait les délais et les difficultés d'ordre procédural lors de l'instruction. Toute interprétation qui exige que le juge du procès examine attentivement la nécessité et la fiabilité de certains éléments de preuve par ouï-dire pour décider de leur admissibilité compromettrait l'efficacité des catégories traditionnelles d'exceptions à la règle du ouï-dire et augmenterait le nombre de voir-dire. Comme il est affirmé dans *Chang* :

> [TRADUCTION] Nous sommes préoccupés par le fait que les procès pour complot, souvent déjà compliqués, puissent le devenir encore plus si, chaque fois que le ministère public souhaite présenter des déclarations de coconspirateurs, le juge du procès doit tenir un voir-dire pour décider si la méthode d'analyse raisonnée est respectée. Nous ne prévoyons pas que ce sera le cas. Un voir-dire sur cette méthode devrait être l'exception. Il ne sera nécessaire que si l'accusé est capable d'indiquer des éléments de preuve soulevant de graves et réelles préoccupations quant à la fiabilité compte tenu des circonstances dans lesquelles une déclaration a été faite, préoccupations auxquelles on ne pourra répondre adéquatement en utilisant la méthode *Carter*. De façon générale, la présomption que la preuve qui satisfait aux exigences de la règle *Carter* respecte également la méthode d'analyse raisonnée devrait permettre d'éviter un voir-dire. [par. 132]

L'appelant nous demande de rendre la règle *Carter* inapplicable à la preuve par double ouï-dire. Or, agir ainsi reviendrait à dire qu'il faut rejeter toute preuve par ouï-dire, même si elle relève d'une exception reconnue, dans les cas où l'élément de preuve considéré ne répond pas aux préoccupations en matière de nécessité et de fiabilité. Cela suppose une vérification au cas par cas qui s'apparente davantage au questionnement sur la fiabilité ultime relevant du jury qu'au questionnement sur le seuil de fiabilité pertinent quant à l'admissibilité.

31 Je conclus que l'exception relative aux coconspirateurs satisfait aux exigences de la méthode d'analyse raisonnée de la règle du ouï-dire et qu'il y a donc lieu de la confirmer.

32 L'appelant nous demande également de modifier la règle *Carter* pour exiger que les deux premiers éléments soient tranchés par le juge du procès plutôt que par le jury, au motif que cette situation rend l'exception inéquitable en pratique. Bien que les tribunaux puissent adapter graduellement les règles de common law pour éviter une injustice manifeste, ils ne le font que dans la mesure où il y a une indication claire qu'un changement s'impose dans l'intérêt de la justice. La nécessité d'un tel changement n'a pas été établie en l'espèce. En fait, la prétention de l'appelant a été examinée et rejetée dans l'arrêt *Carter* précisément en raison du risque que le jury confonde la preuve directe et la preuve par ouï-dire contre l'accusé et s'appuie sur cette dernière pour le condamner. La Cour a conclu que la méthode en trois volets était plus appropriée pour bien faire comprendre au jury la nécessité de trouver une preuve indépendante de la participation de l'accusé au complot. Je n'accède pas à cette demande.

33 Je conclus que la règle *Carter* demeure valable et que la preuve en question n'était pas exclue par la règle du ouï-dire.

34 Il reste à examiner l'argument selon lequel, même si l'exception relative aux coconspirateurs satisfait à l'exigence concernant l'existence d'indices de nécessité et de fiabilité, nous sommes en présence d'un des rares cas où la preuve relevant d'une exception valide à la règle du ouï-dire ne saurait néanmoins être admise, car les indices de nécessité et de fiabilité requis n'existent pas dans les circonstances particulières de

l'espèce. Les mêmes considérations qui amènent à conclure que l'exception relative aux coconspirateurs satisfait aux exigences concernant l'existence d'indices de nécessité et de fiabilité s'appliquent en l'espèce. La nécessité est établie, faute de preuve directe émanant des déclarants coaccusés. Les indices de fiabilité se retrouvent dans les exigences de la règle *Carter* – la preuve hors de tout doute raisonnable d'un complot et celle de la participation de l'accusé à ce complot selon la prépondérance des probabilités – et dans la règle voulant que seules les déclarations faites en vue du complot soient admises. Il devient dès lors difficile de conclure que la preuve relevant de la règle *Carter* ne présente pas les indices de fiabilité et de nécessité requis pour l'admission de la preuve par ouï-dire selon la méthode d'analyse raisonnée. Sauf cas très exceptionnels, l'argument perd toute valeur à partir du moment où l'exception à la règle du ouï-dire est jugée conforme à la méthode d'analyse raisonnée.

