Court File No. CT-2021-002

FEDERAL COURT

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

AND IN THE MATTER OF the acquisition by Secure Energy Services Inc. of all of the issued and outstanding shares of Tervita Corporation;

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

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- and -

SECURE ENERGY SERVICES INC.

Respondent

BOOK OF AUTHORITIES

DEPARTMENT OF JUSTICE CANADA
Attorney General of Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau QC K1A 0C9

Jonathan Hood
Paul Klippenstein
Ellé Nekiar

Tel: 647-625-6782
Fax: 819-953-9267

Counsel to the Commissioner of Competition

Court File No. CT-2021-002

FEDERAL COURT

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

AND IN THE MATTER OF THE ACQUISITION BY Secure Energy Services Inc. of all of the issued and outstanding shares of Tervita Corporation;

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

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

SECURE ENERGY SERVICES INC.

Respondent

INDEX

JURISPRUDENCE **TAB**

LEGISLATION **TAB**

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

Table of Contents

I. EXECUTIVE SUMMARY

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

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

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

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

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

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

II. INTRODUCTION AND OVERVIEW

A. The parties

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

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

B. Section 79 of the Act

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

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

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

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

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

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

C. The parties' pleadings

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

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

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

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

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

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

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

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

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

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

D. Procedural history

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

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

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

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

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

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

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

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

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

III. FACTUAL BACKGROUND

A. YVR

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

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

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

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

B. VAA

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

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

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

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

[…]

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

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

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

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

C. Airport revenues and fees

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

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

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

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

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

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

D. Airlines

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

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

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

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

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

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

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

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

E. In-flight catering

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

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

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

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

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

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

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

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

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

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

F. In-flight catering providers

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

G. In-flight caterers at YVR

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

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

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

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

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

H. The 2013-2015 events

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

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

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

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

[86] [CONFIDENTIAL].

I. The 2017 RFP

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

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

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

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

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

IV. EVIDENCE -- OVERVIEW

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

A. Lay witnesses

(1) The Commissioner

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) VAA

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

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

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

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

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

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

B. Expert witnesses

(1) The Commissioner

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

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

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

(2) VAA

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

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

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

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

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

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

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

(a) Admissibility of expert evidence

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

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

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

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

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

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

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

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

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

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

(b) Dr. Tretheway's evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Documentary evidence

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

V. PRELIMINARY ISSUES

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

A. Admissibility of evidence

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

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

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

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

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

(1) Rules of evidence at the Tribunal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Lay opinion evidence

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

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

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

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

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

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

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

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

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

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

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

(3) Hearsay evidence

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

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

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

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

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

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

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

(4) Conclusion

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

B. Alleged late amendments to pleadings

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

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

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

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

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

(1) Analytical framework

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

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

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

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

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

(2) Expansion of relevant markets

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

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

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

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

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

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

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

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

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

(3) Additional ground for VAA's PCI

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

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

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

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

(4) Conclusion

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

VI. ISSUES

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

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

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

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

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

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

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

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

- What costs should be awarded?

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

VII. ANALYSIS

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

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

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

(1) The RCD

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The parties' positions

(a) VAA

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

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

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

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

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

(b) The Commissioner

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

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

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

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

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

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

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

(3) Assessment

(a) Is the required leeway language present?

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

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

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

(i) The wording of section 79

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) The rationales underlying the RCD

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) Conclusion on the leeway language

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

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

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

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

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

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

(i) Conduct authorized by a federal legislative regime

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) The grounds invoked by VAA

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

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

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

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

[…]

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

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

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

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

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

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

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

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

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

- The 1992 OIC and the 1992 Ground Lease

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

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

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

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

(a) designate any corporation or other body to which the Minister is to sell, lease or otherwise transfer an airport as a designated airport authority; and

(b) designate the date on which the Minister is to sell, lease or otherwise transfer an airport to a designated airport authority as the transfer date for that airport.

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

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

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

- VAA's Board of Directors

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

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

- VAA's additional public interest arguments

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

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

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

- The Canadian Aviation Regulations

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

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

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

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

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

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

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

(iii) Conclusion on the second component of the RCD

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

(4) Conclusion

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

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

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

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

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

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

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

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

(1) Analytical framework

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

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

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

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

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

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

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

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

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

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

(2) The product dimension

(a) The parties' positions

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

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

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

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

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

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

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

(b) The Airside Access Market

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

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

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

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

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

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

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

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

(c) The Galley Handling Market

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

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

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

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

(i) The hypothetical monopolist framework

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

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

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

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

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

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

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

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

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

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

(ii) Evidence supporting a distinct relevant market

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

- Functional interchangeability

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

- The behaviour of airlines and in-flight caterers

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

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

Air Canada

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

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

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

Jazz

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

WestJet

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

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

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

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

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

Air Transat

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

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

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

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

Firms supplying Catering and Galley Handling services

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

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

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

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

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

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

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

Summary

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

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

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

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

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

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

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

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

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

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

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

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

- Physical and technical characteristics

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

- The production of Galley Handling and Catering services

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

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

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

- Price relationships and relative prices

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

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

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

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

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

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

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

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

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

- Fixed or variable proportions

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

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

(iii) Conclusion on the Galley Handling Market

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) The geographic dimension

(a) The parties' positions

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

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

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

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

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

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

(b) The Airside Access Market

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

(c) The Galley Handling Market

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

(i) Double Catering

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) Self-supply

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) Conclusion on the Galley Handling Market

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

(4) Conclusion

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

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

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

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

(1) Analytical framework

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

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

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

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

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

(2) The parties' positions

(a) The Commissioner

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

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

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

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

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

(b) VAA

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

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

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

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

(3) Assessment

(a) The Airside Access Market

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) The Galley Handling Market

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

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

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

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

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

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

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

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

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

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

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

(4) Conclusion

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

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

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

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

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

(a) Meaning of "plausible"

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

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

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

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

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

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

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

[464] The Tribunal considers it appropriate to calibrate the meaning of the word "plausible," as used in the particular context of section 79, to connote <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 prior to the assessment of the overall character, or overriding purpose, of the impugned conduct. It is not conducted together with that assessment.

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

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

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

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

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

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

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

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

(ii) VAA's submissions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) Conclusion

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

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

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

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

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

(a) Analytical framework

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

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

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

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

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

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

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

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

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

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

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

(b) The parties' positions

(i) The Commissioner

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

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

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

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

(ii) VAA

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

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

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

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

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

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

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

(c) Assessment

(i) "Practice"

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

(ii) Intention to exclude and reasonably foreseeable effects

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

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

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

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

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

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

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

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

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

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

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

(iv) VAA's justifications for the Exclusionary Conduct

- <u>The evidence</u>

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

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

The April 2014 events

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

110. **[CONFIDENTIAL]**.

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

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

113. At a minimum, it would have caused significant disruption in the availability of full-service in-flight catering at YVR. In particular, a sudden or unexpected departure of an existing caterer would leave dozens of airlines scrambling to find a new supplier for hundreds of flights. There are over 400 flights that depart YVR every day, almost all of which rely on some form of in-flight catering. For most international flights and flights with first class passengers, full-service catering is a requirement, not an option. Airlines cannot fly those routes without full-service in-flight catering, including fresh meals. Moreover, airlines cannot shut down or suspend operations on those flights while they find a new supplier.

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

Other caterers at the Airport, even if they do offer the full range of services required by the airline, may not have capacity to absorb all the business of the departing caterer. And even if it is possible for one of the remaining in-flight caterers to increase its capacity or expand its service offerings, that could take a significant period of time – even months – while the caterer hires and trains new workers or expands its facilities. During that time period, the supply of in-flight catering would be disrupted.

115. In addition, it is not a simple or quick process for a new caterer to enter the market under any circumstances, including to replace a departing caterer. There are many steps that a new caterer must follow before it can begin supplying airlines at YVR, including going through multiple security checks, obtaining the requisite permits, hiring and training employees, including drivers who will access the airside, and establishing a new catering facilities [*sic*] or taking over an existing facility. Again, this process takes a considerable amount of time.

116. In light of those issues, Mr. Gugliotta and I were concerned that, given the circumstances that existed at the time, the departure of a full-service in-flight caterer would risk significant disruption in the supply of catering services at YVR. That would have been highly problematic for airlines, damaged YVR's reputation, and made it much more difficult for VAA to attract and retain airlines and routes to YVR, which is a key component of VAA's public interest mandate.

117. Having considered all the factors above, Mr. Gugliotta and I concluded that it was not in the best interests of the Airport to grant an additional in-flight catering licence at that time.

118. I should note that one factor that did not affect my decision was whether the entry or exclusion of a third caterer would have any impact on VAA's revenues. VAA's revenues were never considered or discussed in my meeting with Mr. Gugliotta. We were focused on maintaining competition, choice and reliability in in-flight catering at YVR, which was and is far more important to VAA than the relatively small amount of revenue it receives from in-flight caterers through Concession Fees and rent.

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

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

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

The exchanges with Newrest and Strategic Aviation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[563] Among other things, the correspondence during that time period includes an email to Messrs. Richmond, Gugliotta and Hankinson, dated August 13, 2014, in which Mr. Brown underscored that "Strategic Aviation/Sky Café will <u>never</u> 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.

- The legitimacy of VAA's justifications

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

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

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

Preservation of competition

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

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

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

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

Protecting YVR's reputation

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

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

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

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

Avoiding disruption for airlines

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

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

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

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

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

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

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

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

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

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

- The adequacy and credibility of VAA's justifications

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) Conclusion

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

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

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

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

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

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

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

(1) Analytical framework

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

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

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

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

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

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

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

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

[639] "Substantiality" can be demonstrated by the Commissioner through quantitative or qualitative evidence, or both (*TREB CT* at paras 469-471). The Commissioner must however always adduce sufficiently clear and convincing evidence to demonstrate, on a balance of probabilities, that competition has been, is or is likely to be prevented or lessened substantially (*Tervita SCC* at para 65; *TREB FCA* at para 87; *Canada Pipe FCA* at para 46).

[640] In conducting its assessment of substantiality under paragraph 79(1)(*c*), the Tribunal will assess both the degree of the prevention or lessening of competition as well as its duration (*Tervita SCC* at paras 45, 78). Where a prevention or lessening of competition does not extend throughout the relevant market, the Tribunal will also assess its scope and whether it extends throughout a "material" part of the market (*The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14 ("***CCS***") at paras 375, 378, rev'd 2013 FCA 28, rev'd 2015 SCC 3).

[641] With respect to degree, or magnitude, the Tribunal assesses whether the impugned practice has enabled, is enabling or is likely to enable the respondent to exercise materially greater market power than in the absence of the practice (*Tervita SCC* at paras 50-51, 54). The Tribunal has not found it useful to apply rigid numerical criteria in conducting this assessment. What constitutes "materially" greater market power will vary from case to case and will depend on the facts of the case (*Tervita SCC* at para 46; *TREB FCA* at para 88). In assessing whether the degree or magnitude of prevention or lessening of competition is sufficient to be considered "substantial," the Tribunal will consider the overall economic impact of an impugned practice in the relevant market. With respect to the duration aspect of its assessment, the test applied by the Tribunal is whether this material increase in prices or material reduction in non-price dimensions of competition resulting from an impugned practice has lasted, or is likely to be maintained for, approximately two years (*Tervita SCC* at para 80; *CCS* at para 123).

[642] For greater certainty, when assessing whether competition with respect to prices has been, is or is likely to be prevented or lessened substantially, the test applied by the Tribunal is to determine whether prices were, are or likely would be materially higher than in the absence of the impugned practice. With respect to non-price dimensions of competition, such as quality, variety, service or innovation, the test applied is to determine whether the level of one or more of those dimensions of competition was, is or likely would be materially lower than in the absence of the impugned practice (*Tervita SCC* at para 80; *CCS* at paras 123-125, 376-377).

[643] Where it is alleged that future competition has been, is or is likely to be prevented by an impugned practice, this period will run from the time when that future competition would have likely materialized, in the absence of the impugned practice. If such future competition cannot be demonstrated to have been, or to be, likely to materialize in the absence of the impugned practice, the test contemplated by paragraph 79(1)(*c*) will not be met. To be likely to materialize, the future competition must be demonstrated to be more probable than not to occur in the absence of the impugned practice (*Tervita SCC* at para 66). To meet this test, the Commissioner is required to demonstrate that the future competition, whether in the form of entry by new competitors or expansion by existing competitors (including in the form of the introduction of new product offerings), likely would have materialized within a discernible time frame. This time frame need not be precisely calibrated. However, it must be based on evidence of when the entry or expansion in question realistically would have occurred, having regard to the typical lead time for new entry or expansion to occur in the relevant market in question.

[644] It bears emphasizing that the burden to demonstrate both the substantial nature of the alleged prevention or lessening of competition, and the basic facts of the "but for" scenario that are required to make that demonstration, lies with the Commissioner (*Tervita FCA* at paras 107-108).

(2) The parties' positions

(a) The Commissioner

[645] The Commissioner argues that VAA's conduct has had, is having and is likely to have the effect of substantially preventing or lessening competition in the Galley Handling Market. In

support of this position, the Commissioner asserts that, "but for" VAA's Exclusionary Conduct, the market for the supply of Galley Handling services at YVR would be substantially more competitive, including by way of materially lower prices, materially enhanced innovation and/or materially more efficient business models, and materially higher service quality.

[646] The Commissioner submits that in the absence of VAA's impugned conduct, significant new entry into the Galley Handling Market at YVR likely would have occurred, and likely would occur in the future. In this regard, he notes that potential new entrants have already sought authorization to access the airside to provide in-flight catering at the Airport, and would likely have begun operations at the Airport in the absence of VAA's Practices. The Commissioner therefore maintains that VAA's conduct insulates the incumbent in-flight catering firms at the Airport from these new sources of competition, enabling those incumbent firms to exercise a materially greater degree of market power, through materially higher prices and materially lower levels of service quality, than would otherwise prevail in the absence of VAA's practice.

[647] The Commissioner claims that the ability of airlines seeking Galley Handling services at YVR to contract with alternatives to the incumbent providers would allow them to realize at YVR the price and non-price benefits that they have enjoyed at other airports in Canada where new entry has been permitted to occur.

[648] The Commissioner further contends that new entry would also bring to YVR the introduction of innovative and/or more efficient Galley Handling business models. For example, airlines would gain the ability to procure Galley Handling services from a less than full-service in-flight catering firm, or from in-flight catering firms with a lower-cost off-Airport location, delivering efficiencies to service providers and savings to airlines.

[649] In support of his position, the Commissioner relies on the evidence of the market participants directly impacted by VAA's Exclusionary Conduct, namely several airlines and in-flight catering firms, as well as on the expert evidence of Dr. Niels. Dr. Niels' evidence includes: (i) the analysis of switching by airlines at Canadian airports; (ii) Jazz's gains from switching at airports other than YVR; (iii) the price effects for airlines that did not switch; and (iv) **[CONFIDENTIAL]**. The Commissioner claims that, on their own and certainly in the aggregate, these various sources of evidence demonstrate that VAA's anti-competitive conduct has caused, is causing and is likely to cause a substantial prevention and lessening of competition in the supply of Galley Handling at YVR. Specifically, the Commissioner maintains that, "but for" VAA's Exclusionary Conduct, there would likely have been in 2014-2015 and would likely be in the future: (i) entry by new competitors for the supply of Galley Handling at YVR; (ii) switching and threats of switching from airlines at YVR to new competitors for the supply of Galley Handling; (iii) lower prices for airlines for the supply of Galley Handling services at YVR; and (iv) a greater degree of dynamic competition for Galley Handling at YVR.

[650] Finally, the Commissioner argues that the alleged prevention or lessening of competition would be substantial in terms of magnitude, duration and scope: it adversely impacts competition to a degree that is material, the duration of the adverse effects is substantial and the adverse effects impact a substantial part of the Relevant Market.

[651] As stated before, the Commissioner's focus throughout the hearing of this Application was on one of VAA's two alleged impugned Practices, namely, the Exclusionary Conduct. Indeed, the other allegation regarding continued tying of access to the airside for the supply of Galley Handling services to the leasing of land at YVR from VAA was not addressed by the Commissioner during the hearing or in his closing written submissions.

(b) VAA

[652] VAA responds that its Practices do not, and are not likely to, prevent or lessen competition substantially in any market. More specifically, VAA submits that the Commissioner has failed to meet his burden to prove, on a balance of probabilities, that VAA's refusal to license Newrest and Strategic Aviation has had, is having or is likely to have the effect of substantially preventing or lessening competition in the Galley Handling Market.

[653] In its Amended Response, VAA submitted that its decision to limit the number of in-flight caterers at the Airport has not enabled the incumbent firms to exercise materially greater market power than they would have been able to exercise in the absence of the acts. VAA further claimed that there is vigorous competition between Gate Gourmet and CLS, that the presence of two full-service in-flight catering firms is consistent with the number of such competitors at other comparable North American airports, and that airlines can and do change firms in response to price and service competition.

[654] VAA further argued that the airlines (and their large international alliances) have considerable countervailing market power. Finally, VAA submitted that the licensing of dnata and the arrival of this third in-flight caterer at YVR will eliminate any prevention or lessening of competition that could have resulted from VAA's refusal to grant licences to Newrest and Strategic Aviation.

[655] In its closing submissions, VAA elaborated by stating that, on the unique facts of this case where it does not compete in the Relevant Market (i.e., the Galley Handling Market), the Commissioner must prove that its actions materially created, enhanced or maintained the market power of both Gate Gourmet and CLS, in the supply of Galley Handling at YVR. VAA argued that the evidence on the record does not establish that "the market at issue would be substantially more competitive" (*TREB FCA* at para 88), "but for" the Exclusionary Conduct.

[656] VAA reiterated that in evaluating whether its conduct materially enhanced the market power of either Gate Gourmet or CLS, the Tribunal must also consider the interaction between the effect of the denial of licences to Newrest and Strategic Aviation and the countervailing market power exercised or exercisable by the airline customers of Gate Gourmet and CLS.

[657] VAA also maintains that the evidence provided by the Commissioner, whether from the market participants or from Dr. Niels, is not sufficient to meet the test under paragraph 79(1)(*c*). More specifically, VAA submits that the anecdotal evidence from Jazz and Air Transat is unreliable and open to serious question following the cross-examination of the Commissioner's witnesses. VAA further asserts that the Commissioner's evidence is limited to two small carriers. Furthermore, VAA claims that the economic evidence from Dr. Niels suffers from numerous

flaws. For example, it states that the alleged price effects only occur for "small" airlines, that they are largely associated with entry at airports going from a monopoly position to two in-flight caterers, and that these small airlines account only for about **[CONFIDENTIAL]**% of the flights at YVR, with no indication of the proportion they represent of the Galley Handling Market at YVR.

[658] VAA acknowledges that the Tribunal can assess both the quantitative and qualitative effects of the impugned conduct and that the qualitative effects are more relevant to an assessment of dynamic competition in innovation markets, in the sense that innovation or technology plays a key role in the competitive process. However, VAA submits that the Galley Handling Market is not such a market, and that there is no clear and convincing evidence of any adverse effect on innovation in this case.

[659] Finally, VAA adds that the factual circumstances relevant to the consideration of whether there has been or will likely be a substantial prevention or lessening of competition should be updated to the date of the hearing. In this instance, given the imminent entry of dnata, VAA maintains that the Commissioner has to prove that VAA's conduct is likely to have the effect of substantially preventing or lessening competition from a forward-looking perspective. VAA contends that, if any negative price effects have resulted from the impugned conduct, those effects will be remedied and cured with the entry of dnata at YVR.

(3) Assessment

[660] The Tribunal notes at the outset that most of the evidence adduced by the Commissioner was quantitative evidence relating to the alleged price effects of VAA's Exclusionary Conduct. As part of its assessment, the Tribunal has therefore focused significantly on whether prices likely would have been, or would likely be materially lower, "but for" VAA's Exclusionary Conduct. The Tribunal has also evaluated whether entry likely would have been, or would likely be materially greater in the absence of that conduct, whether switching between suppliers of Galley Handling services likely would have been, or would likely be materially more frequent, and whether innovation in terms of Galley Handling services offered likely would have been, or would likely be substantially greater.

[661] For the reasons discussed below, the Tribunal concludes that the Commissioner has not demonstrated that the incremental adverse effect of VAA's Exclusionary Conduct on competition in the Galley Handling Market has been, is or is likely to be material, relative to the "but for" world in which that conduct did not occur. Therefore, the Commissioner has not established that competition has been or is prevented or lessened substantially as a result of the Exclusionary Conduct, or that it is likely to be prevented or lessened substantially in the future.

(a) Alleged anti-competitive effects

(i) Entry

[662] In assessing whether competition has been, is or is likely to be substantially prevented or lessened by a practice of anti-competitive acts, one of the factors to consider is whether entry or expansion into the relevant market likely would have been, likely is or likely would be, substantially faster, more frequent or more significant "but for" that practice (*Canada Pipe FCA* at para 58; *TREB CT* at para 505).

[663] According to the Commissioner, VAA's Exclusionary Conduct constitutes a significant barrier to entry for new providers of Galley Handling services who otherwise would have entered into the Relevant Market.

[664] The Tribunal is satisfied that several of the Commissioner's witnesses provided credible and persuasive evidence regarding the exclusionary impact that VAA's conduct has had on them in terms of entry. Based on that evidence, the Tribunal accepts that this conduct has prevented the development of at least some new competition in the Galley Handling Market. Indeed, VAA does not dispute that Newrest, Strategic Aviation and Optimum would like to compete at YVR. Witnesses from each of these firms (Mr. Stent-Torriani for Newrest, Mr. Brown for Strategic Aviation and Mr. Lineham for Optimum) testified that, "but for" VAA's Exclusionary Conduct, their companies would have entered YVR in 2014-2015 and would have competed for airline business. The evidence shows that they participated in RFPs launched by Jazz and Air Transat in the 2014-2015 timeframe, and were unsuccessful at YVR because of their inability to obtain a licence from VAA to offer their Galley Handling services.

[665] Considering the foregoing, the Tribunal is satisfied that there would have been somewhat more new entry into the Relevant Market than there has in fact been, "but for" the impugned conduct (*Canada Pipe FCA* at para 58).