35 Sommes-nous en présence d'un de ces cas? Le témoignage d'un coconspirateur comporte certainement des faiblesses. Wasfi avait sans doute une raison de mentir, à savoir le désir d'impliquer faussement l'appelant afin que Binahmad pense que l'argent de l'appelant servirait au meurtre. Selon l'appelant, Wasfi avait ses propres raisons de faire tuer Chand : se venger du viol allégué de sa petite amie et liquider une dette. Il a impliqué l'appelant parce que Binhamad savait qu'il ne pouvait lui-même financer l'assassinat. Enfin, la preuve indiquait que Wasfi était en prison au moment où, selon Binahmad, la discussion aurait eu lieu.

36 À part la contradiction quant à la date de la conversation, ces préoccupations sont du même ordre que celles déjà abordées dans l'examen de la question de la conformité de l'exception relative aux coconspirateurs avec la méthode d'analyse raisonnée de la règle du ouï-dire. Elles sont caractéristiques de tout complot.

Toute faiblesse influe sur la valeur probante ultime de la preuve, et c'est au jury de décider. L'erreur de Binahmad quant au moment où la conversation a eu lieu ne justifie pas non plus le rejet de la preuve. Il s'agit d'un problème de fiabilité ultime que le jury peut trancher. Dans son exposé, le juge du procès a attiré l'attention du jury sur cette question lorsqu'il a rappelé la thèse de la défense selon laquelle Wasfi et Binahmad sont tous deux des individus dénués de crédibilité.

37 Il s'ensuit que l'appelant n'a pas établi que la preuve à laquelle il s'oppose constitue l'un des « rares cas » où la preuve relevant d'une exception valide à la règle du ouï-dire ne présente pas, eu égard aux circonstances particulières de l'espèce, les indices de nécessité et de fiabilité requis pour l'admissibilité de la preuve par ouï-dire.

B. *Admissibilité de l'appel n° 79*

38 M. Chow a composé le numéro de M. Wasfi, puis a passé le téléphone à l'appelant. Après un bref échange avec Wasfi, l'appelant a redonné le téléphone à Chow, qui a parlé avec son interlocuteur pendant presque tout le reste de la conversation téléphonique, exception faite d'un bref échange à la toute fin entre l'appelant et Wasfi. Durant ce dernier intervalle, l'appelant a reçu un appel de M. Chand, et cette partie de la conversation avec Chand a été interceptée par écoute électronique. Selon l'enregistrement, l'appelant disait à la victime de le rencontrer dans 15 minutes sur le terrain de Rags to Riches. Une fois l'appel terminé, l'appelant a repris sa conversation avec Wasfi et lui a fait part de cet heureux arrangement.

39 L'appelant soutient que l'interception de ses propos durant cet appel était illégale puisqu'elle excédait les conditions de l'autorisation. M. Chow était désigné

comme cible dans l'autorisation et l'interception de ses propos était donc légale. L'appel faisait l'objet d'une surveillance humaine. Selon l'autorisation, les policiers devaient cesser d'écouter lorsque M. Chow ne participait pas à la conversation. Il s'agit donc de savoir si Chow a continué d'y participer après avoir passé le téléphone à l'appelant. Si l'appelant avait emprunté le téléphone de Chow et avait appelé Wasfi, il y aurait eu clairement obligation de cesser l'interception de la conversation. Or c'est Chow qui a téléphoné à Wasfi et les deux cours d'instance inférieure ont décidé qu'il n'avait jamais cessé d'être partie à la conversation : il s'agissait d'un échange à trois pendant toute la conversation et non d'une série d'échanges séparés. De plus, comme le fait remarquer l'intimée, l'appelant lui-même a décrit cet appel comme un échange à trois lors de son contre-interrogatoire.