[666] The representatives of Newrest, Strategic Aviation and Optimum all testified that, despite the entry of dnata at YVR, they would still be interested in commencing operations at YVR and in competing for airline business in the Galley Handling Market. There is also evidence, notably from the witnesses who appeared on behalf Air Canada (Mr. Yiu) and WestJet (Mr. Soni), indicating that airlines are still generally looking for more competition in the in-flight catering business. However, apart from general statements from Newrest, Strategic Aviation and Optimum regarding their continued interest in operating at YVR, and similar statements from Air Canada and WestJet regarding the benefits of increased competition in Galley Handling services, the Commissioner has provided limited evidence regarding the incremental benefits that past, current or future new entry would have yielded in the Galley Handling Market. Normally, as part of an analysis of likely past, present or future entry, the Commissioner is expected to provide evidence regarding the proportion of the market that was, is or is likely to be available to new entrants. As part of this exercise, it is incumbent upon the Commissioner to identify concrete market opportunities that would likely have been, are or would likely be available to new entrants. In other words, the Commissioner has the burden to establish that new entrants would likely have entered or expanded in the relevant market, or would be likely to do so, "within a

reasonable period of time, and on a sufficient scale, to effect either a material reduction of prices or a material increase in one or more levels of non-price competition, in a material part of the market" (*Tervita FCA* at para 108). Such evidence has not been provided in this proceeding. Among other things, the Commissioner has not addressed the fact that the contracts between the incumbent in-flight caterers and the airlines are typically long-term contracts, varying between three to five years.

[667] As a result, the Tribunal is not satisfied that there is clear and convincing evidence to support the conclusion that there were, are or would likely be sufficient opportunities available to new entrants to support entry on a scale that would likely have been or would likely be sufficient to have a material impact on the price and non-price dimensions of competition in the Galley Handling Market.

[668] The Tribunal underscores that the situation is now different from the 2014-2015 and 2017 periods when there were RFPs for Galley Handling services initiated by airlines such as Air Transat, Jazz or Air Canada, and when Newrest, Strategic Aviation and/or Optimum offered their services and participated in the process. No evidence was adduced to demonstrate that new contracts for Galley Handling services are currently available or would soon be available for any airlines at YVR. When relying on an allegation that impugned conduct prevents or would likely prevent new entrants from having a material impact on the price or non-price dimensions of competition, the Commissioner must demonstrate more than the existence of firms that are interested in entering the relevant market. The Commissioner must go further and demonstrate that those firms are likely to be successful and that they are likely to achieve a scale of operations that permitted or would permit them to materially impact one or more important dimensions of competition. He has not done so for present or future entry. Likewise, as to the 2014-2015 and 2017 periods mentioned above, the Commissioner has not established that entry by Newrest, Strategic Aviation and/or Optimum likely would have been on a sufficient scale to result in materially lower prices or a materially higher level of innovation, quality, service or other non-price effects in a substantial part of the market.

[669] Based on the foregoing, the Tribunal finds that the Commissioner has not demonstrated, with clear and convincing evidence, that successful and sufficient entry at YVR has been or is prevented, or will likely be prevented in the foreseeable future, "but for" the Exclusionary Conduct.

(ii) Switching

[670] The Commissioner maintains that, had entry been permitted, switching from Gate Gourmet or CLS likely would have taken place to a materially higher degree than in the presence of VAA's Exclusionary Conduct. He adds that airlines would likely have resorted, and would likely turn in the future, to new providers of Galley Handling services at YVR. VAA replies that the evidence on switching does not demonstrate that VAA's Exclusionary Conduct has had, or is likely to have, the effect of limiting competition in the Galley Handling Market at YVR, let alone substantially.

- Switching by airlines

[671] On this issue, the Commissioner relied on Dr. Niels' analysis of the extent of switching at various Canadian airports. Dr. Niels' switching analysis consisted of counting the number of switches of in-flight catering providers made by the airlines at different airports over the period 2013-2017. In his analysis, Dr. Niels identified **[CONFIDENTIAL]** instances in which airlines switched in-flight caterers during that period. Of these, **[CONFIDENTIAL]** occurred at YVR, **[CONFIDENTIAL]**. Of the other **[CONFIDENTIAL]** which took place at other airports, **[CONFIDENTIAL]** involved switches to new entrants. A little more than half of these changes in in-flight caterers (i.e., **[CONFIDENTIAL]**) were made by **[CONFIDENTIAL]**.

[672] The evidence from Dr. Niels also showed an important change in the average yearly percentage of total airline purchases of in-flight catering services from in-flight caterers who were switched in the period from 2013 to 2017. That percentage was at **[CONFIDENTIAL]**% at YVR whereas it was much higher at every other airport in Canada, ranging from **[CONFIDENTIAL]**% to **[CONFIDENTIAL]**%, including YYZ at **[CONFIDENTIAL]**%. In other words, Dr. Niels found that the proportion of airline spending on in-flight catering that was switched during the period 2013-2017 was much lower at YVR than at other large Canadian airports. Dr. Niels added in reply to Dr. Reitman that **[CONFIDENTIAL]**, implying that VAA's refusal to permit entry has resulted in weaker competitive dynamics at YVR.

[673] According to the Commissioner, this analysis by Dr. Niels demonstrates that: (i) there was very little switching by airlines among the incumbent providers of in-flight catering services at YVR; (ii) comparatively, substantial switching occurred at airports other than YVR; and (iii) switching is often associated with the entry of new in-flight caterers.

[674] The Commissioner submits that this disparity in switching at YVR compared to other airports is relevant for two reasons. First, would-be entrants across Canada were ready to enter in 2014 and they remain ready to enter the Galley Handling Market. Therefore, "but for" VAA's Exclusionary Conduct, more switching would likely have occurred at YVR in the past and more would likely occur in the future. Second, the Commissioner suggests that Dr. Niels and Dr. Reitman agree that it is reasonable to presume that airlines benefit when they switch in-flight catering providers. Based on this, he maintains that there is a direct link between the fact of switching and benefits to airlines, and a direct link between a lack of switching and increased costs and/or reduced quality of service to airlines.

[675] The Tribunal acknowledges that there likely would have been at least some additional switching at YVR, "but for" the Exclusionary Conduct. However, the Tribunal considers that the switching analysis conducted by Dr. Niels has some important shortcomings. First, as pointed out by VAA, the switches counted by Dr. Niels in his analysis were for Catering and Galley Handling together. It is not possible to discern specific effects in the Galley Handling Market, *per se*, or to determine whether the switches observed related to that market or in respect of catering services. Second, Dr. Niels' analysis was incomplete. As Dr. Niels acknowledged, he did not factor into his analysis instances of partial switching made by airlines for their Galley Handling services. Third, apart from the fact that there has been more entry at some other airports than at YVR, it is not clear that there is any material difference between the intensity of

competition in the provision of Galley Handling services at YVR, relative to other airports. Dr. Niels essentially conceded this point.

[676] That said, further to its assessment of Dr. Niels' evidence on this point, and considering also the evidence provided by Air Transat and Jazz showing that they would have switched to a new in-flight caterer further to their respective 2014 and 2015 RFPs, the Tribunal agrees with the Commissioner that, on a balance of probabilities, switching would have been and would likely be greater and more frequent in the absence of VAA's Exclusionary Conduct. However, that is not the end of the analysis. As discussed above, the Commissioner must also address whether such switching likely would have been sufficient to result in materially lower prices, or materially higher levels of non-price benefits, in a substantial part of the market, "but for" the Exclusionary Conduct. For the reasons discussed in Section VII.E.3.b below, he has not satisfied his burden in this regard.

- Entry by dnata

[677] The Commissioner also submits that dnata's entry as a third provider of in-flight catering services at YVR in 2019 will have limited impact on the Galley Handling Market. The Commissioner argues that, unlike the situation for Newrest, Strategic Aviation and Optimum, there is limited evidence that dnata will likely be an effective competitor at YVR.

[678] The Commissioner claims that dnata has no presence in Canada and virtually none in North America (being only present in Orlando, Florida). He submits that dnata's limited presence in North America will be an obstacle to its success at YVR, as it will be unable to offer "network" pricing and satisfy airlines' preferences for a single caterer supplier across Canada.

[679] The Commissioner also contends that **[CONFIDENTIAL]** (Commissioner's Closing Argument, at para 78). The Commissioner further notes that, **[CONFIDENTIAL]**. Stated differently, despite the fact that domestic flights account for 67% of flights per week at YVR, **[CONFIDENTIAL]**. The Commissioner submits that since international flights account for a smaller proportion of flights per week at YVR, **[CONFIDENTIAL]**.

[680] The Commissioner further argues that VAA's process for selecting dnata – namely, the In-Flight Kitchen Report and the 2017 RFP itself – was fundamentally flawed in many respects, as were the results of the process.

[681] Finally, the Commissioner contends that dnata is a "**[CONFIDENTIAL]**" type of new competitor vis-à-vis the two incumbent caterers at YVR, in an in-flight catering environment where innovative business models exist and benefit airlines everywhere but YVR (Commissioner's Closing Argument, at para 77).

[682] The Tribunal disagrees with the Commissioner's position with respect to dnata. In brief, the evidence does not support the Commissioner's contention that dnata is unlikely to be an effective competitor.

[683] Regarding the scope of dnata's presence, the evidence does not support the Commissioner's suggestion that dnata's entry will be limited and targeted. In his cross-examination by counsel for VAA, **[CONFIDENTIAL]**.

[684] As to the RFP conducted by VAA in 2017, the Tribunal is not convinced by the Commissioner's arguments. The Tribunal agrees with VAA that, in light of the evidence regarding the In-Flight Kitchen Report and the RFP itself, the RFP was beyond reproach. The Tribunal does not find that the process was flawed or geared towards a given result. The Commissioner has not pointed to any persuasive evidence in that regard. Indeed, the RFP process was found to be fair by a third-party fairness advisor. It was expressly open to both full-service and non-full-service in-flight catering firms. It was also open to firms operating a kitchen on-Airport as well as those operating off-Airport. And the criteria for analyzing the bids were extremely detailed and objective. Contrary to the Commissioner's suggestion, the Tribunal finds no evidence showing that the RFP process was geared towards a "full-flight kitchen" operator or against providers like Strategic Aviation or Optimum.

[685] The Tribunal also disagrees with the Commissioner's comment that dnata is "**[CONFIDENTIAL]**" and will not be considering "innovative" new business models. On the contrary, the testimony of Mr. Padgett showed that dnata is ready and able to go after any type of in-flight catering work, whether that consists of catering or last-mile logistics or both. In other words, dnata has left the door open to the possibility of providing only Galley Handling services for airline customers who may not wish to source their catering services from dnata.

[686] The Tribunal considers that there is every indication that dnata will enter and compete fully with Gate Gourmet and CLS in the Galley Handling Market at YVR. In fact, Dr. Niels acknowledged that the entry of dnata will bring increased rivalry to the Galley Handling Market at YVR, as his evidence suggests that at least some switches occur upon the entry of new in-flight catering firms. Dr. Niels further accepted that, with the entry of dnata and the presence of three caterers at YVR going forward, there will be stronger competition than with two, though he qualified this increased competition as being a matter of degree. **[CONFIDENTIAL]**.

[687] In light of the foregoing, the Tribunal is not persuaded that dnata will not be an effective competitor. On the contrary, the Tribunal is inclined to accept Mr. Padgett's testimony that **[CONFIDENTIAL]**.

[688] That said, the Tribunal agrees with the Commissioner that as far as paragraph 79(1)(*c*) is concerned, the appropriate "but for" analysis is to compare outcomes with VAA's exclusionary practice in place to outcomes that would likely be realized absent that practice. It is not to compare outcomes with the presence of the two incumbent competitors to outcomes with those same two competitors plus dnata. However, the entry of dnata has made it more difficult for the Commissioner to demonstrate that, "but for" VAA's Exclusionary Conduct, prices likely would be materially lower, or non-price levels of competition likely would be materially greater, relative to the levels of prices and non-price competition that are in fact likely to prevail now that dnata has entered the Relevant Market.

(iii) Price effects

[689] The main focus of the Commissioner's arguments pertaining to alleged anti-competitive effects was on the price dimensions of VAA's Exclusionary Conduct and on how prices for Galley Handling services would likely have been and would likely be lower "but for" the impugned conduct. The Commissioner relied on evidence from a number of market participants, notably the various airlines called to testify, and on the expert evidence of Dr. Niels, to support his position that prices in the Galley Handling Market at YVR are materially higher than they would likely have been or would likely be, "but for" the Exclusionary Conduct. The Commissioner maintains that the aggregate savings resulting from reduced prices of Galley Handling services would likely have been and would likely be in the future, substantial.

[690] VAA responds that the Commissioner has not demonstrated that airlines would likely have benefitted from, or would likely be offered, materially lower prices in the Relevant Market in the absence of VAA's Exclusionary Conduct.

[691] The Tribunal agrees with VAA. Further to its review of the evidence, the Tribunal is not persuaded that VAA's Exclusionary Conduct has increased, is increasing or will likely increase the prices for Galley Handling services to a non-trivial degree in the Relevant Market, relative to the prices that likely would have existed "but for" the Exclusionary Conduct. Stated differently, the Commissioner has not demonstrated that, "but for" VAA's Exclusionary Conduct, the prices of the Galley Handling services at YVR would likely have been or would likely be lower, let alone "materially" lower.

[692] The Tribunal pauses to underscore, at the outset, that the Commissioner's evidence is essentially limited to **[CONFIDENTIAL]** of the total revenues generated by the in-flight catering firms operating at YVR, from 2013 to 2017. No evidence specifically addressed **[CONFIDENTIAL]** of in-flight catering revenues at YVR. This, says VAA, is a fatal flaw in the Commissioner's case, as he has not alleged any form of collusion between Gate Gourmet and CLS. The Tribunal agrees that this significantly weakens the Commissioner's case on paragraph 79(1)(*c*). In the circumstances of this case, the evidence does not allow the Tribunal to infer or imply anything with respect to **[CONFIDENTIAL]** in the absence of the Exclusionary Conduct.

[693] With respect to the alleged anti-competitive price effects of VAA's Exclusionary Conduct, the Commissioner relied on: (i) Dr. Niels' economic analyses of the price effects for airlines that did not switch providers, Jazz's gains from switching, and **[CONFIDENTIAL]**; and (ii) evidence provided directly by various airlines (i.e., Jazz, Air Transat, Air Canada and WestJet, and the eight airlines having provided letters of complaint).

- Prices to the non-switchers

[694] The main economic analysis relied upon by the Commissioner is a regression analysis conducted by Dr. Niels for airline customers that did not switch in-flight caterers. This is the only econometric evidence relied upon by the Commissioner.

[695] Dr. Niels used an event study methodology to analyze the effect of the entry of Strategic Aviation and/or Newrest on the average monthly price paid by a given airline customer **[CONFIDENTIAL]**, for a given Galley Handling product, at various airports other than YVR between 2014 and 2016. He compared the prices paid **[CONFIDENTIAL]** for Galley Handling services before and after entry by Strategic Aviation (**[CONFIDENTIAL]**) and Newrest (**[CONFIDENTIAL]**), for airlines that did not switch to the new entrants. Dr. Niels' analysis was essentially a comparison of prices paid **[CONFIDENTIAL]** over the two years prior to entry at the airport concerned with the average prices paid during the two years after entry. It yielded what Dr. Niels considered to be an estimate of the average effect of new entry on the prices paid by the airline customers who remained with **[CONFIDENTIAL]** and did not switch.

[696] This regression analysis **[CONFIDENTIAL]**. Dr. Niels also did not look at Catering prices, even though he recognized that he had the data to do so.

[697] Dr. Niels first found that the entry of new competitors did not have a statistically significant effect on the prices paid **[CONFIDENTIAL]** over the period 2013-2017. However, he found that **[CONFIDENTIAL]** "smaller airlines" customers by **[CONFIDENTIAL]**% if price observations are equally weighted, by **[CONFIDENTIAL]**% if they are revenue weighted and by **[CONFIDENTIAL]**% if they are quantity weighted. These results were statistically significant at the 5% level for unweighted and revenue-weighted results, and at the 1% level for quantity-weighted results. **[CONFIDENTIAL]**% if they are revenue-weighted but this result was statistically insignificant. Dr. Niels concluded that the analysis showed "robust evidence of a reduction **[CONFIDENTIAL]** galley handling prices for the smaller airlines in response to the entry of **[CONFIDENTIAL]**, despite these airlines not actually switching themselves" (Niels Report, at para 1.43).

[698] Dr. Niels indicated during his testimony that he had first performed the regression for all airline customers **[CONFIDENTIAL]** that did not switch, **[CONFIDENTIAL]**. He explained that he found no price effect for this "all airlines" sample and then proceeded to re-do the analysis, using a narrower sample for the "smaller airlines."

[699] Dr. Reitman criticized Dr. Niels' regression analysis at three levels.

[700] First, he stated that Dr. Niels' regression was based on a shorter time period than that for which Dr. Niels had the relevant data. Dr. Niels used data for a window of two years preceding and following entry, but had such data for periods of three years before and after entry.

[701] Second, Dr. Reitman criticized Dr. Niels' failure to distinguish between markets where **[CONFIDENTIAL]** a monopoly and markets where **[CONFIDENTIAL]** competition. In other words, Dr. Niels' regression did not differentiate between entry events that reflect the competitive situation at YVR (i.e., two competing in-flight caterers) and those that do not (i.e., monopoly situations). Instead, Dr. Niels' analysis gave the same weight to the impact on **[CONFIDENTIAL]** a monopoly prior to **[CONFIDENTIAL]** entry, as to the impact at other airports which already had pre-existing competition. Of the **[CONFIDENTIAL]** instances in which entry occurred over the period 2014-2016, **[CONFIDENTIAL]** involved the entry of a **[CONFIDENTIAL]**. These all related to airports where **[CONFIDENTIAL]** entered. A number

of other instances (e.g., **[CONFIDENTIAL]**) involved situations where a caterer entered into an airport where two or more incumbents were already present.

[702] Third, Dr. Niels did not define his entry event windows in a manner that ensured that the price changes at airports experiencing entry are compared with the price changes at airports at which no entry occurred. According to Dr. Reitman, Dr. Niels "does not perform a properly designed study that tests the impact of entry in markets where entry occurred against a control group where entry did not occur. […] Instead, he conflates entry effects in multiple markets and periods without a valid control sample" (Reitman Report, at para 196).

[703] Dr. Reitman adapted the regression model used by Dr. Niels to estimate the respective price effects of entry into previously monopolized markets and entry into markets with pre-existing competition. Dr. Reitman compared the pre- and post-entry differences in Galley Handling prices between airports in which entry occurred and a control group of airports in which no entry occurred for three different entry events. In this manner, Dr. Reitman estimated the respective price impacts of **[CONFIDENTIAL]** entry into monopoly airports **[CONFIDENTIAL]**, and **[CONFIDENTIAL]** into airports where there was pre-existing competition. Dr. Reitman did this for an "all airlines" sample and for a "small airlines" sample.

[704] For the all airlines sample, the results for entry that occurred at airports where there were already at least two incumbent caterers provided no statistically significant evidence that prices fell following entry. Dr. Reitman concluded that "there is no evidence that entry at airports that already had at least two providers had any substantial downward effect on pricing" (Reitman Report, at para 210). Dr. Reitman also found that **[CONFIDENTIAL]** with revenue-weights and **[CONFIDENTIAL]** with equal weights, although these estimates were statistically significant only at the **[CONFIDENTIAL]** level.

[705] With his sample confined to "small airlines" customers, Dr. Reitman found that, in the case of entry into a monopoly situation, **[CONFIDENTIAL]** was not statistically significant, except in the case of quantity-weighted prices where there was a statistically significant **[CONFIDENTIAL]**. By comparison, Dr. Reitman found a revenue-weighted **[CONFIDENTIAL]** and an equally-weighted **[CONFIDENTIAL]**, neither of which is statistically significant, **[CONFIDENTIAL]**. Notwithstanding **[CONFIDENTIAL]** of two of his estimates of the **[CONFIDENTIAL]** and **[CONFIDENTIAL]** quantity-weighted estimate, Dr. Reitman averaged the three and stated that**[CONFIDENTIAL]** (Reitman Report, at para 211).

[706] In one case of entry **[CONFIDENTIAL]**, Dr. Reitman found that **[CONFIDENTIAL]**.

[707] The Tribunal is persuaded that Dr. Reitman's critique of Dr. Niels' analysis seriously undermines the conclusions Dr. Niels derived from that analysis. In brief, in view of Dr. Reitman's critique, the Tribunal is of the view that Dr. Niels' analysis does not provide clear and convincing evidence that, "but for" VAA's Exclusionary Conduct, prices for Galley Handling services would likely have been lower at YVR. The Tribunal considers that, for the following reasons, it cannot give much weight to Dr. Niels' regression analysis in assessing the likely adverse price effects of VAA's Exclusionary Conduct.

[708] First, regarding the time frame used for his regression analysis, Dr. Niels was unable to provide, further to questions from the panel, a justification for his curtailment of the study window to a period of two years before and after entry. Dr. Niels conceded that his estimate of the price reduction following new entry becomes statistically insignificant if a longer six-year window (i.e., three years before entry and three after) is chosen.

[709] Second, regarding the statistical results, Dr. Reitman persuasively testified that revenue-weighted figures ranked higher than equally-weighted or quantity-weighted figures when it comes to estimating what happened to prices paid by airlines for in-flight catering. Dr. Reitman also mentioned that both he and Dr. Niels prefer revenue weights to quantity weights (Reitman Report, at para 212). The Tribunal agrees and considers that the revenue-weighted figures of the various regression analyses are the most relevant for its analysis. Dr. Niels' "blended estimate" of the price effects **[CONFIDENTIAL]** but when revenue weights are considered, **[CONFIDENTIAL]**. For his part, when revenue-weighted figures are considered, Dr. Reitman finds **[CONFIDENTIAL]**.

[710] Third, and most importantly, the Tribunal considers that the results relating to entry into markets where there were competing incumbents (as opposed to monopoly situations) are the relevant ones for its analysis, as they better reflect the situation that prevails at YVR. The Tribunal agrees with VAA that observed price effects of entry into previously monopolized markets is not particularly relevant for an assessment of price effects at YVR, which had two competing incumbents in the 2014-2016 timeframe. Likewise, the Tribunal agrees that any effects **[CONFIDENTIAL]** cannot be extrapolated to YVR. Generally speaking, one would expect that the price effect of introducing competition into a monopoly situation may well be different from the price effect of adding a third competitor to a duopoly situation. Indeed, Dr. Reitman's analysis suggests that this is in fact the case. Dr. Niels accepted that, as a matter of theory, the price-reducing effect of entry should decline as the number of incumbent competitors in the market concerned increases. However, he maintained that this decline is "a matter of degree" (Transcript, Conf. B, October 15, 2018, at pp 491-492). Dr. Niels further conceded, upon questioning from the panel, that he could have measured the effects separately for airports that went from one to two providers from those that went from two to three providers, but did not.