40 La défense de l'appelant repose sur cette question fondamentale, qui est de nature factuelle. Selon la preuve au dossier, il n'y a aucune raison de modifier les conclusions des cours d'instance inférieure.

41 Compte tenu de la durée relativement courte de l'appel et de la fréquence avec laquelle la conversation entre Chow, Mapara et Wasfi passait de l'un à l'autre, le préposé à l'écoute pouvait raisonnablement estimer que Chow était constamment présent en second plan et probablement prêt à intervenir dans la conversation à tout moment. Sur le plan pratique, il est difficile de dire à quel moment le policier aurait dû conclure que Chow ne participait plus à la conversation, qui s'est réduite à un échange entre Mapara et Wasfi. Je ne qualifierais pas de délibérée et déraisonnable la conduite du policier qui surveillait cet appel. Même si on pouvait dire relativement à la toute dernière partie de l'appel quand, par exemple, Chow ne reprend pas le combiné, qu'il s'agissait d'une interception illégale, cela ne constituerait pas une

violation suffisamment grave pour qu'il faille se demander si, suivant le par. 24(2) de la *Charte*, la conduite de la police a déconsidéré l'administration de la justice.

II. Conclusion

42 Je suis d'avis de rejeter le pourvoi et de confirmer la décision de la Cour d'appel.

Traduction

COUR SUPRÊME DU CANADA

SAMEER MAPARA

- c. -

SA MAJESTÉ LA REINE

- et -

PROCUREUR GÉNÉRAL DU CANADA et PROCUREUR GÉNÉRAL DE L'ONTARIO

CORAM : La Juge en chef et les juges Bastarache, Binnie, LeBel, Fish, Abella et Charron

LE JUGE LEBEL —

43 J'ai lu les motifs de la juge en chef McLachlin. Bien que je souscrive à son opinion concernant l'admissibilité de l'appel nº 79 ainsi qu'au dispositif qu'elle propose en l'espèce, je suis en désaccord sur l'interaction entre l'exception à la règle du ouï-dire dans le cas des coconspirateurs, dite exception relative aux coconspirateurs, et la méthode raisonnée énoncée dans *R. c. Starr*, [2000] 2 R.C.S. 144, 2000 CSC 40.

A. *La méthode d'analyse raisonnée de la preuve par ouï-dire – sa pertinence*

44 Dans *Starr*, la Cour a statué que la preuve relevant d'une exception traditionnelle à la règle du ouï-dire est présumée admissible et que les exceptions doivent être interprétées d'une manière conforme aux exigences de la méthode d'analyse raisonnée, soit la nécessité et la fiabilité (par. 212-213). Elle y a également reconnu que, même en cas d'application d'une exception à la règle du ouï-dire, il peut y avoir lieu d'exclure la preuve dans les rares cas où elle ne satisfait pas aux exigences de nécessité et de fiabilité de la méthode raisonnée (par. 214). De plus, l'arrêt *Starr* n'établit pas de distinction entre les types d'exception à la règle du ouï-dire. Il semble donc que toutes les exceptions à la règle du ouï-dire puissent être éventuellement soumises aux exigences de la méthode d'analyse raisonnée. Cela inclut l'exception relative aux coconspirateurs, que cette exception puise sa justification dans les principes du mandat, de la *res gestae* ou des aveux : voir *R. c. Pilarinos* (2002), 2 C.R. (6th) 273, 2002 BCSC 855, par. 68. Il faut tenir compte en priorité du risque que l'admission d'éléments de preuve non fiables ait une incidence sur l'équité du procès : *R. c. Chang* (2003), 173 C.C.C. (3d) 397 (C.A. Ont.), par. 86.