[711] Given that dnata has now entered the Galley Handling Market at YVR, it is even more difficult to see how the impact of entry into a monopoly situation can be extrapolated to the Relevant Market at YVR. The effect of the entry of a third competitor (prior to dnata's recent entry) is what is relevant to the case at hand. Moreover, the Tribunal must concern itself with the effect of entry on the prices paid by all airlines, or at least by those accounting for a substantial part of the relevant market, rather than a small and arbitrary subset of them. Only two revenue-weighted parameter estimates qualify to meet those two requirements. The first is Dr. Reitman's parameter for **[CONFIDENTIAL]**. The second is Dr. Reitman's parameter for **[CONFIDENTIAL]**.

[712] The Tribunal notes that on this issue, Dr. Niels responded that there were other factors in addition to the number of competitors that affected the intensity of competition. He cited evidence to the effect that **[CONFIDENTIAL]**. The Tribunal does not accept such statement because the evidence on the record does not establish, on a balance of probabilities, that **[CONFIDENTIAL]**.

[713] For all the above reasons, the Tribunal accepts Dr. Reitman's finding that the effect of the entry of a third competitor on the Galley Handling prices paid by all airlines is not statistically significant. For greater certainty, Dr. Niels's econometric analysis of the prices to non-switchers therefore does not constitute clear and reliable evidence supporting a conclusion that, "but for" VAA's Exclusionary Conduct, the prices of Galley Handling services at YVR would likely have been or would likely be lower, let alone "materially" lower.

- Jazz's gains from switching

[714] The Commissioner also relies on another economic analysis conducted by Dr. Niels, with respect to Jazz's gains from switching subsequent to its 2014 RFP ("**Jazz Analysis**"). This analysis **[CONFIDENTIAL]** Jazz's own estimated gains from switching done by Ms. Bishop, which is discussed later in this section.

[715] Dr. Niels used in-flight caterer data to determine Jazz's savings from switching in-flight caterers in 2015 (from Gate Gourmet to Strategic Aviation and Newrest at eight different airports other than YVR). Dr. Niels' analysis identified specific cost benefits enjoyed by Jazz when entry was not excluded. Dr. Niels found that Jazz saved approximately **[CONFIDENTIAL]** the year following the switch, **[CONFIDENTIAL]** resulted from savings in Galley Handling. Dr. Niels' conclusion was that the savings earned by Jazz resulted from the competition that was introduced by the new entrants.

[716] The Commissioner maintains that the lower prices Jazz paid after switching reflect a change in the competitive position of entrant in-flight caterers and the benefits of competition. The Commissioner submits that **[CONFIDENTIAL]** represent substantial savings with respect to the market for in-flight catering in 2015 at those airports.

[717] VAA responded that the Jazz Analysis is limited to Gate Gourmet, and therefore completely ignores CLS.

[718] Dr. Reitman added that Dr. Niels overstated the savings realized by Jazz. Dr. Reitman submitted that Dr. Niels ignored the savings that Jazz would have realized had it renewed its contract with Gate Gourmet. According to Dr. Reitman, Gate Gourmet initially offered Jazz **[CONFIDENTIAL]** on its new contract, which represented a saving of **[CONFIDENTIAL]**, and **[CONFIDENTIAL]**. Therefore, had Jazz stayed with Gate Gourmet, it would have **[CONFIDENTIAL]**. Dr. Niels responded that **[CONFIDENTIAL]**.

[719] Dr. Reitman also maintained that in any event, the savings realized at other airports do not apply to YVR as prices at YVR may not have been **[CONFIDENTIAL]** as they were at other airports (Reitman Report, at paras 188-190). Stated differently, the other airports where the savings were achieved may not be entirely comparable to YVR. Dr. Reitman testified that the **[CONFIDENTIAL]**. By contrast, he noted that the evidence from Jazz **[CONFIDENTIAL]**. He therefore concluded that the savings in those **[CONFIDENTIAL]** do not reflect the market conditions at YVR.

[720] Furthermore, VAA submitted that the Jazz Analysis is not confined to Galley Handling prices, and so does not control for the possibility that any savings in Galley Handling costs were

partially or entirely offset through higher costs for catering. Therefore, VAA says that these results are not reliable as evidence of lower overall costs from switching. The Tribunal observes that Dr. Niels also performed a similar analysis for Galley Handling prices alone, and cautioned that the "galley handling only result should be interpreted with care" (Niels Report, at para 4.55).

[721] VAA further stated that the Jazz Analysis employed the incorrect "but for" scenario and is therefore not indicative of the actual savings relative to choosing Gate Gourmet. It measured the difference in costs incurred by Jazz at eight stations by comparing what Gate Gourmet had charged Jazz in 2014 to what Jazz paid to Strategic Aviation or Newrest in 2015. However, the contract renewal terms offered by Gate Gourmet for 2015 **[CONFIDENTIAL]**. The relevant "but for" would have compared what Jazz would have paid to Gate Gourmet the next year, if it had not switched, to what Jazz instead paid to the other caterers.

[722] VAA added that the evidence showed that **[CONFIDENTIAL]**.

[723] Further to its assessment of the evidence, the Tribunal agrees with the Commissioner and accepts Dr. Niels' evidence on the **[CONFIDENTIAL]** savings identified in this Jazz Analysis. The fact that Jazz **[CONFIDENTIAL]**. Furthermore, while it is true that the savings are not all confined to Galley Handling, Dr. Niels acknowledged that **[CONFIDENTIAL]** related to Galley Handling. In addition, regarding his statement that **[CONFIDENTIAL]**.

[724] For all the above reasons, the Tribunal concludes that Dr. Niels' Jazz Analysis on the savings obtained by Jazz at airports other than YVR constitutes reliable evidence supporting a conclusion that, "but for" the Exclusionary Conduct, the prices of Jazz's Galley Handling services would likely have been or would likely be somewhat lower. However, that alone is not sufficient to discharge the Commissioner's burden under paragraph 79(1)(*c*), particularly considering that **[CONFIDENTIAL]**.

- **[CONFIDENTIAL]**

[725] A third piece of economic evidence prepared by Dr. Niels and relied upon by the Commissioner at the hearing is evidence relating to the renegotiation of a contract between **[CONFIDENTIAL]** in 2014.

[726] **[CONFIDENTIAL]**.

[727] In his Reply Report, Dr. Niels analyzed **[CONFIDENTIAL]**.

[728] Dr. Reitman provided two critiques of Dr. Niels' analysis: (i) **[CONFIDENTIAL]**; and (ii) with no change in the number of competitors at YVR, the price increase could not have resulted from an increase in market power.

[729] The Tribunal accepts the Commissioner's submission that even though **[CONFIDENTIAL]**.

[730] However, the Tribunal remains unpersuaded that **[CONFIDENTIAL]** resulted from the exercise of market power that **[CONFIDENTIAL]** would not likely have been able to exercise,

"but for" VAA's Exclusionary Conduct. **[CONFIDENTIAL]** was competing against **[CONFIDENTIAL]** both before and after the change, and the Commissioner has not demonstrated that the presence of Newrest, Strategic Aviation and/or Optimum likely would have prevented **[CONFIDENTIAL]** from being able to impose the price increase in question. Moreover, insofar as **[CONFIDENTIAL]** is concerned, the Tribunal reiterates that Dr. Niels' claim that **[CONFIDENTIAL]** was shown to be unsupported by the available evidence, including the **[CONFIDENTIAL]** at YVR. It was also contradicted by the **[CONFIDENTIAL]** at YVR.

[731] The Tribunal therefore concludes that the Commissioner has not demonstrated with clear and convincing evidence that, "but for" VAA's Exclusionary Conduct, **[CONFIDENTIAL]** for Galley Handling services at YVR likely would have been or would likely be lower, let alone "materially" lower.

- Jazz

[732] In support of its argument regarding the anti-competitive price effects of VAA's conduct, the Commissioner also relied on evidence provided directly by certain airlines. One of these airlines was Jazz, which provided evidence in relation to the RFP it launched in 2014. In that 2014 RFP, **[CONFIDENTIAL]**.

[733] Ms. Bishop from Jazz testified that further to the RFP, Jazz switched from Gate Gourmet to Newrest at YYZ, YUL and YYC, and from Gate Gourmet to Strategic Aviation at five other airports. In her witness statement and in her examination in chief, Ms. Bishop provided evidence regarding the increased expenses that Jazz allegedly incurred as a result of being constrained to contract with Gate Gourmet, as opposed to **[CONFIDENTIAL]**, at YVR. She also provided evidence regarding savings allegedly realized by Jazz as a result of contracting with Newrest and Sky Café at the eight other airports across the country. She testified that the switching at those eight airports generated savings of $2.9 million (or 16%) for Jazz, in 2015 alone. As it was unable to switch at YVR, Jazz had to accept a bid from Gate Gourmet that was approximately **[CONFIDENTIAL]** greater than what Jazz would have paid at that airport had its preferred provider, **[CONFIDENTIAL]**, been allowed airside access at YVR. Accounting for material changes to Jazz's fleet since 2015, Jazz estimated that it was forced to pay approximately **[CONFIDENTIAL]** over a period of 2 years and three months, or **[CONFIDENTIAL]**, for in-flight catering at YVR than it would have had to pay had it been able to use its preferred provider.

[734] All of the evidence given by Ms. Bishop in that regard was based on Exhibits 10 and 13 to her witness statement.

[735] Ms. Bishop further testified that, when it became aware that Jazz intended to switch to other in-flight caterers at other airports in Canada, Gate Gourmet submitted a bid for YVR that ultimately reflected an **[CONFIDENTIAL]** increase over its 2014 prices to Jazz at YVR. Despite this increase and **[CONFIDENTIAL]**, Ms. Bishop stated that Jazz had no choice but to award the **[CONFIDENTIAL]** contract to Gate Gourmet.

[736] However, on cross-examination, Ms. Bishop testified that she had no role in performing the calculations that underlay the figures set out in Exhibits 10 and 13. Nor did she have any detailed understanding as to how the figures were calculated. Ms. Bishop was unable to reconcile inconsistencies between the figures in Exhibit 10 and those appearing in an email sent by her colleague, Mr. Umlah. Similarly, Ms. Bishop was unable to reconcile inconsistencies between the figures in Exhibit 10 and those derived following an attempt to recreate the figures in Exhibit 10, using the explanation provided by Jazz's counsel and adopted by Ms. Bishop. Ms. Bishop was invited by counsel for VAA to reconcile several other inconsistencies and, on each occasion, she stated that she could not do so. The Tribunal observes that there were significant discrepancies in the figures resulting from those calculations, compared to what was reported in Exhibit 10. Ms. Bishop was similarly unable to offer complete information as to how the figures in Exhibit 13 were calculated.

[737] Further to the cross-examination of Ms. Bishop, and having listened to how Ms. Bishop gave her evidence and responded to cross-examination at the hearing, and having observed her demeanour, the Tribunal is not satisfied that either the numbers used in her statement or her testimony regarding those numbers can be considered as reliable. While Ms. Bishop could explain how some arithmetic calculations were made, she could not clarify the apparent discrepancies with other documentation that emanated from Jazz. The Tribunal thus concludes that the evidence in Ms. Bishop's witness statement with respect to Exhibits 10 and 13 and the alleged missed savings or increased expenses at YVR does not constitute reliable, credible and probative evidence, and can only be given little weight. The figures she put forward cannot be verified, and are contradicted by the evidence.

[738] For all of the foregoing reasons, the evidence regarding Jazz's 2014 RFP does not assist the Commissioner to demonstrate anti-competitive price effects linked to VAA's Exclusionary Conduct.

- Air Transat

[739] The Commissioner referred to similar evidence from Air Transat, in relation to a 2015 RFP for in-flight catering at a total of 11 airports serviced by Air Transat. As part of the RFP, Air Transat received proposals from **[CONFIDENTIAL]**.

[740] Similarly to Ms. Bishop, Air Transat's witness, Ms. Stewart, testified as to the alleged increased expenses that Air Transat expected to incur at YVR as a result of contracting with Gate Gourmet, as opposed to Optimum. She also testified regarding the alleged savings by Air Transat as a result of contracting with Optimum, as opposed to Gate Gourmet, at other airports across the country.

[741] Ms. Stewart stated that the actual prices of Optimum represented cost savings of approximately **[CONFIDENTIAL]**, or **[CONFIDENTIAL]**, over **[CONFIDENTIAL]** years for stations across the country, compared to the actual costs being paid by Air Transat to **[CONFIDENTIAL]**. Ms. Stewart further stated that at YVR, the fact that it contracted with Gate Gourmet at only that airport caused Air Transat to pay approximately **[CONFIDENTIAL]**

% more at YVR than it expected to pay Optimum, its preferred in-flight caterer for service at YVR.

[742] Furthermore, Ms. Stewart indicated that **[CONFIDENTIAL]**. Nevertheless, **[CONFIDENTIAL]** were not quantified by Ms. Stewart in her witness statement.

[743] With respect to the alleged increased expenses at YVR, Ms. Stewart affirmed in her witness statement that "Air Transat determined that Optimum's bid for YVR was superior to that of Gate Gourmet from both a price and service perspective" (Stewart Statement, at para 33). However, on cross-examination, Ms. Stewart agreed that **[CONFIDENTIAL]**.

[744] On cross-examination, Ms. Stewart also acknowledged an important error in her witness statement, relating to her affirmation that as a result of contracting with Gate Gourmet at YVR, Air Transat paid "approximately **[CONFIDENTIAL]** than what it would have paid to Optimum for service at YVR" (Stewart Statement, at para 35). Ms. Stewart clarified that Air Transat paid approximately **[CONFIDENTIAL]**, not **[CONFIDENTIAL]** than what it would have paid to Optimum.

[745] The Tribunal agrees with VAA that, even as corrected, Ms. Stewart's statement is not particularly persuasive evidence of likely increased prices relating to Galley Handling at YVR. First, Ms. Stewart's claim of a **[CONFIDENTIAL]**% increase in costs paid to Gate Gourmet encompasses both food and Galley Handling together. Second, in her testimony, Ms. Stewart acknowledged that she was not able to identify whether the cost savings offered by Optimum were coming from the Galley Handling services or from the Catering services. Third, even if it is assumed that **[CONFIDENTIAL]**'s bid for Galley Handling services **[CONFIDENTIAL]**, that price **[CONFIDENTIAL]** for Galley Handling services **[CONFIDENTIAL]**. Finally, comparing the prices **[CONFIDENTIAL]** would have charged at YVR **[CONFIDENTIAL]** with the prices it charged **[CONFIDENTIAL]** does not provide persuasive evidence of any market power **[CONFIDENTIAL]** at YVR. In both cases, **[CONFIDENTIAL]**.

[746] There were similar problems with respect to Ms. Stewart's evidence relating to Air Transat's alleged savings as a result of contracting with Optimum, as opposed to Gate Gourmet, at airports other than YVR. Ms. Stewart admitted on cross-examination that, when only the prices for Galley Handling services are considered, **[CONFIDENTIAL]**. Air Transat's costing analysis further revealed that **[CONFIDENTIAL]**.

[747] The Tribunal pauses to observe that even Dr. Niels, the Commissioner's expert, acknowledged that **[CONFIDENTIAL]**, it was not possible to accurately determine the amounts of any gains resulting from that airline's switch from Gate Gourmet to Optimum.

[748] In summary, for the reasons set forth above, and having heard Ms. Stewart during her testimony and having observed her demeanour, the Tribunal does not consider that her evidence on Air Transat's alleged increased expenses and expected savings constitutes clear, compelling and reliable evidence in this regard. The Tribunal concludes that this evidence does not merit much weight in terms of the alleged anti-competitive price effects of VAA's Exclusionary Conduct, compared to the "but for" world.

- Testimony from Air Canada and WestJet

[749] The Commissioner also referred to the testimonies of witnesses from Air Canada (Mr. Yiu) and WestJet (Mr. Soni), regarding the price effects of VAA's Exclusionary Conduct. The Commissioner submits that this evidence demonstrates that, "but for" that conduct, those airlines would have likely had, and in the future would have, access to more competitively priced in-flight catering options at YVR.

[750] However, the Tribunal notes that the evidence relied on by the Commissioner consists of general and generic statements contained in the witness statements about the lack of competition and the benefits of increased competition in Galley Handling services, with no specific concerns or examples given by these two major airlines, which accounted for nearly 70% of all flights at YVR in 2016 and 2017. In the same vein, and as further discussed in the next section below, the Air Canada **[CONFIDENTIAL]**, expressing concerns about the refusals to grant licences to Newrest and Strategic Aviation, do not provide any specific examples or concerns with respect to Galley Handling services at YVR, despite the fact that Air Canada is, by far, the major airline operating at YVR, and **[CONFIDENTIAL]** across Canada and **[CONFIDENTIAL]** at YVR.

[751] The Tribunal considers that this generic evidence from Air Canada and WestJet does not provide clear, convincing and non-speculative evidence, with a sufficient degree of particularity, with respect to adverse price effects of VAA's Exclusionary Conduct.

[752] The Tribunal appreciates that airlines would prefer more, rather than less, in-flight catering options. But, to constitute evidence that is sufficiently clear and convincing to meet the standard of balance of probabilities, and to support a finding of a likely prevention or lessening of competition in the Galley Handling Market attributable to VAA's Exclusionary Conduct, the evidence from these two major airlines would have needed to be more precise and particularized.

- Airlines' letters

[753] During the hearing, the Commissioner put much emphasis on letters from eight airlines that expressed their support for more competition in Galley Handling services at YVR. These consist of four letters sent in April 2014 by each of Air Canada, Jazz, Air France / KLM and British Airways, and five letters sent in November and December 2016 by **[CONFIDENTIAL]**, Korean Air, Delta Airlines and Air France.

[754] For the following reasons, the Tribunal does not find these letters from the airlines to be particularly convincing and considers that it can only give them limited weight in terms of evidence of likely anti-competitive effects in the Galley Handling Market due to VAA's Exclusionary Conduct.

[755] With respect to the first four letters written in April 2014, the Tribunal notes that they were sent by the airlines at the request of Newrest, in the context of Newrest's application to be granted a licence for in-flight catering services at YVR. Only two of those letters (i.e., those from Air Canada and Jazz) were addressed to VAA. (The other two were addressed to Newrest.) The letters were short, expressed the airlines' support for Newrest's (and Strategic Aviation's)

requests for catering licences at YVR, and stated that competition was not optimized at YVR, where there were only two major in-flight caterers. Apart from their general support for new entry, none of the letters mentioned particular concerns with respect to the Galley Handling services at YVR.

[756] In their witness statements and in their testimonies before the Tribunal, Mr. Richmond and Mr. Gugliotta underlined that the letters were limited to a few sentences expressing each airline's general support for Newrest's request. They noted that none contained particular information or complaints specific to in-flight catering at YVR that VAA had not considered. Likewise, the letters did not provide any reasons to reconsider VAA's decision.

[757] During the month of May 2014, Mr. Richmond wrote response letters to the President and CEO of Air Canada and to Jazz (the only two airlines which had written directly to VAA), providing VAA's explanation for its decision not to authorize a third in-flight caterer to access the airside at YVR. With one exception, there is no evidence that, following Mr. Richmond's response and explanation for VAA's decision not to grant a licence to Newrest and Strategic Aviation, Air Canada or Jazz replied to VAA regarding the situation of in-flight catering at YVR. The Tribunal notes that, in her witness statement prepared for this Application, Ms. Bishop stated that Jazz disagreed with VAA's assessment of the in-flight catering marketplace at YVR, as expressed by Mr. Richmond at the time. However, the evidence from 2014-2015 does not show that those two airlines voiced particular concerns to VAA further to the May 2014 response. The exception is a telephone conversation with Jazz's CEO mentioned by Mr. Richmond in his witness statement, about which Mr. Richmond had no clear recollection and which did not change VAA's views.

[758] There is also no evidence on the record of specific concerns or complaints expressed to VAA by Air France / KLM or British Airways (i.e., the two airlines that wrote the other 2014 letters) regarding the Galley Handling services at YVR.

[759] As to the five letters from late November and early December 2016, the Tribunal observes that they were sent in the context of the Commissioner's Application, shortly after the Commissioner had filed the Application in late September 2016. The Tribunal further notes that the letters are all fairly succinct, they again contain only general statements about the benefits of competitive markets, and they do not refer to any particular issues or problems regarding in-flight catering services at YVR. In addition, they are very similarly worded (with some sentences being virtually identical), even though they come from airlines spread all across the globe (i.e., **[CONFIDENTIAL]**, Air France, Delta Airlines and Korean Airlines).

[760] Each letter starts with a paragraph stating that the letter is sent in the context of the Application made by the Commissioner. It then indicates that competition is always "most welcome" at airports where the airline operates and that competition is insufficient or not optimized at YVR, as there are only two in-flight catering firms. Finally, it affirms the airline's support for Newrest's request for a catering licence at YVR. Turning more specifically to **[CONFIDENTIAL]** save for an added introductory reference to the Commissioner's Application.

[761] These general letters (and the evidence provided by witnesses who appeared on behalf of these airlines, namely, Air Canada and Jazz) have to be balanced against the evidence from Mr. Richmond and Mr. Gugliotta which demonstrates that VAA had regular and continuous interactions with all airlines operating at YVR and that, during these interactions in the relevant time frame, airline executives with whom Mr. Richmond and Mr. Gugliotta dealt did not raise concerns with VAA relating to in-flight catering services or competition at YVR (except for the telephone conversation with Jazz mentioned above). More specifically, there is no evidence to indicate that, **[CONFIDENTIAL]** voiced any concerns with VAA about the price or quality of Galley Handling services at YVR.

[762] Mr. Richmond further noted that in his experience, when airlines have a serious problem about airport operations, they do not hesitate to raise it immediately with airport management. Mr. Richmond also testified that in April 2014, no airlines had raised operational or financial concerns about catering, and that "no airline either before or since has called [him] about catering at the airport" (Transcript, Conf. B, October 30, 2018, at p 818). Mr. Gugliotta added that there is a formal mechanism at YVR, the Airline Consultative Committee, where VAA and the airlines meet on a frequent basis. However, no airlines have raised any issues there, or in the other regular interactions between VAA and the airlines, with respect to the service quality or the pricing of in-flight catering services.