45 Les exigences de la méthode d'analyse raisonnée doivent continuer à jouer un rôle important dans l'application de l'exception relative aux coconspirateurs, énoncée dans *R. c. Carter*, [1982] 1 R.C.S. 938. Affirmer le contraire semblerait incompatible avec les efforts qu'a déployés la Cour ces deux dernières décennies pour reformuler le droit de la preuve par ouï-dire afin de tempérer la rigidité des règles traditionnelles en la matière. À cet égard, le juge en chef Lamer a souligné, dans *R. c. U. (F.J.)*, [1995] 3 R.C.S. 764, par. 21, que « [p]uisque notre modification des principes régissant le ouï-dire vise à mettre fin à l'artifice rigide des exceptions

compartimentées, il importe que les nouveaux critères demeurent souples ». La fiabilité et la nécessité sont ainsi devenues les critères prédominants en matière d'admissibilité de la preuve par ouï-dire.

46 En outre, il ne faut pas perdre de vue qu'en élaborant la méthode d'analyse raisonnée de la règle du ouï-dire, la Cour était préoccupée par les effets potentiellement préjudiciables des dangers inhérents à la preuve par ouï-dire, à savoir l'absence de serment et de contre-interrogatoire, ainsi que l'impossibilité pour le juge des faits d'évaluer le comportement du déclarant : voir *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740, p. 787; *R. c. Hawkins*, [1996] 3 R.C.S. 1043, par. 74-75; *Starr*, par. 200 et 212. L'existence de ces dangers constitue une autre raison de conserver les indices de fiabilité et de nécessité dans le cadre de l'analyse de l'admissibilité des déclarations relatées en vertu d'une exception reconnue telle la règle relative aux coconspirateurs.

47 L'équité du procès et les principes de justice fondamentale commandent également de considérer ces indices avec suffisamment de souplesse. Comme la Cour à la majorité l'a déclaré dans *Starr* :

> Cela est particulièrement vrai en matière criminelle, étant donné que « la règle selon laquelle l'innocent ne doit pas être déclaré coupable est un principe de justice fondamentale garanti par la *Charte* » : *R. c. Leipert*, [1997] 1 R.C.S. 281, au par. 24, cité dans l'arrêt *R. c. Mills*, [1999] 3 R.C.S. 668, au par. 71. Si on permettait au ministère public de présenter une preuve par ouï-dire non fiable contre l'accusé, peu importe qu'elle se trouve ou non à relever d'une exception existante, cela compromettrait l'équité du procès et ferait apparaître le spectre des déclarations de culpabilité erronées. [par. 200]

48 Les tribunaux reconnaissent généralement que l'exception relative aux coconspirateurs est assujettie aux exigences de la méthode d'analyse raisonnée ou que

la présomption de validité du témoignage d'un coconspirateur peut être écartée dans des circonstances particulières : voir *R. c. Ticknovich* (2003), 343 A.R. 243, 2003 ABQB 854, par. 30-31; *R. c. Duncan* (2002), 1 C.R. (6th) 265 (C. Prov. Man.), par. 59-67; *Pilarinos*, par. 68. Il est intéressant de noter également que la Cour d'appel de l'Ontario dans *Chang*, malgré sa conception restrictive de l'application de la méthode d'analyse raisonnée à l'exception relative aux coconspirateurs, a reconnu qu'il pouvait arriver que les circonstances d'une déclaration particulière soulèvent des doutes tellement graves quant à sa fiabilité que le tribunal exclura la preuve malgré sa conformité à la règle relative aux coconspirateurs : *Chang*, par. 125.

49 Nombre d'auteurs ont également souligné le peu de fiabilité de la preuve relevant de l'exception relative aux coconspirateurs : M. R. Goode, *Criminal Conspiracy in Canada* (1975), p. 252; S. Whitzman, « Proof of Conspiracy, The Co-conspirator's Exception to the Hearsay Rule » (1985-86), 28 Crim. L. Q. 203, p. 205; D. Stuart, *Canadian Criminal Law: A Treatise* (4e éd. 2001), p. 682; H. Stewart, « Hearsay after *Starr* » (2002), 7 Can. Crim. L. R. 5, p. 15-16; D. Layton, « *R. v. Pilarinos* : Evaluating the Co-conspirators or Joint Venture Exception to the Hearsay Rule » (2002), 2 C.R. (6th) 293, p. 303; B. P. Archibald, « The Canadian Hearsay Revolution: Is Half a Loaf Better Than No Loaf at All? » (2000), 25 *Queen's L.J.* 1, p. 49.

50 En raison de ce peu de fiabilité, de sérieuses préoccupations ont été soulevées, tant dans la jurisprudence que dans la doctrine, relativement à la question de savoir si la méthode prescrite dans l'arrêt *Carter* répond aux exigences de la méthode d'analyse raisonnée. Les préoccupations majeures suivantes ont notamment été exprimées. Premièrement, une déclaration relatée ne gagne pas nécessairement en

fiabilité pour avoir été faite dans le cadre d'une entreprise commune. L'existence d'une entreprise commune n'augmente pas forcément la probabilité que la déclaration du déclarant soit exacte : voir Layton, p. 303-304. Comme l'a écrit le juge Bennett dans *Pilarinos*, par. 66 :

> [TRADUCTION] Le juge Juriansz [dans *R. c. Hape*, [2002] O.J. nº 168 (QL) (CSJ)] paraît conclure que le respect des étapes prescrites dans l'arrêt *Carter* crée une garantie circonstancielle de fiabilité. Ce résultat peut certes se produire dans certains cas, mais il ne se produira sûrement pas dans tous les cas, et on ne peut le tenir pour acquis. Le critère de l'arrêt *Carter* offre des garanties à l'accusé, mais il ne confère pas automatiquement à la déclaration relatée une garantie circonstancielle de fiabilité.

51 Deuxièmement, dans la mesure où elle oblige le juge des faits à rechercher une preuve corroborante, la méthode *Carter* entre en conflit avec la méthode d'analyse raisonnée de la règle du ouï-dire, dégagée dans *Starr*. Même si elle ne corrobore pas en soi la déclaration relatée, la preuve d'un complot découlant de l'application de la première et de la seconde étape de *Carter* permettra parfois de prendre en compte certaines déclarations extérieures aux circonstances immédiates qui les ont entourées. La règle relative aux coconspirateurs peut donc aller à l'encontre de la position majoritaire adoptée dans *Starr*, par. 217, où l'on a conclu que seule peut être prise en considération la preuve ayant trait aux circonstances de la déclaration elle-même. Voir aussi *Duncan*, par. 54.

52 Troisièmement, la méthode *Carter* ne permet pas de prendre en considération la raison que le déclarant peut avoir de mentir, élément qui, dans certaines circonstances, sera pertinent pour déterminer le seuil de fiabilité. Les membres d'un complot criminel auront souvent des raisons de mentir, surtout si l'on considère que la réussite de leur entreprise criminelle ne repose pas sur une fidélité

méticuleuse à la vérité : voir Layton, p. 304. Il est possible que des coconspirateurs veuillent minimiser leur propre participation ou accentuer celle de leurs associés dans l'entreprise criminelle, dans l'espoir d'obtenir la clémence du tribunal ou un avantage personnel. À cet égard, il se peut fort bien que la théorie du mandat étayant la règle relative aux coconspirateurs sous-estime la probabilité qu'un coconspirateur déforme l'intention des autres, mais il ne faut pas présumer que ce soit toujours le cas. Même les qualités propres à la *res gestae* n'offrent pas implicitement et invariablement des garanties suffisantes.

53 Par conséquent, on ne saurait tenir pour acquis que les indices essentiels de fiabilité sont présents dans tous les cas où l'exception relative aux coconspirateurs est invoquée. Bien que les deux premières étapes de la méthode *Carter* offrent effectivement des indicateurs circonstanciels de fiabilité, cette méthode comporte trop de failles créant un risque d'admission en preuve de déclarations relatées erronées ou mensongères. Elle ne permet pas non plus de prendre en compte tous les types de situations susceptibles de se produire dans une entreprise commune criminelle.

54 Ces préoccupations, ainsi que les dangers du ouï-dire et la nécessité d'éviter des condamnations injustes et erronées commandent une approche contextuelle de l'application de l'exception relative aux coconspirateurs. La démarche doit être suffisamment souple pour permettre au juge du procès de déterminer si, d'après les faits de l'espèce, une déclaration relatée présente des indices suffisants de fiabilité et de nécessité.