[763] Mr. Gugliotta also referred to the regular meetings that VAA has with the senior management of Air Canada and WestJet, the two biggest airlines operating at YVR. He stated that "this flight kitchen issue in terms of either service or pricing was never raised" by either of these airlines during those regular meetings (Transcript, Conf. B, November 1, 2018, at p 1036). This specific evidence provided by VAA was not contradicted by the witnesses who appeared on behalf of Air Canada and WestJet, namely, Mr. Yiu and Mr. Soni, respectively.

[764] The Tribunal found the testimony of Mr. Richmond and Mr. Gugliotta on this point to be credible and reliable. The Tribunal attributes more weight to their specific evidence regarding their interactions with airline customers than to the general statements made by the eight airlines in the 2014 and 2016 letters sent at the request of Newrest or in the context of these proceedings, which simply expressed a general preference for more competition in catering services at YVR.

[765] To support a finding of likely adverse price or non-price effects, relative to the required "but for" scenario, the Commissioner must adduce sufficient clear, convincing and cogent evidence to satisfy the balance of probabilities test. Letters and documents from customers affected by the impugned conduct can of course be highly relevant and probative in that context. However, where sophisticated customers are involved, it is not unreasonable to expect the letters in question to provide a minimum level of detail regarding the actual or anticipated effects of the impugned conduct on their respective business or on the market in general. The Tribunal finds that the particular letters discussed above do not materially assist in meeting that test. When the Commissioner relies on letters from sophisticated industry participants such as the airlines in this case, the Tribunal needs more than boiler-plate statements supporting increased competition.

[766] In the circumstances, the Tribunal is of the view that the letters produced by the Commissioner from the airlines do not amount to clear and convincing evidence supporting a

conclusion that, "but for" VAA's Exclusionary Conduct, the prices of Galley Handling services at YVR would likely have been or would likely be lower.

[767] The Tribunal pauses to observe that VAA argued that the countervailing power of airlines has to be taken into account as a constraining factor on any exercise of market power by the in-flight catering firms. However, in the absence of specific evidence to that effect, the Tribunal is not prepared to give much weight to this argument.

- VAA's Pricing Analyses

[768] The Tribunal makes one additional comment regarding the pricing analyses submitted by VAA. In response to Dr. Niels' switching analysis, Dr. Reitman conducted regression analyses to compare Galley Handling prices at YVR with prices for those services at other Canadian airports.

[769] Dr. Reitman tendered two econometric models of his own (using data from Gate Gourmet prepared by Dr. Niels). In them, he compared the prices paid for all in-flight catering products by all airlines at YVR with the corresponding prices paid at other Canadian airports. He also compared prices across airports for all in-flight catering and Galley Handling products, as well as for just Galley Handling, for all airline customers from 2013-2017. In addition, he estimated the effect of entry on the difference between the prices charged **[CONFIDENTIAL]** at airports where entry occurred and the prices at airports where no entry occurred.

[770] In his analyses, Dr. Reitman found that the prices charged to airlines at YVR **[CONFIDENTIAL]**, than at the other airports. In other words, he found **[CONFIDENTIAL]** at YVR relative to prices at other airports. Dr. Reitman's conclusion was robust to numerous sensitivity tests including confining the sample to Galley Handling products and smaller airline customers. He reached the same conclusion when he confined his analysis to comparing the period before there was any entry at the airports concerned to the period after all entry had taken place. With respect to all in-flight catering and Galley Handling products, he concluded that "[t]he regression results **[CONFIDENTIAL]** coefficients on the variables for other airports" (Reitman Report, at para 163). With respect to just Galley Handling, he observed that **[CONFIDENTIAL]** (Reitman Report, at para 171). Dr. Reitman also ran different variations of the model to test whether there were price differences between YVR and other airports for in-flight catering products and services in the period before those other airports experienced additional entry by flight caterers **[CONFIDENTIAL]**, as well as in the period after the last entry of **[CONFIDENTIAL]**. Dr. Reitman concluded that **[CONFIDENTIAL]**.

[771] In response to this evidence, the Commissioner submitted that Dr. Reitman's opinion reflects a fundamental misunderstanding of the relevant economic assessment to be made.

[772] Dr. Niels argued that Dr. Reitman did not properly control for inter-airport differences in wages, prices of relevant inputs and taxes. For example, **[CONFIDENTIAL]** used by Dr. Reitman does not reflect inter-city differences in prices. As a result, the effect of VAA's entry restrictions on **[CONFIDENTIAL]** at YVR relative to other airports may be obscured by other influences for which he has not controlled. To control for that, Dr. Niels compared

[CONFIDENTIAL] EBITDA margins across airports instead of its prices across airports. Dr. Niels found that these margins **[CONFIDENTIAL]** at YVR. Dr. Reitman agreed that margins were a better measuring tool than prices. However, he criticized Dr. Niels for using EBITDA margins instead of variable cost margins to assess competition. When variable cost margins are used, Dr. Reitman found that the differences in variable cost margins being earned **[CONFIDENTIAL]** across Canadian airports **[CONFIDENTIAL]**.

[773] More fundamentally, the Commissioner submitted that Dr. Reitman's methodology does not address the anti-competitive effects of VAA's Exclusionary Conduct, because the appropriate "but for" question is not to ask whether prices or margins at YVR are low relative to other airports, but whether they would likely have been lower absent VAA's conduct.

[774] The Tribunal agrees with the Commissioner on this point and finds that Dr. Reitman's pricing analyses are not of much assistance with respect to the assessment of the actual and likely effects of VAA's Exclusionary Conduct that is contemplated by paragraph 79(1)(*c*). Dr. Reitman did not assess price changes in his analysis. He looked at price levels overall, as well as during the before and after periods, and concluded that prices at YVR **[CONFIDENTIAL]** than at other airports, either before or after entry had occurred at them. However, his analysis did not properly hold constant other sources of differences in price levels across airports. Nor does it test to see whether the difference in prices between YVR and the other airports changed between the pre- and post-entry periods. Accordingly, this aspect of his analysis failed to persuasively address the effect of entry on prices. As a result, this evidence merits little, if any, weight.

- Conclusion on price effects

[775] In light of the foregoing, the Tribunal is left with unpersuasive and insufficient evidence regarding the alleged price effects of VAA's Exclusionary Conduct in the Galley Handling Market. The Tribunal therefore concludes that the Commissioner has not demonstrated that VAA's Exclusionary Conduct has had, is having or is likely to have the effect of adversely impacting the prices charged for Galley Handling services in the Relevant Market.

(iv) Innovation and dynamic competition

[776] Turning to the non-price effects of VAA's Exclusionary Conduct, the Commissioner submits that VAA's conduct has stifled innovation or shielded the airlines from innovative forms of competition, by excluding new in-flight catering business models from the Relevant Market and by preventing in-flight caterers from offering innovative hybrid or mixed-model services to the airlines. The Commissioner argues that market participants have confirmed that innovation in in-flight catering is an important dimension of competition, which has created (and is creating) substantial price and non-price benefits to customers through new business models and processes. The Commissioner states that, "but for" VAA's Exclusionary Conduct, airlines would have the option to choose to procure Galley Handling at YVR from firms other than the full-service incumbent in-flight caterers and that as a result, innovation and dynamic competition would be substantially greater at YVR.

[777] Relying on an article from the economist Carl Shapiro (Carl Shapiro, "Competition and innovation: Did Arrow Hit the Bull's Eye?" in Josh Lerner and Scott Stern, eds, *The Rate and Direction of Inventive Activity Revisited*, (Chicago: University of Chicago Press, 2012) at pp 376-377), the Commissioner emphasizes that innovation encompasses a wide range of improvements and efficiencies, not just the development of novel processes and products. He claims that there is overwhelming evidence of improvements in efficiency and business models for existing products and services, and that these are just as important for dynamic competition and innovation as the products and service offerings themselves.

[778] The Commissioner relies on four sources of evidence on this issue, namely, the testimonies of in-flight catering firms Strategic Aviation, Optimum and Newrest, as well as the evidence provided by the representative of Air Transat, Ms. Stewart.

[779] According to the Commissioner, Strategic Aviation has introduced a differentiated and cost-efficient business model, namely, a "one-stop-shop" for both Catering and Galley Handling. Unlike traditional firms, Strategic Aviation provides Galley Handling using its own personnel but partners with specialized third parties to source Catering for those airlines that require it. This model allows airlines to procure the specific mix of Galley Handling and Catering that they require, without being forced to absorb their share of fixed overhead costs for in-flight catering services that they do not want. This new business approach was itself spurred by the emergence of a new airline business model, namely, the low-cost carrier model and its focus on BOB. Mr. Brown from Strategic Aviation testified that there was an opportunity to take advantage of the emerging airline model of providing improved food to passengers. He further stated that these more flexible business models not only allow for airlines to source a particular type of food more easily, they also result in important increases in economic efficiency and lower prices to airlines by, essentially, offering them the possibility to use outside kitchens having excess capacity.

[780] Another example relied on by the Commissioner is Optimum. Optimum does not operate Catering facilities nor does it provide Galley Handling. It subcontracts all these services to independent third-party providers. In essence, it acts as an intermediary to find the best providers for each airline's needs at each airport. Mr. Lineham from Optimum testified that its business model allows airlines to "find the right kitchens that can make food that's appropriate" (Transcript, Public, October 3, 2018, at p 180).

[781] Turning to Newrest, Mr. Stent-Torriani testified that innovation falls into two categories: (i) the "front end customer side" and (ii) the production side. With respect to the "front end customer side," Mr. Stent-Torriani testified that there is "a great deal that can be done with respect to point of sales, i.e., digital, pre order, et cetera" (Transcript, Public, October 4, 2018, at p 239). With respect to the production side, he added that there are also technological improvements that can be pursued in terms of robotics, giving customers a higher level of traceability and quality.

[782] The representative of Air Transat also testified that Air Transat values fresh approaches to doing business spurred by entry and competition. Ms. Stewart testified that **[CONFIDENTIAL]** (Transcript, Conf. B, October 9, 2018, at p 356).

[783] VAA responds that the Galley Handling Market is not a "dynamic market" in the sense of featuring significant technological change or innovation, the two hallmarks of a market in which it states that qualitative effects are of particular relevance. VAA submits that Galley Handling is an activity into which the major inputs are labour, physical facilities such as warehouses, and equipment such as trucks. According to VAA, Strategic Aviation was not proposing to "innovate;" rather, it was proposing to follow a business model of providing only the Galley Handling component of in-flight catering services, while partnering with Optimum or others for the provision of food. During cross-examination, **[CONFIDENTIAL]**.

[784] As it affirmed in *TREB CT*, the Tribunal considers that dynamic competition, including innovation, is the most important dimension of competition (*TREB CT* at para 712). To echo the words of the economist Joseph Schumpeter, competition is, at its core, a dynamic process "wherein firms strive to survive under an evolving set of rules that constantly produce winners and losers" (*TREB CT* at para 618). The Tribunal also does not dispute that innovation can take multiple incarnations and that it encompasses more than the development of new products or novel processes or the introduction of cutting-edge new technology. It can indeed extend to competing firms coming up with different or improved business models.

[785] However, in the present case, the evidence pertaining on innovation falls short of the mark. The Tribunal is not persuaded that the evidence on the record demonstrates that, "but for" the Exclusionary Conduct, there would likely have been, or would likely be, a realistic prospect of material changes in innovation linked to the arrival of new entrants in the Galley Handling Market.

[786] First, apart from one reference made by **[CONFIDENTIAL]**, there is no clear and convincing evidence of qualitative benefits, distinct and separate from a reduction of input costs, that would likely be brought by Strategic Aviation, Optimum or Newrest. The evidence from these three in-flight caterers did not provide persuasive examples of materially more innovative products or approaches to be offered to airlines.

[787] Second, Strategic Aviation's and Optimum's business models of offering Catering and Galley Handling separately are not new. The evidence shows that Gate Gourmet and other full-service in-flight caterers have also evolved in that direction and can and do provide Galley Handling services separately. In other words, the allegedly innovative Galley Handling services that Strategic Aviation is proposing to provide (i.e., to provide only the Galley Handling portion of in-flight catering) are currently being provided by Gate Gourmet at YVR and may well be provided by dnata once it commenced operations.

[788] There is evidence that Gate Gourmet is prepared to offer the Galley Handling subset of its full-line services to airlines that do not wish to take advantage of Gate Gourmet's ability to prepare the food. Notably, since 2017, Gate Gourmet has provided WestJet solely with Galley Handling services at YVR. Similarly, Gate Gourmet provides services to Air Canada that involve loading and unloading pre-packaged frozen food prepared by Air Canada's **[CONFIDENTIAL]** and Optimum. As evidenced by the success of **[CONFIDENTIAL]** and the trend of airlines moving more Catering operations off-airport, these options already exist and the in-flight catering incumbents already offer evolving business models and processes, adaptable to the

needs of airline customers. Incumbent in-flight catering firms are also using their kitchens to supply non-airline customers.

[789] [CONFIDENTIAL].

[790] [CONFIDENTIAL].

[791] The Tribunal recognizes that the business models of Gate Gourmet, CLS and dnata are not identical to those of Strategic Aviation and Optimum, as the latter focus on sourcing from different restaurants with excess capacity. But, as far as Galley Handling services are concerned, the Commissioner has not demonstrated that, "but for" the Exclusionary Conduct, new entrants likely would have brought, or would likely bring, materially new models or particularly significant incremental innovations to the Relevant Market. Put differently, with respect to this non-price dimension of competition, the Tribunal does not find that innovation or the range of services offered in the Galley Handling Market was, is or likely would be significantly lower than it would have been in the absence of VAA's Exclusionary Conduct.

[792] Indeed, Mr. Brown from Strategic Aviation and Ms. Bishop from Jazz confirmed that the Galley Handling services provided by Strategic Aviation were no different from Gate Gourmet or other full-service in-flight catering firms.

[793] The evidence reveals that the only firm that explicitly stated that it would hesitate to provide Galley Handling services on a stand-alone basis to airline customers at YVR was one of the new entrants, namely Newrest. In his testimony, Mr. Stent-Torriani indicated that Newrest might offer catering services without Galley Handling, but that this was not its preference, and that it would "almost certainly" not provide such Galley Handling services separately (Transcript, Public, October 4, 2018, at pp 236-237).

[794] There is also no clear and convincing evidence of lower service quality in the Galley Handling Market at YVR, relative to the "but for" scenario in which VAA did not engage in the Exclusionary Conduct. Apart from one example from the witness from Air Transat in the context of the 2015 RFP (referred to above), no evidence was adduced to demonstrate that there were material service or product quality improvements as a result of airlines switching to the "innovative" catering providers at other airports.

[795] For the above reasons, the Tribunal finds no clear and convincing evidence that VAA's decision not to license Newrest or Strategic Aviation resulted in less innovation or a lower quality of services, than would likely have existed in the absence of the Exclusionary Conduct. Moreover, the evidence demonstrates that dnata intends to provide the full range of in-flight catering services from its flexible, modern kitchen located off-airport, in proximity to YVR in Richmond. Therefore, particularly when one considers dnata's entry as part of the existing factual circumstances, there is no persuasive evidence of reduced choice, service or innovation at YVR as a result of the Exclusionary Conduct. In other words, it has not been established that the levels of such non-price dimensions of competition would not likely have been, and would not likely be ascertainably greater "but for" VAA's Exclusionary Conduct.

[796] The Tribunal underscores that the incumbent in-flight catering firms have developed new types of offerings and other innovations that provide new and valuable offerings to airlines, as

food served on airplanes has moved away from fresh meals and more towards frozen meals and pre-packaged food. This has had an important impact on the Tribunal's assessment of whether innovation would likely be, or would likely have been, materially greater in the absence of VAA's Exclusionary Conduct, and whether the elimination of the Exclusionary Conduct likely would permit innovative in-flight catering firms with new business models to advance the Galley Handling Market substantially further on the innovation ladder. The Tribunal is not persuaded that this is more likely than not to be the case in this Application.

(v) Conclusion

[797] Having regard to all of the foregoing, the Tribunal therefore concludes that, "but for" the Exclusionary Conduct, there may have been some fairly limited and positive price and/or non-price effects on competition in the Galley Handling Market at YVR. In this regard, there likely would have been some new entry into the Galley Handling Market; there likely would have been some additional switching; and Jazz may have paid somewhat lower prices to Gate Gourmet, including at airports other than YVR. However, those effects are far less than what the Commissioner alleged. Moreover, the conclusion stated above does not represent the end of the required analysis.

(b) Magnitude, duration and scope

[798] The Tribunal will now address whether the limited anti-competitive effects identified above, taken together, rise to the level of "substantiality," as required by paragraph 79(1)(*c*) of the Act. The Tribunal finds that this is not the case. In brief, the aggregate impact of the limited anti-competitive effects that have been demonstrated to result from VAA's Exclusionary Conduct does not constitute an actual or likely substantial prevention or lessening of competition in the Relevant Market. In other words, the Tribunal is not satisfied, on a balance of probabilities, that "but for" VAA's Exclusionary Conduct, the prices for Galley Handling services would likely have been, or would likely be, materially lower in the Galley Handling Market, or that there would likely have been, or would likely be, materially greater non-price competition in that market, for example in respect of service levels or innovation.

[799] The Tribunal is not persuaded that the evidence regarding the likelihood of additional entry and regarding the likelihood of additional switching in the Relevant Market is sufficient to enable the Commissioner to discharge his burden under paragraph 79(1)(*c*). Without a link between, on the one hand, such additional entry and switching and, on the other hand, some material impact on the price or non-price dimensions of competition in a material part of the Galley Handling Market (*Tervita FCA* at para 108), the Commissioner's evidence falls short of the mark. In this regard, the Tribunal agrees with VAA that the Commissioner's evidence does not provide clear and compelling evidence that there would likely have been, or would likely be, materially greater price or non-price competition at YVR "but for" VAA's Exclusionary Conduct.

[800] In his closing submissions, the Commissioner made a general statement that the anti-competitive effects attributable to VAA's Exclusionary Conduct rise to the level of substantiality "because VAA has, and continues to, foreclose rivalry in the market for the supply of Galley

Handling at YVR" and because "Gate Gourmet, CLS and, soon, dnata service airlines at YVR without threat of entry" (Commissioner's Closing Argument, at para 112). The Commissioner further referred to the Tribunal's statement in *TREB CT* to the effect that "[i]n the absence of rivalry, competition does not exist and cannot constrain the exercise of market power, unless the threat of potential competition is particularly strong" (*TREB CT* at para 462).

[801] However, the anti-competitive effects attributable to VAA's Exclusionary Conduct cannot necessarily be said to rise to the level of substantiality simply because VAA has foreclosed entry in the market for the supply of Galley Handling services at YVR.

[802] As the SCC stated in *Tervita*, it is not enough that a potential competitor must be likely to enter the market. "[T]his entry must be likely to have a substantial effect on the market. […] [A]ssessing substantiality requires assessing a variety of dimensions of competition including price and output. It also involves assessing the degree and duration of any effect it would have on the market" (*Tervita* at para 78). Accordingly, the Commissioner must demonstrate that entry likely would have decreased the market power of the incumbent firms, or that it would be likely to have this effect in the future. In the absence of such evidence, the impugned conduct cannot be said to prevent competition substantially (*Tervita* at para 64). In this case, the Commissioner has not demonstrated the extent to which either of the two incumbents had market power, and how VAA's Exclusionary Conduct has permitted those market participants to maintain their market power, or is likely to have this effect in the future.

[803] There has to be evidence that the prevention of entry or of increased switching translates into likely and material price or non-price effects in the Relevant Market. This evidence has not been provided in this case. This is a fatal shortcoming in the Commissioner's case.

[804] With respect to Jazz's gains from switching, the fact that there is evidence of savings in the order of **[CONFIDENTIAL]** is of limited use to the Tribunal's analysis under paragraph 79(1)(*c*), because it relates to one airline's savings at airports other than YVR. Moreover, no evidence was provided by the Commissioner with respect to the size of the Galley Handling markets at those other airports, or of Jazz's total expenditures on Galley Handling services at those airports. Therefore, even though the **[CONFIDENTIAL]** figure estimated by Dr. Niels **[CONFIDENTIAL]**, the Tribunal does not have the necessary evidence to determine the relative significance and magnitude of these savings made by Jazz from its switching of in-flight caterers at other airports, and to determine the materiality of these savings. The measure has to be a relative one, compared to the size of the market as a whole and to Jazz's overall expenditures for Galley Handling services at those airports other than YVR. That evidence has not been provided, and the Tribunal cannot therefore determine the relative materiality of this alleged price effect and how much of it ought to be attributed to the Exclusionary Conduct at YVR.

[805] Even if the Tribunal was to consider that some of the other evidence adduced by the Commissioner regarding the price effects of VAA's conduct could be interpreted as having established an actual or likely prevention or lessening of competition in the Relevant Market, the Tribunal would not conclude, on the evidence before it, that the Galley Handling Market would likely have been, or would likely be, substantially more competitive, "but for" VAA's Exclusionary Conduct. For example, the Commissioner's evidence regarding

[CONFIDENTIAL] and the **[CONFIDENTIAL]**% price decrease for non-switching "smaller" airlines do not significantly assist the Commissioner to demonstrate a prevention or lessening of competition that rises to the level of "substantial," either in terms of magnitude or scope.

[806] With respect to **[CONFIDENTIAL]**, this evidence related to one very small airline at YVR and a **[CONFIDENTIAL]**, for a specific product. The only evidence provided by Dr. Niels of an increase to the Galley Handling prices charged to **[CONFIDENTIAL]** was an increase to the price of "**[CONFIDENTIAL]**", which represented **[CONFIDENTIAL]**. And this airline is a **[CONFIDENTIAL]** operating at YVR.

[807] Similarly, regarding the evidence of price decreases at other airports for smaller airlines, the Tribunal considers the revenue-weighted **[CONFIDENTIAL]** found by Dr. Niels to be fairly modest and hardly material, in the context of this particular Relevant Market. Even Dr. Niels qualified this as "evidence of **[CONFIDENTIAL]** of entry for the smaller airlines" (Exhibits A-085, CA-086 and CA-087, Reply Report of Dr. Gunnar Niels, at para 5.89). Furthermore, it relates solely to "smaller airlines" which, in the aggregate, represent approximately **[CONFIDENTIAL]** of the traffic (in terms of flights) at YVR. Even in his "blended" analysis which included entries into monopoly situations, Dr. Niels did not find significant price effects for an "all airlines" sample comprising the **[CONFIDENTIAL]** airline customers of **[CONFIDENTIAL]**. Moreover, no evidence was provided on the proportion that these "smaller airlines" account for in the Galley Handling Market, as opposed to the number of flights at YVR. The above-mentioned "**[CONFIDENTIAL]**" figure does not reflect a share of passengers, nor does it necessarily reflect a share of Galley Handling expenditures at YVR. As mentioned by Dr. Reitman, the appropriate metric for the assessment of an alleged substantial prevention or lessening of competition is the fraction of the Galley Handling expenditures at YVR represented by those airlines, not the fraction of flights at YVR that they represent. As Dr. Niels himself reported, the **[CONFIDENTIAL]** airlines **[CONFIDENTIAL]** that were excluded from his smaller sample represent a significant proportion of **[CONFIDENTIAL]**.

[808] It bears emphasizing that there is no evidence indicating that the percentage of flights accounted for by an airline is a good proxy of the percentage of the Galley Handling services it purchases. Indeed, the evidence instead suggests that airlines having a larger proportion of international flights likely account for a larger share of the Galley Handling services than their actual proportion of flights. This further undermines the significance of Dr. Niels' evidence with respect to "smaller airlines".

[809] The Tribunal pauses to observe that one problem with the Commissioner's argument regarding the alleged substantial prevention or lessening in the Galley Handling Market is that the Commissioner has not provided clear, convincing and reliable evidence regarding the relative significance of the various airlines in the Galley Handling Market.

[810] In addition, as stated above, the Commissioner's evidence regarding the price effects of VAA's Exclusionary Conduct is limited to **[CONFIDENTIAL]** of the total revenues generated by the in-flight catering firms operating at YVR, from 2013 to 2017. No evidence specifically addressed **[CONFIDENTIAL]** of in-flight catering revenues.

[811] In light of all of the foregoing, the Tribunal is not satisfied that the above-mentioned anti-competitive price or non-price effects which could be attributable to VAA's Exclusionary Conduct are, individually or in the aggregate, "substantial" as required by paragraph 79(1)(*c*) of the Act. The evidence does not allow the Tribunal to conclude that VAA's Exclusionary Conduct has adversely affected or is adversely affecting, price or non-price competition in the Relevant Market, to a degree that is material, or that it is likely to do so in the future.

(4) Conclusion

[812] For the reasons set forth above, the Tribunal concludes that the Commissioner has not demonstrated, on a balance of probabilities, that the requirements of paragraph 79(1)(*c*) are met. In brief, the Tribunal is not satisfied that there is clear and convincing evidence demonstrating, on a balance of probabilities, that "but for" VAA's Exclusionary Conduct, prices for Galley Handling services would likely be materially lower in the Relevant Market, that there would likely be a materially broader range of services in the Relevant Market, or that there would likely be materially more innovation in the Relevant Market.

VIII. CONCLUSION

[813] For all the above reasons, the Commissioner's Application is dismissed. In light of this conclusion, no remedial action will be ordered.

IX. COSTS

[814] At the end of the hearing, the Tribunal encouraged the parties to reach an agreement as to the quantum of costs without knowing the outcome of the case. The Tribunal explained that if no agreement could be reached, the parties could make submissions on costs in due course. The Tribunal reaffirms that it is increasingly favouring this approach. This is because asking the parties to agree on the issue of costs before they know the outcome is more likely to result in a reasonable and expeditious resolution of the question of costs. The Tribunal further reiterates that it will typically favor lump sum awards of costs over formal taxation of bills of costs.

[815] By way of letter dated December 14, 2018, counsel for the Commissioner and for VAA notified the Tribunal that they had reached an agreement with respect to counsel fees as well as a partial agreement with respect to disbursements. According to that agreement, if the Tribunal awarded costs payable by VAA to the Commissioner, VAA would pay $101,000 to the Commissioner for counsel fees, whereas the Commissioner would pay $103,000 to VAA, if costs were payable to VAA. However, the parties were unable to reach an agreement on disbursements, except for travel costs and transcript costs, which they both agreed should be $73,314 and $35,258, respectively. The parties were unable to agree on the balance of the disbursements, and notably on their respective expert fees. They each submitted detailed bills of costs.

[816] As VAA is the successful party in this matter, it is entitled to recover at least some of its costs.

[817] Section 8.1 of the CT Act gives jurisdiction to the Tribunal to award costs of proceedings before it in accordance with the provisions governing costs in the *Federal Courts Rules*, SOR/98-106 ("**FC Rules**"). Accordingly, pursuant to FC Rule 400(1), the Tribunal has "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid." A non-exhaustive list of factors that the Tribunal may consider when exercising its discretion is set out in FC Rule 400(3). It is a fundamental principle that an award of costs represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party (*Apotex Inc v Wellcome Foundation Ltd* (1998), 159 FTR 233 (FCTD), 84 CPR (3d) 303, aff'd (2001), 199 FTR 320 (FCA)).

[818] In *Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc*, 2002 FCA 417 ("***Maple Leaf Meats***"), the FCA described the approximation of costs as a matter of judgment rather than an accounting exercise. An award of costs is not an exercise in exact science. It is only "an estimate of the amount the Court considers appropriate" (*Maple Leaf Meats* at para 8). The costs ordered should not be excessive or punitive, but rather reflect a fair relationship to the actual costs of litigation. The question for the Tribunal is therefore to determine what, in the circumstances, are necessary and reasonable legal costs and disbursements (*Nadeau Ferme Avicole Ltée v Groupe Westco Inc*, 2010 Comp Trib 1 at para 49).

[819] With respect to legal costs, there is agreement between the parties on the amount to be paid to the successful party. However, in this case, the success on the issues in dispute has been divided; the Commissioner has prevailed on the product and geographic market definitions, on paragraph 79(1)(*a*) and on the PCI. A fair amount of time was spent by VAA disputing those issues. In the circumstances, the Tribunal is of the view that the legal costs to be paid to VAA should be reduced, by about a third. This is particularly so given that VAA persisted in spending time on market definition, paragraph 79(1)(*a*) and PCI, notwithstanding the Tribunal's encouragement to move along to the issues in respect of which VAA ultimately proved to be the successful party. The Tribunal thus fixes the Tariff B legal costs to be paid to VAA by the Commissioner at $70,000.

[820] Turning to disbursements, in addition to the travel and transcript costs agreed upon, VAA claims expert fees of $1,834,848 for Dr. Reitman and of $379,228 for Dr. Tretheway, as well as electronic discovery and document management fees of $291,290, for a total exceeding $2.6 million. The Commissioner submits that these disbursement amounts are excessive and should be substantially reduced.

[821] The Tribunal is satisfied that both parties have provided, in their respective bills of costs, detailed information and sufficient support to explain the disbursements incurred and the basis of their various claims. The bills of costs were prepared in accordance with Column III of Tariff B of the FC Rules, and evidence has been provided regarding the billing, payment and justifications of the services provided and expenses incurred. With respect to experts, details regarding the tasks performed by each expert (and their teams), as well as the amount of time spent per task, have been provided. The question is not whether the disbursements at issue were incurred but whether they are reasonable, necessary and justified.

[822] The Tribunal notes that the expert fees claimed by VAA are substantially higher than the fees of the Commissioner's sole expert witness, Dr. Niels, which totalled $1,333,209 for his two

reports. Since Dr. Reitman did not have to construct his own data set to perform his analyses and was essentially responding to Dr. Niels' analysis, the Tribunal agrees with the Commissioner that his total fees should be reduced. Expert-related costs are not automatically recoverable in their entirety, and can be adjusted by the Tribunal when they do not appear reasonable. With respect to the expert fees of Dr. Tretheway, the Tribunal is also of the view that they should be reduced as they include expenses incurred prior to the Application and the Tribunal struck a portion of his report (i.e., question 4) on the ground that it was inadmissible expert evidence.

[823] Turning to the disbursements claimed by VAA for electronic discovery and document management, they essentially relate to the fees charged by a third-party provider. The Tribunal agrees with VAA that it would be unfair to expect a party to comply with the requirements of electronic discovery and document management for an electronic hearing, without allowing for a recovery of the fees incurred for that purpose. The use of an effective document management system is essential to the seamless functioning of electronic hearings before the Tribunal, and it has a fundamental impact at each step of the proceedings (whether it is oral discoveries, motions, preparation of witness statements and expert reports, document production, or the hearing itself). Fees incurred in that respect are disbursements which, in principle, should be recoverable by the successful party.

[824] However, there are nonetheless limits to such disbursements. Only the amounts incurred after the filing of the Application can be properly claimed. In this regard, the e-discovery charges incurred by a party to comply with compulsory production orders under section 11 of the Act as part of the Bureau's prior, underlying investigation should not form part of claimed disbursements, even though many documents produced in that context may end up being directly related to subsequent filings before the Tribunal. In *Commissioner of Competition v Canada Pipe*, 2005 Comp Trib 17 ("***Canada Pipe 2005***"), the Tribunal held that it would be against public policy to order costs against the Commissioner for "the expense of complying with an order mandated by the Act and ratified by a Court of competent jurisdiction" (*Canada Pipe 2005* at para 12). Accordingly, the amount of disbursements claimed by VAA for electronic discovery and document management will need to be reduced to exclude such amounts.

[825] As stated above, the Tribunal favors lump sum awards as it simplifies the assessment process. In fact, there is now "a judicial trend to grant costs on a lump sum basis whenever possible" (*Philip Morris Products SA v Marlboro Canada Ltd*, 2015 FCA 9 at para 4). A lump sum award saves time and trouble for the parties by avoiding precise and unnecessarily complicated calculations. Lump sum awards also align with the objective of promoting the "just, most expeditious and least expensive determination" of proceedings, as provided by FC Rule 3, which echoes the direction found in subsection 9(2) of the CT Act to deal with matters as informally and expeditiously as the circumstances and considerations of fairness permit.

[826] In his submissions on costs, the Commissioner argued that the Tribunal should consider FC Rule 400(3)(h) in making its assessment, and the broad public interest in having proceedings litigated before the Tribunal. Relying on *Commissioner of Competition v Visa Canada Corporation*, 2013 Comp Trib 10 ("***Visa Canada***"), where the Tribunal made no award on costs as there was a broad public interest in bringing the case, the Commissioner submits that there was a similarly broad public interest in bringing the present case as it would clarify the interpretation of section 79 of the Act, its defenses, and its application to entities such as VAA.

The Tribunal disagrees. The Tribunal does not find the "public interest" argument in this case to be as "compelling" as it was in *Visa Canada*, where the matter before it was more novel (*Visa Canada* at paras 405, 407). All cases brought forward by the Commissioner have a public interest dimension and contribute to clarify contentious competition law matters, but that does not mean that the Commissioner can escape costs awards in all cases.

[827] In light of the foregoing, and taking into consideration the conditions of reasonableness and necessity, the Tribunal concludes that $1,850,000 would be an acceptable amount for VAA's disbursements, instead of the total exceeding $2.6 million claimed by VAA. However, as with the legal costs, success on the issues in dispute in this case should be taken into account. The Tribunal is of the view that the disbursements to be paid to VAA should also be reduced by about a third. The Tribunal thus fixes the disbursements to be paid to VAA by the Commissioner at $1,250,000.

[828] The Commissioner will therefore be required to pay to VAA a total lump sum amount of $70,000 in respect of Tariff B legal costs, and of $1,250,000 in respect of disbursements.

X. ORDER

[829] The Application brought by the Commissioner is dismissed.

[830] Within 30 days from the date of this Order, the Commissioner shall pay to VAA an amount of $70,000 in respect of legal costs, and of $1,250,000 in respect of disbursements.

[831] These reasons are confidential. In order to enable the Tribunal to issue a public version of this decision, the Tribunal directs the parties to attempt to reach an agreement regarding the redactions to be made to these reasons in order to protect confidential evidence and information. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on October 31, 2019, setting out their agreement and any areas of disagreement concerning the redaction of the confidential version of the decision. If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from these confidential reasons. Such submissions are to be served and filed by the close of the Registry on October 31, 2019.

DATED at Ottawa, this 17th day of October, 2019.

SIGNED on behalf of the Tribunal by the Panel Members.

(s) Denis Gascon J. (Chairperson)
(s) Paul Crampton C.J.
(s) Dr. Donald McFetridge

Schedule "A" – Relevant provisions of the Act

Abuse of Dominant Position	Abus de position dominante
Definition of *anti-competitive act*	**Définition de *agissement anti-concurrentiel***
78 (1) For the purposes of section 79, ***anti-competitive act***, without restricting the generality of the term, includes any of the following acts:	**78 (1)** Pour l'application de l'article 79, ***agissement anti-concurrentiel*** s'entend notamment des agissements suivants :
(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;	**a)** la compression, par un fournisseur intégré verticalement, de la marge bénéficiaire accessible à un client non intégré qui est en concurrence avec ce fournisseur, dans les cas où cette compression a pour but d'empêcher l'entrée ou la participation accrue du client dans un marché ou encore de faire obstacle à cette entrée ou à cette participation accrue;
(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;	**b)** l'acquisition par un fournisseur d'un client qui serait par ailleurs accessible à un concurrent du fournisseur, ou l'acquisition par un client d'un fournisseur qui serait par ailleurs accessible à un concurrent du client, dans le but d'empêcher ce concurrent d'entrer dans un marché, dans le but de faire obstacle à cette entrée ou encore dans le but de l'éliminer d'un marché;
(c) freight equalization on the plant of a competitor for the purpose of impeding or	**c)** la péréquation du fret en utilisant comme base l'établissement d'un

preventing the competitor's entry into, or eliminating the competitor from, a market;

concurrent dans le but d'empêcher son entrée dans un marché ou d'y faire obstacle ou encore de l'éliminer d'un marché;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

d) l'utilisation sélective et temporaire de marques de combat destinées à mettre au pas ou à éliminer un concurrent;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

e) la préemption d'installations ou de ressources rares nécessaires à un concurrent pour l'exploitation d'une entreprise, dans le but de retenir ces installations ou ces ressources hors d'un marché;

(f) buying up of products to prevent the erosion of existing price levels;

f) l'achat de produits dans le but d'empêcher l'érosion des structures de prix existantes;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

g) l'adoption, pour des produits, de normes incompatibles avec les produits fabriqués par une autre personne et destinées à empêcher l'entrée de cette dernière dans un marché ou à l'éliminer d'un marché;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and

h) le fait d'inciter un fournisseur à ne vendre uniquement ou principalement qu'à certains clients, ou à ne pas vendre à un concurrent ou encore le fait d'exiger l'une ou l'autre de ces attitudes de la part de ce fournisseur, afin d'empêcher l'entrée ou la participation accrue d'un concurrent dans un marché;

(i) selling articles at a price

i) le fait de vendre des articles

lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

à un prix inférieur au coût d'acquisition de ces articles dans le but de discipliner ou d'éliminer un concurrent.

(j) and (k) [Repealed, 2009, c. 2, s. 427]

j) et k) [Abrogés, 2009, ch. 2, art. 427]

[…]

[…]

Prohibition where abuse of dominant position

Ordonnance d'interdiction dans les cas d'abus de position dominante

79 (1) Where, on application by the Commissioner, the Tribunal finds that

79 (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

a) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

b) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels;

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

c) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

Additional or alternative order

Ordonnance supplémentaire ou substitutive

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

(2) Dans les cas où à la suite de la demande visée au paragraphe (1) il conclut qu'une pratique d'agissements anti-concurrentiels a eu ou a pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché et qu'une ordonnance rendue aux termes du paragraphe (1) n'aura vraisemblablement pas pour effet de rétablir la concurrence dans ce marché, le Tribunal peut, en sus ou au lieu de rendre l'ordonnance prévue au paragraphe (1), rendre une ordonnance enjoignant à l'une ou l'autre ou à l'ensemble des personnes visées par la demande d'ordonnance de prendre des mesures raisonnables et nécessaires dans le but d'enrayer les effets de la pratique sur le marché en question et, notamment, de se départir d'éléments d'actif ou d'actions.

Limitation

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

Restriction

(3) Lorsque le Tribunal rend une ordonnance en application du paragraphe (2), il le fait aux conditions qui, à son avis, ne porteront atteinte aux droits de la personne visée par cette ordonnance ou à ceux des autres personnes touchées par cette ordonnance que dans la mesure de ce qui est nécessaire à la réalisation de l'objet de l'ordonnance.

Administrative monetary penalty

Sanction administrative pécuniaire

(3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000.

(3.1) S'il rend une ordonnance en vertu des paragraphes (1) ou (2), le Tribunal peut aussi ordonner à la personne visée de payer, selon les modalités qu'il peut préciser, une sanction administrative pécuniaire maximale de 10 000 000 $ et, pour toute ordonnance subséquente rendue en vertu de l'un de ces paragraphes, de 15 000 000 $.

Aggravating or mitigating factors

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account any evidence of the following:

(a) the effect on competition in the relevant market;

(b) the gross revenue from sales affected by the practice;

(c) any actual or anticipated profits affected by the practice;

(d) the financial position of the person against whom the order is made;

(e) the history of compliance with this Act by the person against whom the order is made; and

(f) any other relevant factor.

Facteurs à prendre en compte

(3.2) Pour la détermination du montant de la sanction administrative pécuniaire, il est tenu compte des éléments suivants :

a) l'effet sur la concurrence dans le marché pertinent;

b) le revenu brut provenant des ventes sur lesquelles la pratique a eu une incidence;

c) les bénéfices réels ou prévus sur lesquels la pratique a eu une incidence;

d) la situation financière de la personne visée par l'ordonnance;

e) le comportement antérieur de la personne visée par l'ordonnance en ce qui a trait au respect de la présente loi;

f) tout autre élément pertinent.

Purpose of order

(3.3) The purpose of an order made against a person under

But de la sanction

(3.3) La sanction prévue au paragraphe (3.1) vise à

subsection (3.1) is to promote practices by that person that are in conformity with the purposes of this section and not to punish that person.

encourager la personne visée par l'ordonnance à adopter des pratiques compatibles avec les objectifs du présent article et non pas à la punir.

Superior competitive performance

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

Efficience économique supérieure

(4) Pour l'application du paragraphe (1), lorsque le Tribunal décide de la question de savoir si une pratique a eu, a ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, il doit évaluer si la pratique résulte du rendement concurrentiel supérieur.

Exception

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

Exception

(5) Pour l'application du présent article, un agissement résultant du seul fait de l'exercice de quelque droit ou de la jouissance de quelque intérêt découlant de la *Loi sur les brevets,* de la *Loi sur les dessins industriels,* de la *Loi sur le droit d'auteur,* de la *Loi sur les marques de commerce,* de la *Loi sur les topographies de circuits intégrés* ou de toute autre loi fédérale relative à la propriété intellectuelle ou industrielle ne constitue pas un agissement anti-concurrentiel.

Limitation period

(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice

Prescription

(6) Une demande ne peut pas être présentée en application du présent article à l'égard d'une pratique d'agissements anti-concurrentiels si la

has ceased.

pratique en question a cessé depuis plus de trois ans.

Where proceedings commenced under section 45, 49, 76, 90.1 or 92

Procédures en vertu des articles 45, 49, 76, 90.1 ou 92

(7) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(7) Aucune demande à l'endroit d'une personne ne peut être présentée au titre du présent article si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux qui ont été allégués au soutien :

(a) proceedings have been commenced against that person under section 45 or 49; or

a) d'une procédure engagée à l'endroit de cette personne en vertu des articles 45 ou 49;

(b) an order against that person is sought by the Commissioner under section 76, 90.1 or 92.

b) d'une ordonnance demandée par le commissaire à l'endroit de cette personne en vertu des articles 76, 90.1 ou 92.

Schedule "B" – List of Exhibits

A-001	Witness Statement of Robin Padgett (dnata Catering Services Ltd.)
CA-002	Witness Statement of Robin Padgett (dnata Catering Services Ltd.) (Confidential - Level A)
CA-003	Witness Statement of Robin Padgett (dnata Catering Services Ltd.) (Confidential - Level B)
A-004	Witness Statement of Rhonda Bishop (Jazz Aviation LP)
CA-005	Witness Statement of Rhonda Bishop (Jazz Aviation LP) (Confidential - Level B)
CR-006	Email from **[CONFIDENTIAL]** dated March 31, 2014 (Confidential - Level B)
CR-007	Email from **[CONFIDENTIAL]** dated May 29, 2014 (Confidential - Level A)
A-008	Witness Statement of Geoffrey Lineham (Optimum Stratégies Inc.)
CA-009	Witness Statement of Geoffrey Lineham (Optimum Stratégies Inc.) (Confidential - Level B)
A-010	Witness Statement of Andrew Yiu (Air Canada)
CA-011	Witness Statement of Andrew Yiu (Air Canada) (Confidential - Level B)
R-012	News release dated August 31, 2017 – Air Canada to Launch New International 787 Dreamliner Routes from Vancouver
R-013	Calin's Column dated October 2017 – Our Love for Vancouver
CR-014	**[CONFIDENTIAL]** (Confidential - Level A)
CA-015	**[CONFIDENTIAL]** (Confidential - Level A)
A-016	Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.)
CA-017	Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.) (Confidential - Level A)
CA-018	Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.) (Confidential - Level B)
A-019	Supplemental Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.)