55 Dans ses motifs de jugement en l'espèce, la Juge en chef estime que la règle *Carter* offre à elle seule des garanties circonstancielles de fiabilité suffisantes

tout en étant conforme aux critères fondamentaux de nécessité et de fiabilité. Vu ce qui précède, je ne partage pas cette conclusion. À mon avis, la méthode *Carter* ne présente pas en soi des garanties suffisantes.

B. *Application de la méthode d'analyse raisonnée*

56 L'admissibilité d'un élément de preuve au titre de l'exception relative aux coconspirateurs doit être déterminée selon la méthode d'analyse raisonnée de la règle du ouï-dire lorsque les circonstances dans lesquelles la preuve ou le témoignage a été obtenu ou recueilli, selon le cas, soulève des préoccupations réelles et sérieuses du point de vue la nécessité ou de la fiabilité. Dans ces circonstances, le juge du procès doit examiner attentivement la preuve pour vérifier si elle respecte les critères de la méthode d'analyse raisonnée : *Chang*, par. 127. Il est justifié de s'écarter de la méthode *Carter* pour procéder à un examen attentif dans les cas où le fondement théorique de l'exception relative aux coconspirateurs entre en conflit avec les faits ou les circonstances de l'affaire. L'exception perd alors sa raison d'être et le juge des faits doit éviter de s'appuyer sur la preuve en cause lorsqu'il applique la méthode *Carter* : voir les commentaires de la juge L'Heureux-Dubé dans *Starr*, par. 57, quoique je ne sois pas d'accord avec l'affirmation selon laquelle une exception ne devrait être remise en question qu'en présence de « faits, généralement applicables à une catégorie de personnes, » minant la justification théorique de l'exception

57 Dans ses motifs, la Juge en chef reconnaît que, dans des « cas très exceptionnels », l'exception à l'irrecevabilité du ouï-dire pourrait ne pas être conforme à la méthode d'analyse raisonnée. Ce seuil est trop élevé. On ne saurait, en restreignant ainsi les paramètres de l'approche raisonnée, permettre l'admission de

déclarations relatées mensongères et erronées en vertu d'une règle qui ne répond pas à ses objectifs. La Cour devrait plutôt adopter une autre norme qui offrira des garanties de fiabilité suffisantes et permettra de préserver l'efficacité des procès tout en assurant leur équité.

58 La norme des préoccupations et des doutes sérieux n'est pas aussi restrictive que la solution proposée par les juges majoritaires en l'espèce. Elle reconnaît que les exceptions traditionnelles à la règle du ouï-dire suffiront normalement, mais elle ne limite pas l'application de la méthode d'analyse raisonnée aux seuls « cas très exceptionnels ». La norme des préoccupations ou des doutes sérieux répond mieux aux préoccupations soulevées dans *Starr* en ce qui concerne la fiabilité de la preuve présentée en vertu d'une exception traditionnelle à la règle du ouï-dire, fût-ce dans de « rares » cas (par. 214).

59 Il pourrait exister de forts doutes dans les cas où il y a de nettes indications qu'une déclaration n'a pas pu être faite, qu'elle visait à tromper ou que le déclarant a menti, ou encore que son obtention résulte de la contrainte ou d'encouragements. Cette liste n'est toutefois pas exhaustive.

60 J'aimerais souligner qu'un voir-dire sur l'admissibilité du ouï-dire de coconspirateurs suivant la méthode d'analyse raisonnée demeurera l'exception. Il n'y aura lieu de tenir un voir-dire que dans les cas où une partie soulève des préoccupations sérieuses et réelles quant à la nécessité ou à la fiabilité en apportant des raisons concrètes et détaillées ou en étayant ces préoccupations sur des éléments de preuve précis. Ces préoccupations devront ressortir des circonstances dans lesquelles la déclaration a été faite ou est présentée : *Chang*, par. 132. C'est à la partie qui

s'oppose à l'admission de la déclaration qu'incombe la charge de soulever ces préoccupations.

61 Une question difficile se pose quant au moment où il convient d'appliquer la méthode d'analyse raisonnée à la règle du ouï-dire. De façon générale, l'admissibilité de la preuve est déterminée au moment de sa présentation, sous réserve du pouvoir discrétionnaire du juge du procès d'exiger que les procureurs lui donnent l'assurance que les critères d'admissibilité seront ultimement respectés. Or un problème se pose en l'espèce car, comme nous le savons, la méthode *Carter* s'applique à la fin du procès, lorsque le juge des faits est appelé à apprécier la preuve. On a suggéré, dans certaines affaires, d'appliquer la méthode d'analyse raisonnée une fois la preuve des deux parties close (*Duncan*, par. 65; *Pilarinos*, par. 70) ou une fois les étapes de l'arrêt *Carter* franchies (*R. c. Hape*, [2002] O.J. No. 168 (QL) (C.S.J.) par. 15). Je préfère une approche qui accorde au juge du procès la souplesse voulue pour décider du moment indiqué pour tenir un voir-dire, en s'assurant de le tenir avant l'application de l'arrêt *Carter* à la fin du procès. Je suis d'avis que le juge du procès possède le pouvoir discrétionnaire de décider à quel moment il est nécessaire de tenir un voir-dire pour vérifier si une déclaration satisfait aux critères de nécessité ou de fiabilité, pourvu que ce voir-dire ait lieu avant que l'affaire ne soit soumise au juge des faits : *Chang*, par. 130.

62 Par conséquent, l'élément de preuve devrait être provisoirement admis lorsqu'il est présenté. La méthode raisonnée sera appliquée si une partie satisfait au fardeau de preuve applicable à cet égard et soulève des préoccupations ou des doutes sérieux quant à la nécessité ou à la fiabilité. Si le juge du procès estime que la partie s'est acquittée de ce fardeau, il doit alors tenir un voir-dire pour déterminer si la

déclaration relatée respecte les exigences de la méthode raisonnée. Dans les cas où la partie est incapable de soulever des préoccupations ou des doutes sérieux, le juge des faits appliquera comme d'habitude, à la fin du procès, les étapes prévues par l'arrêt *Carter*.

63 L'approche préconisée contribuera à réaliser un équilibre entre l'efficacité du procès et son équité. De plus, la confiance du public risque moins de s'éroder du fait de l'admission en preuve de déclarations erronées et mensongères par suite de l'application mécanique d'une méthode rigide. Pareil compromis s'impose lorsque les principes fondamentaux de justice sont en jeu et qu'il y a risque de déclarations de culpabilité erronées.

64 Vu les faits de la présente espèce, je conviens avec mes collègues que l'appelant n'a pas établi que la preuve à laquelle il s'oppose soulève des préoccupations sérieuses et réelles quant à sa fiabilité. Le fait que Wasfi était en prison à l'époque où la discussion entre lui et Binahmad aurait eu lieu, s'il avait été connu au moment pertinent, aurait pu modifier ma conclusion. Ce fait, toutefois, n'a été découvert qu'après le voir-dire tenu par le juge Oppal sur l'admissibilité du témoignage de Binahmad : D.A. vol. IX, p. 1541. Quant aux raisons de mentir dans cette affaire, elles ne suffisent pas, à mon avis, pour soulever des préoccupations sérieuses. Je souscris donc à l'opinion de la Juge en chef quant à l'issue du présent pourvoi.

CT-2022-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34;

AND IN THE MATTER OF the proposed acquisition by Rogers Communications Inc. of Shaw Communications Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 92 of the *Competition Act*.

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

- and –

ATTORNEY GENERAL OF ALBERTA
VIDÉOTRON LTD.

Intervenors

BOOK OF AUTHORITIES

Department of Justice Canada
Competition Bureau Legal Services

Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9
Fax: 819-953-9267

John S. Tyhurst
Alexander Gay
Derek Leschinsky
Katherine Rydel
Ryan Caron
Kevin Hong

John.Tyhurst@cb-bc.gc.ca
Alexander.Gay@cb-bc.gc.ca
Derek.Leschinsky@cb-bc.gc.ca
Katherine.Rydel@cb-bc.gc.ca
Ryan.Caron@cb-bc.gc.ca
Kevin.Hong@cb-bc.gc.ca

Counsel to the Commissioner of Competition