CA-020	Supplementary Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.) (Confidential - Level A)
CA-021	Supplementary Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.) (Confidential - Level B)
CR-022	Email from Jonathan Stent-Torriani dated March 7, 2015 (Confidential - Level B)
CR-023	Email from Trevor Umlah dated July 9, 2014 **[CONFIDENTIAL]** (Confidential - Level B)
A-024	Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.)
CA-025	Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.) (Confidential - Level A)
CA-026	Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.) (Confidential - Level B)
A-027	Supplemental Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.)
CA-028	Supplementary Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.) (Confidential - Level A)
CA-029	Supplementary Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.) (Confidential - Level B)
CR-030	Letter from Sky Café dated September 5, 2014 (Confidential - Level B)
CR-031	Email from **[CONFIDENTIAL]** dated June 27, 2014 (Confidential - Level B)
CR-032	Letter from **[CONFIDENTIAL]** dated July 14, 2016 (Confidential - Level B)
CR-033	Letter from **[CONFIDENTIAL]** dated April 30, 2015 (Confidential - Level B)
CR-034	Letter from **[CONFIDENTIAL]** dated September 29, 2015 (Confidential - Level B)
A-035	Witness Statement of Barbara Stewart (Air Transat A.T. Inc.)
CA-036	Witness Statement of Barbara Stewart (Air Transat A.T. Inc.) (Confidential - Level B)
A-037	Supplemental Witness Statement of Barbara Stewart (Air Transat A.T. Inc.)
CR-038	Final Canadian RFP Catering Cost Analysis dated July 28 2016 (Confidential - Level A)

A-039	Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.)
CA-040	Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.) (Confidential - Level A)
CA-041	Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.) (Confidential - Level B)
A-042	Supplemental Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.)
CA-043	Supplemental Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.) (Confidential - Level A)
CA-044	Supplemental Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.) (Confidential - Level B)
CA-045	**[CONFIDENTIAL]** dated February 22, 2012 (Confidential - Level A)
CA-046	**[CONFIDENTIAL]** dated February 22, 2012 (Confidential - Level B)
A-047	GG Canada document dated February 22, 2012
CA-048	**[CONFIDENTIAL]** dated January 21, 2014 (Confidential - Level A)
CA-049	**[CONFIDENTIAL]** dated January 21, 2014 (Confidential - Level B)
A-050	GG Strategy Review dated January 21, 2014
CA-051	**[CONFIDENTIAL]** dated July 3, 2014 (Confidential - Level A)
CA-052	**[CONFIDENTIAL]** dated July 3, 2014 (Confidential - Level B)
A-053	GG Executive Review dated July 3, 2014
CA-054	Canada In-Flight Catering Market Size & Share (Confidential - Level A)
CA-055	Canada In-Flight Catering Market Size & Share (Confidential - Level B)
A-056	Canada In-Flight Catering Market Size & Share
CA-057	**[CONFIDENTIAL]** (Confidential - Level A)
CA-058	**[CONFIDENTIAL]** (Confidential - Level B)
A-059	**[CONFIDENTIAL]**
CA-060	**[CONFIDENTIAL]** dated November 21, 2013 (Confidential - Level A)
CA-061	**[CONFIDENTIAL]** dated November 21, 2013 (Confidential - Level B)

A-062	GG document dated November 21, 2013
CA-063	**[CONFIDENTIAL]** dated March 24, 2014 (Confidential - Level A)
CA-064	**[CONFIDENTIAL]** dated March 24, 2014 (Confidential - Level B)
A-065	GG document dated March 24, 2014
CA-066	**[CONFIDENTIAL]** (Confidential - Level A)
CA-067	**[CONFIDENTIAL]** (Confidential - Level B)
A-068	**[CONFIDENTIAL]**
CA-069	**[CONFIDENTIAL]** (Confidential - Level A)
CA-070	**[CONFIDENTIAL]** (Confidential - Level B)
A-071	**[CONFIDENTIAL]**
CA-072	**[CONFIDENTIAL]** dated May 2015 (Confidential - Level A)
CA-073	**[CONFIDENTIAL]** dated May 2015 (Confidential - Level B)
A-074	GG document dated May 2015
CR-075	Email from Ken Colangelo dated August 8, 2014 (Confidential - Level B)
A-076	Witness Statement of Maria Wall (CLS Catering Services Ltd.)
A-077	Amended and Supplemental Witness Statement of Steven Mood (WestJet)
CA-078	Amended and Supplemental Witness Statement of Steven Mood (WestJet) (Confidential - Level B)
CR-079	**[CONFIDENTIAL]** dated April 4, 2017 (Confidential - Level B)
A-080	Amended and Supplemental Witness Statement of Simon Soni (WestJet)
CA-081	Amended and Supplemental Witness Statement of Simon Soni (WestJet) (Confidential - Level B)
A-082	Expert Report of Dr. Gunnar Niels
CA-083	Expert Report of Dr. Gunnar Niels (Confidential - Level A)
CA-084	Expert Report of Dr. Gunnar Niels (Confidential - Level B)
A-085	Reply Report of Dr. Gunnar Niels

CA-086	Reply Report of Dr. Gunnar Niels (Confidential - Level A)
CA-087	Reply Report of Dr. Gunnar Niels (Confidential - Level B)
A-088	Expert Datapack – July 2018
A-089	Expert Datapack – August 2018
A-090	Dr. Gunnar Niels – Presentation Deck
CA-091	Dr. Gunnar Niels – Presentation Deck (Confidential – Level A)
CA-092	Dr. Gunnar Niels – Presentation Deck (Confidential – Level B)
R-093	Enforcement Guidelines - The Abuse of Dominance Provisions - Sections 78 and 79 of the *Competition Act*
R-094	Ground rules on airport access: the Arriva v Luton case
CA-095	YUL-1402-2017-FILE 3 (Confidential - Level A)
CA-096	Read-in Brief of the Commissioner Volume I (Confidential - Level B)
CA-097	Read-in Brief of the Commissioner Volume II (Confidential - Level B)
R-098	Supplementary Expert Report of Dr. David Reitman
CR-099	Supplementary Expert Report of Dr. David Reitman (Confidential - Level A)
CR-100	Supplementary Expert Report of Dr. David Reitman (Confidential - Level B)
R-101	Dr. Reitman Slide Deck
CR-102	Dr. Reitman Slide Deck (Confidential - Level A)
CR-103	Dr. Reitman Slide Deck (Confidential - Level B)
CA-104	**[CONFIDENTIAL]** (Confidential - Level B)
CA-105	**[CONFIDENTIAL]** (Confidential - Level B)
A-106	Letter to Young-Don Lim, Korean Air, from Craig Richmond, Vancouver Airport Authority, dated December 7, 2016
A-107	Statistics Canada webpage - CPI
R-108	Witness Statement of Craig Richmond
CR-109	Witness Statement of Craig Richmond (Confidential - Level B)

R-110	Supplementary Witness Statement of Craig Richmond
CR-111	Supplementary Witness Statement of Craig Richmond (Confidential - Level B)
CA-112	Tribunal Document No. 58072 (Confidential - Level B)
A-113	Letter to Craig Richmond, Vancouver Airport Authority, from Young-Don Lim, Korean Air, dated November 25, 2016
CA-114	Ground Handling License (Confidential - Level B)
A-115	Delta Airlines - In-flight Catering Letter 28 Nov 2016 (PDF) - 1/10/2017
A-116	Letter from Françoise Renon, Air France, to Craig Richmond, Vancouver Airport Authority, dated December 5, 2016
A-117	YVR Connects 2015 Sustainability Report
A-118	Vancouver Airport Authority 2014 Annual Report (PDF) - 00/00/2014
A-119	Vancouver Airport Authority 2013 Annual and Sustainability Report
A-120	Vancouver Airport Authority, 2012 Annual and Sustainability Report
A-121	VIAA Lobbyist Registration for Mike Tretheway, Consultant, Version 1 of 2 (2000-05-26 to 2005-06-10)
A-122	VIAA Lobbyist Registration for Mike Tretheway, Consultant, Version 2 of 2 (2005-08-16 to 2006-04-11)
A-123	VAA Lobbyist Registration for Gerry Bruno, Consultant
A-124	VAA Lobbyist Registration for Paul Ouimet, Consultant
A-125	VAA Lobbyist Registration for Sam Barone, Consultant
A-126	VAA Lobbyist Registration for Solomon Wong, Consultant
A-127	VAA Lobbyist Registration for Fred Gaspar, Consultant
A-128	VAA Lobbyist Registration for Robert Andriulaitis, Consultant
A-129	ADM (Aéroports de Montréal) Lobbyist Registration for Mike Tretheway, Consultant
A-130	Greater Toronto Airports Authority Lobbyist Registration for Mike Tretheway, Consultant
A-131	Canadian Airports Council Lobbyist Registration for Mike Tretheway, Consultant

A-132	Affidavit of Dr. Michael W. Tretheway
R-133	Supplementary Expert Report of Dr. Michael W. Tretheway
CR-134	Supplementary Expert Report of Dr. Michael W. Tretheway (Confidential - Level B)
R-135	Hearing Presentation
CR-136	Hearing Presentation (Confidential - Level B)
CA-137	Catering Firms vs Passengers at Canadian and Select U.S. Airports (Confidential - Level B)
CA-138	Reconciliation is that Mplan only counts caterers on-site, 2 are authorized access but off site (Confidential - Level B)
A-139	"Delta Dailyfood and Fleury Michon become Fleury Michon Airline Catering", PAX International article dated April 3, 2018
A-140	Meal Received, Business Class
A-141	Meal Served, Business Class
A-142	Special Meals
A-143	Asian Meals
A-144	Chefs
CA-145	Attachment to email from Michelle Wilson to Geoff Eccott, dated May 9, 2014 at 3:10pm. Subject: Flight Kitchens (Confidential - Level B)
CA-146	Email from Michelle Wilson to Geoff Eccott, dated May 9, 2014 at 3:10pm. Subject: Flight Kitchens. Attachment: Flight Kitchens v2.xlsx (Confidential - Level B)
CA-147	Email from Michelle Wilson to Geoff Eccott, dated May 9, 2014 at 10:33am. Subject: Flight Kitchens. Attachment: Flight Kitchens.xlsx (Confidential - Level B)
CA-148	Affidavit of Documents – Vancouver Airport Authority (March 3, 2017) (Confidential - Level B)
CA-149	Attachment to email from Michelle Wilson to Geoff Eccott, dated May 9, 2014 at 10:33am. Subject: Flight Kitchens (Confidential - Level B)
A-150	Re: Letter to Newrest - 5/9/2014

A-151	IATA Economics Briefing No. 4: Value Chain Profitability
A-152	Profitability and the Air Transportation Value Chain, June 2013
A-153	Gategroup Annual Results 2013 Investors and Analysts Presentation (13 March 2014)
A-154	Gategroup Annual Report 2013 (colour version)
CA-155	Data Definitions (Confidential - Level A)
CA-156	2011 to 2016 Actuals IS (Confidential - Level A)
A-157	LSG Sky Chefs 2013 Annual Review
A-158	Tretheway, M. and Andriulaitis, R., *"Airport Policy in Canada: Limitations of the Not-for-Profit Governance Model"*
A-159	Witness Statement of Tony Gugliotta
CR-160	Witness Statement of Tony Gugliotta (Confidential - Level B)
CA-161	Witness Statement of Tony Gugliotta (version provided to Commissioner of Competition on January 12, 2018) (Confidential - Level B)
CA-162	Vancouver Airport Authority 2015 Operating and Capital Budget (DRAFT), by the Finance and Audit Committee, dated November 6, 2014 (Confidential - Level B)
CA-163	Summary memo 3-05.doc - 4/4/2005 (Confidential - Level B)
CR-164	CX Invoice No. 4771516 (Confidential - Level B)
CR-165	Projection 2016 (Confidential - Level A)
CR-166	Projection 2015 (Confidential - Level A)
CR-167	180323 - 2017 Actuals IS (Confidential - Level A)
CR-168	Income Statement - 2011 to 2014 Actuals (Confidential - Level A)
CR-169	Projection 2014 (Confidential - Level A)
CR-170	Spreadsheet for YVR Airline Catering and Retail in 2017 (Confidential - Level A)
R-171	Witness Statement of Scott Norris
CR-172	Witness Statement of Scott Norris (Confidential - Level B)

R-173	Supplementary Witness Statement of Scott Norris
CR-174	Supplementary Witness Statement of Scott Norris (Confidential - Level B)
CA-175	Vancouver Airport Authority Supplemental Affidavit of Documents, sworn October 13, 2017 (Confidential - Level B)
CA-176	In-flight catering RFP - Tiger team!!!.msg - 8/31/2017 (Confidential - Level B)
CA-177	Chart of Undertakings, Questions Taken Under Advisement and Refusals Provided at the Follow-up Examination for Discovery of Craig Richmond held November 1, 2017 (Responses delivered on December 21, 2017) - Requests 3, 5 and 26 (Confidential - Level B)
R-178	Witness Statement of John Miles
CR-179	Witness Statement of John Miles (Confidential - Level B)
CA-180	Gate Gourmet Canada Inc. Statement of Concession Fees, dated January 8, 2014 (Confidential - Level B)
CA-181	CLS Catering Services Ltd. Airport Concession Fee for the month ended July 31, 2017 (Confidential - Level B)
CA-182	Flight Kitchen Valuation Spreadsheet dated June 16, 2017 (Confidential - Level B)
A-183	Lufthansa Group Annual Report 2016
A-184	Lufthansa Group Annual Report 2013
CA-185	Modified version of Tribunal reference 13228 (Confidential - Level B)
A-186	Updated Read-in Brief of the Commissioner of Competition as of 19 October 2018, Volume I
A-187	Updated Read-in Brief of the Commissioner of Competition as of 19 October 2018, Volume II
CR-188	Brief of Read-Ins from the Examinations for Discover and Answers to Undertakings of Kevin Rushton (Volume 1 of 3) (Confidential - Level A)
CR-189	Brief of Read-Ins from the Examinations for Discovery and Answers to Undertakings of Kevin Rushton (Volume 1 of 3) (Confidential - Level B)
R-190	Brief of Read-Ins from the Examinations for Discovery and Answers to Undertakings of Kevin Rushton (Volume 1 of 3)

CR-191	Brief of Read-Ins from the Examinations for Discovery and Answers to Undertakings of Kevin Rushton (Volume 2 of 3) (Confidential - Level B)
CR-192	Brief of Read-Ins from the Examinations for Discovery and Answers to Undertakings of Kevin Rushton (Volume 3 of 3) (Confidential - Level A)
R-193	Brief of Read-Ins from the Examinations for Discovery and Answers to Undertakings of Kevin Rushton (Volume 2 of 3)
R-194	Brief of Read-Ins from the Examinations for Discovery and Answers to Undertakings of Kevin Rushton (Volume 3 of 3)
CR-195	Brief of Read-Ins from the Examinations for Discovery and Answers to Undertakings of Kevin Rushton (Volume 3 of 3) (Confidential - Level B)

COUNSEL OF RECORD:

For the applicant:

The Commissioner of Competition

Jonathan Hood
Antonio Di Domenico
Katherine Rydel
Ryan Caron

For the respondent:

Vancouver Airport Authority

Calvin S. Goldman, QC
Michael Koch
Richard Annan
Julie Rosenthal
Ryan Cookson
Sarah Stothart

Competition Tribunal | Tribunal de la concurrence

PUBLIC VERSION

Citation: *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2021 Comp Trib 7
File No.: CT-2021-002
Registry Document No.:53

IN THE MATTER OF an application by the Commissioner of Competition under section 104 of the *Competition Act*, RSC 1985, c C-34 for an interim order pending the hearing of an application for permanent relief under section 92 of the *Competition Act* ;

BETWEEN:

Commissioner of Competition
(applicant)

and

SECURE Energy Services Inc.
(respondent)

Date of hearing: August 4, 2021
Before: Chief Justice Paul Crampton
Date of reasons and order: August 16, 2021

REASONS FOR ORDER AND ORDER REGARDING THE COMMISSIONER'S REQUEST FOR AN INTERIM ORDER

I. INTRODUCTION

[1] This application concerns a request by the Commissioner of Competition (the **"Commissioner"**) for interim relief pursuant to section 104 of the *Competition Act*, RSC 1985, c C-34 (the **"Act"**). Given that it is only the second fully contested proceeding concerning a merger under that provision,[1] it raises important issues with respect to each of the three parts of the tripartite test for an injunction that have not previously been addressed in this context.

[2] When this application (the "**Section 104 Application**") was initially filed, the Commissioner sought an interim Order directing the Respondents at that time, SECURE Energy Services Inc. (**"Secure"**) and Tervita Corporation (**"Tervita"**) not to proceed with their proposed merger transaction until the final disposition of a second application, filed contemporaneously by the Commissioner. That second application, made under section 92 of the Act (the **"Section 92 Application"**), sought an Order to permanently prohibit the completion of the transaction, as well as certain ancillary relief. In the alternative, the Commissioner sought an Order requiring Secure not to proceed with the acquisition of such assets as would be required for an effective remedy.

[3] However, for reasons explained below, Secure and Tervita (the **"Merging Parties"**) completed their transaction (the "**Merger**") shortly after 12:00 a.m. MT on July 2, 2021. As a result, the Commissioner verbally amended the relief sought in the Section 104 Application during the hearing of that application. The relief now being sought is an Order requiring certain identified facilities formerly owned by Tervita to be "held separately and operated independently" from Secure: Transcript of the hearing of *Canada (Commissioner of Competition) v Secure Energy Services Inc and Tervita Corporation* dated August 4, 2021, p 25.

[4] For the reasons that follow, this application will be dismissed.

II. THE PARTIES

[5] The Commissioner is appointed under section 7 of the Act and is responsible for the enforcement and administration of the Act.

[6] Secure is a publicly traded company headquartered in Calgary, Alberta and listed on the Toronto Stock Exchange. According to the Commissioner, Secure owns and operates 18 treatment recovery and disposal facilities ("**TRDs**"), 6 industrial landfills, and 15 standalone water disposal wells in the Western Canadian Sedimentary Basin (**"WCSB"**) that provide certain waste services. Secure also offers a wide range of environmental services associated with oil and gas drilling, including the sale of drilling fluids, production chemicals, and water services. Additional services it provides include the demolition, decommissioning, remediation and reclamation of oil and gas wells.

[7] Tervita, which no longer exists, was a publicly traded company based in Calgary, Alberta. Its common shares were listed on the Toronto Stock Exchange. According to the

[1] The first was *The Commissioner of Competition v Parkland Industries Ltd*, 2015 Comp Trib 4 ("**Parkland**").

Commissioner, Tervita owned and operated 44 TRDs, 22 industrial landfills, 3 cavern disposal facilities, and 8 standalone water disposal wells in the WCSB. As with Secure, Tervita offered a range of environmental services including the demolition, decommissioning, remediation, and reclamation of oil and gas wells.

III. THE MERGER

[8] In the Section 104 Application, the Commissioner described the Merger as an Arrangement Agreement, dated March 8, 2021, pursuant to which, among other things:

> "… Secure and Tervita will carry out an all-share transaction. Under the Plan of Arrangement, Secure will acquire all of the issued and outstanding shares of Tervita. Upon completion of the Proposed Transaction, Secure and Tervita shareholders will own approximately 52% and 48%, respectively, of the combined entity."

IV. BACKGROUND

A. Procedural History

[9] On March 12, 2021, the Merging Parties submitted a pre-merger notification filing pursuant to subsection 114(1) of the Act, together with a request for an advance ruling certificate under section 102 of the Act.

[10] On April 9, 2021, the Commissioner issued a Supplementary Information Request (**"SIR"**) to each of the Merging Parties pursuant to subsection 114(2) of the Act.

[11] Further to paragraph 123(1)(b) of the Act, a proposed transaction shall not be completed before the end of 30 days after the day on which information required under subsection 114(2) has been received by the Commissioner.

[12] On May 28, 2021, the Commissioner commenced an inquiry pursuant to section 10 of the Act.

[13] On May 31, 2021, the Merging Parties certified the responses to their respective SIRs, after providing the Bureau with approximately 396,000 documents. Consequently, they would have been in a position to legally close the Merger 30 days later, absent the issuance of an interim order by the Tribunal or an undertaking to postpone that transaction.

[14] On June 25, 2021, counsel confirmed in writing to the Commissioner that, before closing their proposed transaction, the Merging Parties would provide 72 hours notice of their intention to do so.

[15] At 11:15 p.m. on June 28, 2021, such notice was provided. This meant that the Merging Parties were free to close their transaction at 11:15 p.m. on July 1, 2021, absent an order from the Tribunal.

[16] On June 29, 2021, the Commissioner filed the Section 104 Application as well as the Section 92 Application.

[17] Later that day, and after failing to obtain an agreement from the Merging Parties not to close their proposed transaction "before the Tribunal reaches a decision on the section 104 application", the Commissioner requested an "emergency case conference." The purpose of that case conference was to obtain an order to prevent the Merger from closing before the Section 104 Application could be heard and determined.

[18] After hearing the Merging Parties' representations on the afternoon of June 30, 2021, I issued a decision the following evening. In brief, I rejected the "interim interim" relief sought by the Commissioner on the ground that the Tribunal does not have the jurisdiction to issue such relief: *Canada (Commissioner of Competition) v Secure Energy Services Inc and Tervita Corporation*, 2021 Comp Trib 4 ("***Secure Energy 1***").

[19] A few hours later, and minutes before the time at which the parties planned to close the Merger (12:01 a.m. MT on July 2, 2021), the Federal Court of Appeal dismissed an application by the Commissioner for an "interim interim" order preventing the completion of the Merger until an appeal of the decision I issued earlier that evening could be heard: *Canada (Commissioner of Competition) v Secure Energy Services Inc and Tervita Corporation* (July 2, 2021)*, Federal Court of Appeal Docket A-185-21*.

[20] The Merger then effectively closed within minutes, at the previously scheduled time of 12:01 a.m. MT, July 2, 2021. Secure has since started to implement a [redacted] integration plan, "with most integration being completed by [redacted] post-closing."

B. Summary of the Commissioner's Allegations

[21] The Commissioner describes the Merging Parties as having been vigorous competitors in the provision of oil and gas waste services (**"Waste Services"**) in the WCSB. In the Section 92 Application, he alleges that:

> "… the merged entity will have significantly enhanced market power that is unlikely to be constrained. Oil and gas producers will likely pay materially higher prices and experience a deterioration in the quality of service to dispose of waste at a time when the oil and gas industry, an important sector of the Canadian economy, is struggling."

[22] More specifically, the Commissioner alleges that competition is likely to be substantially lessened in a large number of local geographic markets for (i) the supply of waste processing and treatment services by TRDs; (ii) the disposal of solid oil and gas waste into industrial landfills;

and (iii) the disposal of produced water and wastewater into water disposal wells owned by third-party waste service providers.

[23] In this regard, the Commissioner places particular emphasis on two sets of oil and gas customers that he alleges are most affected by the Merger, namely: (1) oil and gas customers whose location is such that the Merger effectively results in a merger to monopoly; and (2) oil and gas customers whose location is such that the Merger will reduce their competitive options from 3 to 2.

[24] The Commissioner identifies approximately 7,700 customers who allegedly fall into the former category and over 30,000 who fall into the latter category.[2]

[25] The Commissioner also asserts that the Merger is likely to lead to higher prices and degraded services for certain additional services, described as "environmental services." He states that this is likely to result from the elimination of competition between Secure and Tervita and their ability to foreclose rivals by bundling Waste Services with environmental services. In addition, he maintains that the Merger is likely to substantially prevent competition in North Eastern British Columbia (**"NEBC"**), where Secure has been planning to open an industrial landfill in Wonowon, British Columbia. The Commissioner states that, but for the Merger, Secure's landfill in Wonowon would have competed with two of Tervita's landfills for Waste Services. As a result of such new competition, customers in NEBC would likely have benefited from decreased prices and increased quality of service.

[26] Now that the Merger has been completed, and Tervita no longer exists as a separate entity, the Commissioner maintains that irreparable harm to the competitive process and to purchasers of the services described above has begun to occur.

C. Summary of Secure's Response

[27] Secure maintains that the Merger will allow it to achieve greater financial stability and scale in order to remain viable and meet increasingly demanding customer needs in the struggling oil and gas industry.

[28] Contrary to the Commissioner's allegations, Secure asserts that it continues to face significant effective competition from remaining third-party waste disposal companies. It adds that the majority of its customers are large, sophisticated oil and gas companies that have significant countervailing buyer power and the ability to self-supply the relevant services. Furthermore, it states that there are no meaningful barriers to expansion in the relevant markets and that the Merger raises no particular foreclosure concerns with respect to environmental services.

---

[2] These figures represent the sum of Secure and Tervita customers identified in Exhibit 25 (merger to monopoly), Exhibit 29 (reduction of three to two competitors for TRD facilities), and Exhibit 30 (reduction from three to two for landfill and water disposal facilities) of Dr. Nathan Miller's Report dated June 29, 2021. These numbers represent the sum of the total number of customers who bring waste to each of the parties' allegedly overlapping facilities. Given that some customers may have multiple oil-well locations, and therefore may bring waste to different facilities of Secure and/or Tervita, they may be counted multiple times in these summed figures.

[29] Secure also maintains that the Merger will generate "run rate" efficiencies of at least [tens of millions of dollars] annually, or [hundreds of millions of dollars] on a discounted basis over 10 years.

V. RELEVANT LEGISLATION

[30] Section 104 of the Act states as follows:

Interim Order	**Ordonnance provisoire**
104 (1) If an application has been made for an order under this Part, other than an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner …, may issue any interim order that it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.	**104 (1)** Lorsqu'une demande d'ordonnance a été faite en application de la présente partie, sauf en ce qui concerne les ordonnances provisoires en vertu des articles 100 ou 103.3, le Tribunal peut, à la demande du commissaire …, rendre toute ordonnance provisoire qu'il considère justifiée conformément aux principes normalement pris en considération par les cours supérieures en matières interlocutoires et d'injonction.
Terms of Interim Order	**Conditions des ordonnances provisoires**
(2) An interim order issued under subsection (1) shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case.	(2) Une ordonnance provisoire rendue aux termes du paragraphe (1) contient les conditions et a effet pour la durée que le Tribunal estime nécessaires et suffisantes pour parer aux circonstances de l'affaire.
Duty of Commissioner	**Obligation du commissaire**
(3) Where an interim order issued under subsection (1) on application by the Commissioner is in effect, the Commissioner shall proceed as expeditiously as possible to complete proceedings under	(3) Si une ordonnance provisoire est rendue en vertu du paragraphe (1) à la suite d'une demande du commissaire et est en vigueur, le commissaire est tenu d'agir dans les meilleurs délais

this Part arising out of the conduct in respect of which the order was issued.	possible pour terminer les procédures qui, sous le régime de la présente partie, découlent du comportement qui fait l'objet de l'ordonnance.

[31] A second type of interim order that may be issued in respect of a proposed transaction is provided for in section 100 of the Act. The nature of the order that may be made under this section, and the test that must be satisfied, are set forth in subsection 100(1), which states:

Interim order where no application under section 92	**Ordonnance provisoire en l'absence d'une demande en vertu de l'article 92**
100 (1) The Tribunal may issue an interim order forbidding any person named in the application from doing any act or thing that it appears to the Tribunal may constitute or be directed toward the completion or implementation of a proposed merger in respect of which an application has not been made under section 92 or previously under this section, where	100 (1) Le Tribunal peut rendre une ordonnance provisoire interdisant à toute personne nommée dans la demande de poser tout geste qui, de l'avis du Tribunal, pourrait constituer la réalisation ou la mise en œuvre du fusionnement proposé, ou y tendre, relativement auquel il n'y a pas eu de demande aux termes de l'article 92 ou antérieurement aux termes du présent article, si :
(a) on application by the Commissioner, certifying that an inquiry is being made under paragraph 10(1)(b) and that, in the Commissioner's opinion, more time is required to complete the inquiry, the Tribunal finds that in the absence of an interim order a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger	a) à la demande du commissaire comportant une attestation de la tenue de l'enquête prévue à l'alinéa 10(1)b) et de la nécessité, selon celui-ci, d'un délai supplémentaire pour l'achever, il conclut qu'une personne, partie ou non au fusionnement proposé, posera vraisemblablement, en l'absence d'une ordonnance provisoire, des gestes qui, parce qu'ils seraient alors difficiles à contrer, auraient

on competition under that section because that action would be difficult to reverse; or	pour effet de réduire sensiblement l'aptitude du Tribunal à remédier à l'influence du fusionnement proposé sur la concurrence, si celui-ci devait éventuellement appliquer cet article à l'égard de ce fusionnement;
(b) the Tribunal finds, on application by the Commissioner, that there has been a contravention of section 114 in respect of the proposed merger.	b) à la demande du commissaire, il conclut qu'il y a eu contravention de l'article 114 à l'égard du fusionnement proposé

[32] Pursuant to section 92 of the Act, the Tribunal can grant a range of specific permanent remedies in respect of proposed and completed mergers.

[33] Section 1.1 describes the purpose of the Act as follows:

Purpose of Act	**Objet**
1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.	1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

VI. ISSUES

[34] For the present purposes, there are two broad issues raised in this application. They are as follows:

1. Has the Commissioner satisfied the test to obtain the requested injunctive relief?

2. If so, should such relief be granted?

VII. ANALYSIS

A. Has the Commissioner satisfied the test to obtain the requested injunctive relief?

(1) The applicable test

[35] The Commissioner maintains that the test to be applied by the Tribunal in this proceeding is the classic three-part test applicable to requests for injunctive relief. That test requires the Tribunal to be satisfied that (i) there is a serious issue to be tried; (ii) the applicant would suffer irreparable harm if the application were refused; and (iii) the balance of convenience favours the applicant: *RJR-MacDonald Inc v AG Canada*, [1994] 1 SCR 311 at 334 ("***RJR***"); *Parkland* at para 26.

[36] Even if the Tribunal finds all three parts of the test to be satisfied, it is not compelled to issue an order. Subsection 104(1) of the Act states that the Tribunal "may" issue any interim order that it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief. Accordingly, even where the tripartite test is satisfied, the Tribunal will typically proceed to consider whether to exercise its discretion to grant the relief sought: see e.g. *Parkland* at 113 *et seq*.

[37] Secure submits that the appropriate test to be applied in this proceeding is the more stringent one applicable to applications for mandatory relief. Specifically, Secure states that now that the Merger has closed and certain steps have been taken to integrate its business with the former business of Tervita, the relief sought by the Commissioner would require various positive steps that are mandatory in nature. As a consequence, it maintains that the Commissioner must demonstrate a "strong *prima facie* case," rather than simply a "serious issue to be tried": *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 15 ("***CBC***").

[38] I agree that this test would ordinarily apply to situations where the Commissioner seeks relief under s. 104 that is largely mandatory in nature. However, in the very particular circumstances of this case, I do not consider that this test is the appropriate one to apply.

[39] To demonstrate a strong *prima facie* case, the Commissioner must demonstrate a strong likelihood of success at trial: *CBC* at para 17. In this case, this means a strong likelihood of prevailing with respect to the two overarching issues in the underlying proceeding, namely: (i) his allegation that the Merger is likely to prevent or lessen competition substantially, and (ii) Secure's defence under section 96 of the Act.

[40] The Commissioner's failure to address the section 96 defence in his Section 104 Application would make it impossible for the Tribunal to conclude, based on the evidentiary record as it stands, that he has a strong likelihood of prevailing with respect to that defence. Among other things, overcoming that defence will require the Commissioner to prove the extent of the anti-competitive effects that he alleges are likely to result from the Merger: *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at paras 122-126, 128, and 136 ("***Tervita***"). In turn, this will require the Commissioner to provide evidence regarding price-elasticities of demand and estimates of the deadweight loss that will likely result from the Merger: *Tervita* at paras 132, 134 and 139. Since no such evidence was provided in the Section 104 Application, I am unable to conclude that the Commissioner "is very likely to succeed at trial": *CBC* at para 17.

[41] The Commissioner maintains that he should not have been expected to provide this type of evidence on the Section 104 Application because Secure has not yet provided its Response to the Section 92 Application. Therefore, Secure has not yet invoked the efficiencies defence contemplated by section 96 and he has no obligation to provide evidence regarding the extent of the anti-competitive effects he alleges are likely to result from the Merger: *Tervita* at para 166. I disagree.

[42] The Commissioner has been on notice since March 12, 2021, when Secure made its request for an advance ruling certificate, that Secure intends to take the position that the Merger will generate substantial efficiencies. At the very latest, the Commissioner was made aware of Secure's intention to rely on section 96 on June 3, 2021, when it informed the Commissioner in writing that the efficiencies generated by the merger would be significant, likely and cognizable under Section 96. In Mr. Harington's Report of that same date, which was enclosed with Secure's letter, numerous references to section 96 were made. Secure also explicitly invoked section 96 in a letter to the Commissioner dated June 25, 2021.

[43] Notwithstanding the foregoing, I consider that it would not be in the interests of justice to permit Secure to benefit from the more stringent "strong *prima facie* case" test in the particular circumstances of this case.

[44] I recognize that the Commissioner could have ensured that he would obtain the benefit of the less stringent "serious issue to be tried" test by filing the Section 104 Application sooner. As an alternative, he could also have filed an application under section 100 to obtain additional time to complete his inquiry and simultaneously prepare an application under section 104. Among other things, this would have given him time to prepare at least a rough estimate of a plausible range of anti-competitive effects. Although the Commissioner was still in ongoing discussions with the parties in the week leading up to the filing of the Section 104 Application, it would have been prudent for him to have better protected his position before he ultimately filed that application on June 29, 2021.

[45] I also acknowledge that Secure had a legal right to close its transaction after defeating the Commissioner's attempts to obtain an "interim interim" application from the Tribunal and then from the Federal Court of Appeal. In addition, I recognize that Secure appears to have underscored to the Commissioner, on multiple occasions over the course of his review of the Merger, that time is of the essence to close the Merger.

[46] However, by racing ahead to close "in the face of" the Section 104 Application and within minutes of defeating the Commissioner's request for an "interim interim" injunction before the Federal Court of Appeal, Secure deliberately acted in a high-handed manner, without regard to the Commissioner's interests or indeed the public interest. In so doing, it effectively "stole a march" on the Commissioner: *Redland Bricks Ltd v Morris*, [1970] AC 652 at 666 (HL); *Burnside Industrial Packaging Ltd, Re*, 1994 CarswellNS 376 at para 31 (NSSC); *International Steel Services Inc v Dynatec Madagasgar SA*, 2016 ONSC 2810 at paras 58 and 65; *Ruskin v Canada All-News Radio Ltd*, 1979 CarswellOnt 158 at para 5 (Ont HCJ); *Clerke v Fougère*, 2002 CarswellNB 488 at para 21 (QB); *Kraft Jacobs Suchard (Schweiz) AG v Hagemeyer Canada Inc*, 1998 CanLII 147804 at para 62 (OCJ); Robert Sharpe, *Injunctions and Specific Performance*, Looseleaf Edition (Toronto: Carswell, 2018), at 1.600 ("***Sharpe***"). See also *1338121 Ontario Inc v FDV Inc*, 2011 ONSC 3816 at para 49.

[47] Although Secure's conduct cannot be characterized as having been wrongful, it would not in these circumstances be in the interests of justice to permit Secure to avail itself of the more stringent "strong *prima facie* case" test. Doing so would completely frustrate the Commissioner's efforts to preserve the *status quo* and prevent harm to the public pending a full hearing on his Section 92 Application.

[48] I recognize that such conduct is often taken into account as an equitable consideration at a later stage of the three-part test applicable to applications for an injunction. However, I consider that it can also be considered at the first stage where a failure to do so will effectively determine the application before a consideration of irreparable harm and the balance of convenience can be undertaken.

[49] In my view, this is entirely consistent with (i) the need to apply a flexible approach in considering such applications; (ii) the principle that the ultimate focus of the assessment must be upon whether granting the injunction would be "just and equitable in all of the circumstances of the case"; and (iii) the general recognition that the three parts of the RJR test are not watertight compartments: *Google Inc v Equustek Solutions Inc,* 2017 SCC 34 at paras 1, 23, and 25 ("***Google***"); *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2017 BCCA 395 at para 38; *Sharpe* at 2.600.

[50] Just as persons in other contexts are prevented from claiming damages that could have been avoided by taking reasonable steps after a cause of action has arisen (see e.g., *Red Dear College v Michaels*, [1976] 2 SCR 324), Secure should not be able to rely on its deliberate and high-handed conduct to gain the benefit of the "strong *prima facie* case" test.

[51] The principal foundations for that test are (i) requiring the situation to be "put … back to what it should be", is often costly or burdensome for a defendant or respondent; (ii) such relief can usually be obtained at trial; and (iii) such relief can constitute the effective final determination of the action in favour of the plaintiff or applicant: *CBC* at para 15.

[52] In the current context, only the first of these foundations applies. This is because the relief being sought by the Commissioner (preventing interim irreparable harm to the competitive process and Secure's customers) cannot be obtained at trial and this relief would not constitute the effective final determination of the action in favour of the Commissioner.

[53] Where the costs required to be incurred to "put the situation back to what it should be" could have been avoided by maintaining the *status quo* until the application that had already been served and filed could be heard, it would not be appropriate or in the interests of justice to permit a respondent to effectively rely on those same costs to avail itself of a much more favourable legal test. This is especially so in the particular circumstances of this case, described above.

[54] Secure suggests that it should not face any adverse consequences as a result of exercising its legal right to close. In this regard, it relies on *The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14 (**"CCS"**), which did not involve an application under section 104 of the Act. In considering the Commissioner's request for an order of dissolution under section 92 of the Act, the Tribunal held that vendors who had sold their shares after being warned by the Commissioner that she would seek dissolution were not estopped from raising issues of hardship in respect of that remedy. However, that type of situation, as well as situations in which parties close a proposed transaction before the completion of the Commissioner's review, and after having been cautioned that doing so would be "at their own risk," are distinguishable. This is because the filing of an application under section 104 of the Act serves to crystallize a legal dispute brought by a public authority to protect the public interest.

[55] In addition to the foregoing, I cannot ignore that, after assuring the Tribunal on June 30, 2021 that it would cooperate with the Commissioner in ensuring the Section 104 Application would be heard in a timely fashion (*Secure Energy 1* at para 62), Secure fought hard to have the hearing take place "on or after August 30th" or in any event "the last week of August": Transcript of the Case Management Conference of *Canada (Commissioner of Competition) v Secure Energy Services Inc and Tervita Corporation* dated July 6, 2021, at pp 6 – 11, 16 and 23**.** In the meantime, Secure was proceeding with integrating Tervita's business into its own, and increasing the costs that would be associated with restoring the situation that the Section 104 Application was intended to maintain.

[56] In my view, applications under section 104 should be heard within approximately one week of their filing in circumstances where merging parties appear to be intending to close a merger transaction immediately upon the expiry of the 30 waiting period set forth in paragraph 123(1)(b), or have not confirmed that they will wait until after the application is determined before doing so. Although this may seem somewhat short, any longer period may very well prevent the Commissioner from being able to assess responses provided to a supplementary information request issued pursuant to subsection 114(2), and then prepare the application under section 104, as he would have less than three weeks in which to do so.

[57] In summary, for the reasons set forth above, I consider that the test to be applied in assessing the present application is the classic test as set forth in *RJR* and articulated at paragraph 35 above. It is not the modified test articulated in *CBC*, which requires the applicant to establish a "strong *prima facie* case" at the first stage of the tripartite analysis.

[58] I agree with the Commissioner that to give Secure the benefit of the "strong *prima facie* case" test in circumstances such as those before the Tribunal in this application would incentivize others to do the same in the future and thereby make it much more difficult for the Commissioner to fulfill his statutory mandate.

[59] I will add in passing that I recognize that Secure was motivated, at least in part, by a desire to begin attaining certain efficiencies associated with integrating its operations with those of Tervita. However, this is something that is more appropriately considered at the third stage of the assessment of injunctive relief.

(2) Serious issue to be tried

[60] The threshold to determine whether there is a serious issue to be tried is a low one. In brief, the Tribunal must simply be satisfied that the issues raised are neither vexatious nor frivolous: *RJR* at 335.

[61] The evidence before the Tribunal amply demonstrates that this test is met for the overarching issue of whether the Merger is likely to prevent or lessen competition. This evidence is substantial and relates to many of the quantitative and qualitative considerations that are relevant in adjudicating this overarching issue.

[62] Among other things, the quantitative evidence indicates that there is a large number of locations at which the competitive choices available to Secure's customers may have been reduced from two to one, or from three to two, as a result of the Merger. Additionally, the merging parties' internal documents indicate that Secure and Tervita had very high market shares before the Merger and provide support for the Commissioner's position that they were each other's closest rivals in the relevant markets. With respect to qualitative factors, the parties have adduced considerable evidence that will require the Tribunal to make determinations concerning important and complex matters such as:

i. the product and geographic dimensions of the relevant markets;

ii. the effectiveness of remaining competition;

iii. the nature and extent of any barriers to entry into the relevant markets;

iv. the extent to which acceptable substitutes for the relevant products are likely to be available;

v. the extent to which the option of self supply is likely to constrain the exercise of market power by Secure; and

vi. the extent to which Secure's customers have countervailing power.

[63] Moreover, if Secure invokes the efficiencies defence under section 96 of the Act, as it has stated it intends to do, that will be a further serious issue to be tried. Among other things, this will require the Tribunal to assess the parties' respective positions concerning important matters such as:

i. the merged entity's own-price elasticity of demand;

ii. the deadweight loss that will likely result from the Merger;

iii. whether the various efficiencies identified by Secure are cognizable; and

iv. whether those efficiencies are likely to be greater than, and offset, any anti-competitive effects that the Tribunal finds are likely to result from the Merger.

[64] Having regard to the foregoing, there can be little doubt that the Commissioner has demonstrated that there is a serious issue to be tried.

(3) Irreparable harm

(a) General legal principles

[65] The term irreparable connotes the nature of the harm suffered, rather than the magnitude of that harm. "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* at 341.

[66] Given that an application under section 104 of the Act is akin to a *quia timet* injunction, irreparable harm typically will not yet have occurred and may therefore be inferred on the basis of "clear and not speculative" evidence: *Parkland* at paras 50-53.

[67] This evidentiary requirement must meet the balance of probabilities standard that generally applies in civil cases. In brief:

> "… [T]o meet his burden in this section 104 application where the harm is apprehended, the Commissioner must establish, on a balance of probabilities, that there is clear and non-speculative evidence demonstrating how such harm will occur, so that the inferences can be found to reasonably and logically flow from the evidence."
>
> (*Parkland* at para 58)

[68] Although harm to third parties is typically assessed at the third stage of the tripartite test for an injunction, harm to the public interest is considered at both the second and third stages where a government authority is the applicant in a motion for injunctive relief: *RJR* at 349.

[69] Moreover, where the applicant is a public authority:

> "… [t]he test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action."

(*RJR* at para 346)

(b) The Commissioner's position

[70] The Commissioner's submissions with respect to irreparable harm focus solely on the harm that he alleges is currently occurring and will continue to occur to competition and customers in the relevant markets pending the determination of the Section 92 Application, unless the relief that he has requested in the present application is granted. As in *Parkland*, the Commissioner explicitly has not alleged that, in the absence of injunctive relief, there will not be an effective remedy available to restore competition to the requisite level: *Parkland* at paras 16 and 22. Accordingly, he did not adduce any of the usual types of evidence that might be relevant in that regard, such as evidence concerning Secure's access to Tervita's pricing strategies or other competitively sensitive information, the loss of key employees, or the likelihood that any buyer of assets that may be ordered to be divested will not be able to restore competition to the requisite level.

[71] The Commissioner maintains that the Merger is currently causing irreparable harm to competition primarily because it has eliminated all rivalry in a large number of local areas and it has eliminated competition between the two principal rivals in many other areas where Secure and Tervita were each other's closest competitors, and only one other competitor now remains. As a result, the Commissioner alleges that it can be reasonably and logically inferred that customers now facing a "monopoly situation" will no longer be able to negotiate price discounts that were a common aspect of competition prior to the Merger. He adds that customers in many other geographic markets will obtain smaller discounts than they would have received in the absence of the Merger. In addition, he states that the benefits of non-price competition, including reduced wait times, service, innovation, and competition for new landfill sites have been eliminated or substantially lessened.

[72] Relying on *Parkland*, the Commissioner alleges that this harm to competition is irreparable because the Tribunal has no authority to award damages under the merger provisions of the Act if the Section 92 Application is successful: *Parkland* at para 48.

[73] In one example provided by the Commissioner, Tervita offered a customer a discount of [tens of thousands of dollars in relation to the disposal of many thousand MT of waste], to meet or slightly beat a rival offer from Secure.

[74] The Commissioner underscores that because the Merger has eliminated or substantially lessened competition between Secure and Tervita, the merged entity has the *ability* to charge prices that are higher than they would have been in the absence of the Merger. Likewise, he alleges that Secure now has the *ability* to reduce the non-price benefits of competition. The Commissioner adds that Secure's commitment not to raise prices ignores the fact that there is no one "price" at which transactions occur and it would be impossible to monitor or enforce this commitment across hundreds of customers and facilities. This is because of the prevalence of discounting in the relevant markets before the Merger. More fundamentally, the Commissioner underscores that a behavioural pricing "remedy" does not allow the competitive process to do its job.

(c) Secure's position

[75] Secure maintains that the interim effects on competition that are the focus of the Commissioner's submissions are not relevant as a matter of law in an application under section 104. This is for two reasons. First, section 104 requires the Tribunal to have regard to "the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief." Secure insists that, at the second stage of the tripartite test for granting such relief, those principles require the Tribunal's assessment to focus exclusively on whether its ability to grant effective relief in the underlying Section 92 Application will be preserved. On this issue, Secure states that the unchallenged evidence on this application establishes that an Order under section 104 is not necessary to preserve the assets of Tervita (and indeed Secure) as an effective remedy. Consequently, if the Commissioner is successful in the Section 92 Application, a viable competitor can be created through divestiture to restore competition in the relevant market(s). Second, Secure states that the scheme of the Act does not contemplate a concern with preventing interim price effects.

[76] In any event, Secure submits that even if the Tribunal is able to consider interim effects on competition at this stage of its analysis, no such effects will occur. This is because it has issued internal "Integration Guidance" to its management team stating that there are to be no price increases to customers. [redacted]

[77] Secure also states that it will have no incentive to increase prices and that this was acknowledged by Dr. Miller during cross-examination.

[78] Moreover, Secure asserts that interim price effects cannot constitute irreparable harm in the present context because the Commissioner conceded in another case involving this same industry that the alleged wealth transfer should be treated as neutral: *CCS* at para 284. As a result, the only potential type of irreparable harm, in this case, would be the deadweight loss to the Canadian economy, in respect of which the Commissioner failed to lead any evidence.

[79] Finally, Secure states that the Commissioner is not entitled to the benefit of the usual assumption that irreparable harm to the public interest will result if the relief he seeks, in his capacity as a public authority charged with the duty of promoting or protecting the public interest, is not granted: *RJR* at 346. This position is based on the fact that the Commissioner did not engage the aspect of his mandate that requires him to consider the efficiencies that Secure claims are likely to result from the Merger.

(d) Assessment

[80] I agree with the Commissioner that adverse interim price and non-price effects on customers can constitute irreparable harm for the purposes of an application under section 104. I also agree that the evidence he has adduced is clear and non-speculative evidence from which it can be reasonably and logically inferred, on a balance of probabilities, that such irreparable harm will occur. In reaching this conclusion, I have been mindful that the onus of demonstrating

irreparable harm to the public interest is less for a public authority such as the Commissioner than it is for a private applicant: *RJR* at 346. I do not accept Secure's position that the Commissioner is not entitled to the assumption described in the immediately preceding paragraph above simply because he did not engage with Secure's efficiency claims in the Section 104 Application. In my view, this is something that is more appropriately considered in the assessment of balance of convenience.

[81] In support of its position that interim effects on competition are not relevant as a matter of law in an application under section 104 of the Act, Secure relies on authorities stating that the purpose of injunctive relief is to ensure that the subject matter of litigation will be preserved so that effective relief will be available when the case is ultimately heard on the merits: see e.g., *Google* at para 24; and *Sharpe* at 2.550. However, this argument begs the question of what constitutes "effective relief".

[82] In the present application, the relief the Commissioner seeks is a remedy that would restore the competitive discipline on Secure that was provided by Tervita prior to the Merger, pending a determination of the Section 92 Application on its merits. The Commissioner maintains that this remedy is necessary to avoid the irreparable harm to competition that has already occurred and will continue to occur until that point in time. The Commissioner adds that this remedy is also necessary to avoid the consequent irreparable harm to customers in the relevant markets, in the form of net prices that are higher than they otherwise have been in the absence of the Merger, and non-price benefits of competition that will be less than what they otherwise have been.

[83] I agree with Justice Gascon that these harms are cognizable in an application under section 104 of the Act and constitute irreparable harm because the Tribunal has no authority to award damages under the merger provisions of the Act or to otherwise remedy any adverse interim price or non-price effects of a merger: *Parkland* at para 48.

[84] Secure's position that the scheme of the Act precludes a recognition of the alleged interim harms to competition and customers in the present application is based on its reading of sections 74.101, 92, 96 and 100 of the Act.

[85] Subsection 74.101(2) provides a court with the ability to order the payment of restitution up to a specified limit in certain circumstances, in connection with representations to the public that are false or misleading in a material respect. Secure suggests that it can be inferred from the absence of a similar remedial power in the merger provisions of the Act that Parliament decided that restitution should not be available in the merger context. However, with respect, this misses the point. It is readily apparent that Parliament decided not to make restitution available in the merger context. Yet, it cannot be inferred from this that Parliament did not intend the authority provided in section 104 to include an order to preserve competition and the associated price and non-price benefits that it generally produces.

[86] Turning to section 92, Secure notes that the post-closing remedies that it makes available are directed towards the restoration of competition to the point at which it can no longer be said to be lessened or prevented "substantially." It infers from this that the Act does not evince any

intention by Parliament to absolutely eliminate alleged anti-competitive effects that may occur between closing and disposition of a section 92 application.

[87] This is not the right question to ask. Rather, the question is whether the Act evinces an intention to prevent any material adverse price or non-price effects on customers of the merging parties. This question has been answered in the affirmative: see e.g. *Tervita* at paras 80-83.

[88] With respect to section 96, Secure submits that it reflects a view that any anti-competitive effects of a merger are tolerated if they are outweighed by efficiencies. Secure asserts that this militates against the Commissioner's position that section 104 confers upon the Tribunal the authority to address any temporary anti-competitive effects that may occur prior to a determination of an application under section 92.

[89] I disagree. The fact that section 96 may provide a defence where the respondent(s) in a section 92 application may be able to establish the requirements of that defence does not infer anything about what Parliament's intention may have been with respect to any interim anti-competitive effects that result, or are likely to result, from a merger prior to a determination of the respondent's defence on its merits.

[90] In my view, the better view of the scheme of the Act is rooted in a reading of section 104 together with sections 1.1, 92, 100 and 123.

[91] Section 1.1 sets forth the purposes of the Act. As reflected in the full text reproduced at paragraph 33 above, one of those purposes is "to maintain and encourage competition in Canada *in order to* … provide consumers with competitive prices and product choices" (emphasis added). The words "in order to" make it clear that competition is not an end in itself, but is desired to achieve other objectives, including providing consumers with competitive prices and product choices.

[92] In furtherance of that objective (and the other objectives set forth in section 1.1), section 92 provides the Tribunal with the ability to issue remedial orders in respect of both proposed and completed mergers. With respect to proposed mergers, sub-clause 92(1)(f)(iii)(A) provides the Tribunal with the authority to prohibit any person "from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially." As noted above, this contemplates prohibiting any merger that is likely to result in prices that are materially higher, or in non-price benefits of competition being materially lower, than they would likely be in the absence of the merger: *Tervita* at paras 80-83.

[93] To ensure that potentially anti-competitive mergers are reviewed *before* they are completed, section 123 imposes two waiting periods. The first is an initial 30 day waiting period after a pre-merger notification filing has been made. The second is as a further 30 day waiting period that begins to run the day after the Commissioner has received the responses to any SIR that has been issued pursuant to subsection 114(2).

[94] To further reinforce the objectives of the Act, including the objective of providing consumers with competitive prices and product choices, sections 100 and 104 provide the

Tribunal with the authority to issue injunctive relief before the completion of the Commissioner's inquiry and after the filing of an application under section 92, respectively.

[95] Secure asserts that section 100 is squarely focused on preserving the Tribunal's ability to issue a remedy. It states that this is clear from the requirement that the Tribunal find:

> "… that in the absence of an interim order a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under [section 92] because that action would be difficult to reverse."

[96] I am inclined to agree with Secure that section 100 does not appear to reflect a concern with the types of interim effects that are the focus of the present application. This is because the focus of that provision is upon *actions* that are taken that would be difficult to reverse. Examples of actions that can potentially fall into this category include completing a transaction, accessing strategic plans or other competitively sensitive information pertaining to the other merging party, terminating key employees and integrating the merging parties' businesses in a way that would be difficult to reverse. But increasing prices or reducing the level of service, quality, or other non-price benefits of competition do not appear to be contemplated by section 100. Instead, the section appears to focus on preserving the Tribunal's ability to remedy the effects of proposed mergers on competition by reversing *actions* that have such effects, rather than by preventing such effects from occurring at all.

[97] However, the fact that section 100 does not reflect a concern with the types of interim effects that are the focus of the present application is far from determinative. This is especially so in light of the language of section 1.1 (discussed above) and the fact that Parliament did not include language similar to that provision in section 104: *Parkland* at paras 34-35. Instead, Parliament gave the Tribunal a broader authority to "issue any interim order that it considers to be appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief." These principles include preventing irreparable harm as defined at paragraph 65 above, where the other two components of the tripartite test are satisfied.

[98] Interpreting section 104 in a manner that permits the Tribunal to prevent interim anti-competitive effects is consistent with the comprehensive scheme set forth in sections 1.1, 92, 100 and 123 of the Act. This interpretation is also consistent with giving the Act "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, RSC 1985, c I-21, s 12.

[99] Secure maintains that such an interpretation of section 104 is contrary to the interpretation adopted in *Canada (Commissioner of Competition) v Superior Propane Inc*, [2001] 3 FC 175 (FCA) ("***Superior Propane"***). I disagree.

[100] The passage of that decision relied upon by Secure is the following:

> [12] In his report [the Commissioner's expert] … concluded that the "integration of Superior Propane Inc. and ICG operations would at best impede, and at worst *jeopardize an effective divestiture*", that is, the" relatively rapid restoration of vigorous competition in the industry". This is hardly proof that the harm "could not be remedied". (See *RJR-MacDonald* at 341). It is argued that, since interim integration will "diminish or practically destroy ICG as a *divestible entity*", the "public interest" will be "irreparably harmed" if a stay is refused. *In other words, it is said that consumers would be subjected to the anti-competitive effect of this merger during the period awaiting the decision on the appeal.* There is no doubt that *divestiture* would be difficult and costly if the merger proceeded, but the Respondents are aware of that fact and willing, if necessary, to bear the cost of it. These costs have been expertly estimated, and it is clear that the money saved will more than offset the cost.
>
> [13] In my view, the metaphor of *scrambled eggs* is dramatic, but not entirely apt. When one scrambles eggs it *is* impossible to unscramble them, but a merged company is not exactly like scrambled eggs. *It can be broken up*, though it is maybe difficult to do so. *Competition can be restored*. It is not enough for it to be hard or inconvenient to do so. To obtain a stay, the damage must be truly irreparable and proved to be so. (Emphasis added.)

[101] This passage followed the Court's reference to the Commissioner's position regarding irreparable harm, which was that "once the eggs are scrambled, they cannot be unscrambled": *Superior Propane* at para 11. This passage, together with all but one of the italicized segments in the passage quoted immediately above, make it apparent that the Court was focused on the effectiveness of the ultimate remedy, and not on the types of interim effects being alleged by the Commissioner in the present application. Although the fully italicized sentence in paragraph 12 appears to address such interim effects, the Court never returned to them in the remainder of its decision. Instead, the focus of that decision remained on the effectiveness of a divestiture as a remedy after the Court's determination of the Commissioner's appeal on its merits. After focusing solely on the effectiveness of such a remedy in paragraphs 14 and 15, the Court concluded with the following sentence: "*Consequently*, the evidence, in my view, is overwhelming that the applicant has not been able to establish, as it must, that there will be irreparable harm suffered if the stay is not granted" (emphasis added): *Superior Propane* at para 16.

[102] I will now briefly turn to Secure's submission that there will be no irreparable harm because of the internal "Integration Guidance" that it has given to its management team to refrain from initiating any price increases [redacted]. In my view, this can hardly be relied upon as a reason to conclude that the irreparable harm to competition and to customers alleged by the Commissioner is unlikely to occur. To begin, the Commissioner has provided clear and non-speculative evidence that most transactions in the relevant markets prior to the Merger were conducted at discounts off the list or "gate" price. That evidence also demonstrates that such discounts were provided because customers were able to play Secure and Tervita off against one another. Accordingly, even if the list price is not increased, and even if

[redacted], there is clear and non-speculative evidence that further discounting activity will likely be eliminated in a large number of areas where it appears that Secure will face no remaining competition. The same is true in areas where Secure and Tervita were each other's closest competitors and the number of rivals has been reduced from three to two. This is because the degree of competitive discipline on Secure has been reduced or eliminated.

[103] More fundamentally, the Tribunal cannot rely on a merged entity to benevolently refrain from exercising any increased market power that results from a Merger. It is the *ability* to exercise increased market power that must be addressed in applications under section 104 (and indeed 92): *Tervita* at paras 44, 51 and 80-83. With respect to prices, that ability can be manifested either by increasing or maintaining prices above levels that would otherwise prevail in the absence of a merger: *Tervita* at paras 44, 154, 55 and 80; *Parkland* at para 101.

[104] The foregoing discussion applies equally to Secure's position that it will not have any incentive to increase prices or to reduce service levels or other non-price benefits of competition prior to the hearing of the Section 92 Application, because doing so would create evidence that would be used against it in that application. I recognize that the Commissioner's expert, Dr. Miller, acknowledged during cross-examination that he stated in a prior case that a merged entity would not have any incentive to raise prices in such circumstances. Dr. Miller was also led to concede that incentives can in some cases be dispositive, although he expressed discomfort with the word "dispositive." This was in part because a merged entity's incentives could also be to increase prices, based on the facts of a particular case.

[105] I acknowledge that evidence with respect to a merged entity's incentives may, in some cases, be relevant to an assessment of whether irreparable harm will occur in the absence of injunctive relief. However, such evidence would not typically be determinative. Among other things, it would have to be considered with all of the other evidence. In addition, the Tribunal will always remain mindful that there are many ways in which market power can be exercised in a manner that does not give rise to "bad evidence." It will also be mindful that customers may not have an incentive to bring exercises of market power to the Commissioner's attention. Also, monitoring a firm's behaviour can be exceptionally difficult. These are all reasons why the Tribunal and the courts have generally focused on the *ability* to exercise increased market power: see e.g. *Tervita*, above, at paras 44, 51 and 80-83.

[106] Finally, I do not accept Secure's argument that there will be no irreparable harm in this case because any transfer of wealth from customers to Secure will be "neutral" from the perspective of the economy as a whole, and because the Commissioner has failed to lead any evidence with respect to any deadweight loss to the economy that may result from the Merger. There is currently no evidence before the Tribunal that any wealth transfer between Secure and its very large number of customers should be treated as neutral. The Tribunal cannot rely on a concession made by one of the Commissioner's predecessors in another case, involving a single geographic market, even if that case involved the same industry. Moreover, for the purposes of assessing the irreparable harm component of the tripartite test for injunctive relief, harm to the public cannot be confined to the issue of whether there is harm to the economy as a whole. Irreparable harm is a much broader concept that extends to any "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* at 341.

[107] For all of the above reasons, I conclude that adverse interim price and non-price effects on customers can constitute irreparable harm for the purposes of an application under section 104. I also find that the evidence the Commissioner has adduced is clear and non-speculative evidence from which it can be reasonably and logically inferred, on a balance of probabilities, that such irreparable harm will occur.

(4) The balance of convenience

[108] This stage of the assessment requires the Tribunal to consider "… which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits": *RJR* at 342. In the course of its consideration, "the interest of the public must be taken into account" and can be invoked by either party: *RJR* at 348. In assessing this interest, "… the public interest in enforcing the law weighs heavily in the balance": *Harper v Canada (Attorney General)*, 2000 SCC 57 at para 9; *Parkland* at paras 59 and 108.

[109] The Commissioner maintains that the irreparable harm he has alleged outweighs the alleged financial harm to Secure, which he asserts is based on unreliable and speculative evidence.

[110] Secure makes numerous submissions in support of is position that it will suffer the greater harm if the relief sought by the Commissioner is granted. For the present purposes, it will suffice to address one of those submissions.

[111] Secure asserts that the Commissioner has not provided the Tribunal with any sense whatsoever of the extent of harm that the public will suffer if the relief he seeks is not granted. It states that when a party to a merger has adduced evidence of substantial and likely efficiency gains resulting from its merger, the Commissioner has an onus to provide at least some initial indication or estimate of the extent of the irreparable harm he claims. Without such a preliminary indication or estimate, the Tribunal cannot conduct the balancing analysis required at the third stage of the tripartite test for injunctive relief.

[112] I agree.

[113] The Commissioner has provided the Tribunal with extensive evidence. Among other things, that evidence includes hundreds of pages of records of exchanges with a large number of customers in the relevant markets and other third parties. It also includes other industry documentation, internal documents of Tervita and Secure, evidence from ongoing litigation that they had between them prior to the Merger, and materials they and others provided to the Competition Bureau in connection with previous merger transactions in this industry. In addition, the Commissioner filed expert reports by Dr. Miller and Dr. Eastman, and provided the Tribunal with evidence adduced in a prior proceeding before the Tribunal.

[114] However, the Commissioner has made no effort to provide the Tribunal with even a very preliminary or rough sense of how all of that evidence comes together, so that the Tribunal can have at least some appreciation of how the interim harm he alleges compares with the harm Secure has identified on its side of the ledger.

[115] The latter harm is based largely on estimates of the operating efficiencies that will be permanently lost by Secure in various scenarios, including those in which the broad type of relief currently being sought by the Commissioner is obtained and kept in place for periods of 6, 12 and 18 months. Mr. Harington estimated those lost efficiencies [to range from tens of millions of dollars to a multiple of that figure], respectively. For greater certainty, those estimates do not include the other financial and non-financial harm Secure claims it will suffer if the relief sought by the Commissioner is granted.

[116] Even if I accept some of the Commissioner's submissions regarding the shortcomings of Secure's estimates, I will still have a good general sense of the extent of harm to be considered on Secure's side of the ledger, for the purposes of the balance of convenience assessment. That is to say, Secure has provided clear and non-speculative evidence regarding the general extent of the harm that it will suffer if the relief requested by the Commissioner is granted.

[117] I have not, however, been given any such general sense of the extent of harm to be considered on the Commissioner's side of the ledger.

[118] I recognize that "[w]ithout the benefit of pleadings and full discovery, the factual and legal issues may well be only roughly defined and, perhaps, not even fully investigated by the parties themselves": *Sharpe* at 2.70. This will particularly be the case in circumstances such as those presently before the Tribunal, where a merging party proceeds to closing immediately following the applicable 30 day waiting period. In such circumstances, the Commissioner cannot reasonably be expected to have fully synthesized, within the very short period of time available, the extensive information that is typically provided by merging parties in their response to a SIR. Such a task would be further complicated by the need to integrate that information with information obtained from market contacts and other third parties during the course of the Bureau's review of the merger, as well as with other information the Bureau may already have in its records. The Commissioner's challenge is accentuated by the need to file his application in time for it to be heard prior to the expiry of the 30 day waiting period, or such other tight timeline as may be applicable.

[119] Nevertheless, in a merger case where the respondent provides clear and non-speculative evidence of the extent of harm that it would suffer if the relief sought by the Commissioner is granted, the Commissioner must provide at least some "rough" or initial sense of the irreparable harm he alleges would result if that relief is not granted.

[120] I do not accept the Commissioner's submission that requiring such evidence would essentially transform a section 104 application into a full-blown contested application under sections 92 and 96 of the Act, or make it otherwise inordinately difficult for him to prevail in a proceeding under section 104.

[121] With the assistance of staff in the Competition Bureau and outside experts, the Commissioner should be able to provide at least rough estimates, supported by evidence, of (i) the range of price effects that are likely to result from the merger; (ii) a range of plausible elasticities; (iii) a "ballpark" estimate of the deadweight loss; and (iv), where applicable, a basic sense of the extent to which non-price effects are likely to result from the merger. This is particularly so where, as here, the Bureau has extensive information from previous cases upon which he can build. Where the Commissioner requires more time to prepare such rough estimates, resort can be had to the interim relief contemplated by section 100 of the Act.

[122] With respect to prices, a preliminary estimate of the range of adverse price effects (usually expressed as a percentage of the prevailing price) is not sufficient because this "is not enough to determine the extent of any anti-competitive effect": *Tervita* at para 132. Accordingly, rough estimates of price elasticities and deadweight loss are also required to permit the Tribunal to assess the balance of convenience, where the respondent in a merger case provides clear and non-speculative evidence of harm for the purposes of the balancing exercise.

[123] In my view, the Supreme Court of Canada's teaching that "[e]ffects that can be quantified should be quantified, even as estimates" is equally applicable to applications under both section 104 and section 92 of the Act, when the defence contemplated by section 96 has been raised: *Tervita* at para 100. Such an 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": *Tervita* at para 124. Moreover:

> [a]n 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.
>
> (*Tervita* at para 124)

[124] During the hearing, the Commissioner maintained that the volume of commerce estimates that Dr. Miller provided in Exhibits 25-27 of his report dated June 29, 2021 are sufficient to provide the Tribunal with what it requires for the purposes of assessing the balance of convenience. The Commissioner characterized those estimates as totalling in the "hundreds of millions of dollars." However, without a rough sense of the extent of adverse price effects, price elasticities and deadweight loss, estimates of the volume of affected commerce are of little utility: *Tervita* at para 132. Moreover, Secure had no advance notice of this position prior to the hearing.

[125] In summary, for the reasons provided above, the Commissioner has not established that the balance of convenience is in his favour.

[126] Before concluding the discussion regarding the third prong of the tripartite test, I will make two additional observations.

[127] First, Secure initially appeared to suggest that the Commissioner should be required to provide an undertaking to compensate Secure for any damages suffered as a result of the granting of the relief sought in this application. I disagree. Given that the Commissioner is a public authority acting in furtherance of his statutory mandate, he is not required to provide such an undertaking: *Financial Services Authority v Sinaloa Gold plc*, [2013] UKSC 11 at paras 1 and 31; *British Columbia (Attorney General) v Wale*, 1986 CarswellBC 413 at para 62 (CA). Although Justice Linden in *Superior Propane* attached significance to the fact that no such undertaking had been given by the Commissioner, he did so in *obiter dictum* remarks in which he appeared to be simply suggesting that this meant that the harm identified by the respondent would be irreparable: *Superior Propane* at para 17.

[128] Second, the Commissioner further complicated the Tribunal's task by failing to provide the Tribunal with any sense of the terms of the order being sought. Although counsel for the Commissioner requested during the hearing that the order be made "on terms similar to" what was sought in *Parkland*, that did not provide fair notice to Secure and left many questions unanswered.

VIII. CONCLUSION

[129] For the reasons provided above, the Commissioner has met the first and second parts of the tripartite test applicable to applications for injunctions. However, he has not met the third part of that test.

[130] Given that the tripartite test requires an applicant for injunctive relief to prevail with respect to each of the three prongs of the test, this application will be denied and it is unnecessary to consider the second general issue raised on the application.

IX. COSTS

[131] Having regard to the public interest nature of this application, as well as the novel nature of the issues raised by Secure and the mixed results that it achieved in respect of those issues, I consider it appropriate to deny Secure's request for costs.

DATED at Ottawa, this 16th day of August, 2021.

SIGNED on behalf of the Tribunal by:

"Paul Crampton"
(s) Paul Crampton C.J.

ORDER

For the reasons set forth in the Reasons for Order attached hereto, the Commissioner's request for interim relief under section 104 of the *Competition Act*, RSC 1985, c C-34 is dismissed without costs.

SIGNED on behalf of the Tribunal by:

"Paul Crampton"
(s) Paul Crampton C.J.

COUNSEL OF RECORD:

For the applicant:

The Commissioner of Competition

Jonathan Hood
Paul Klippenstein
Ellé Nekiar

For the respondent:

SECURE Energy Services Inc.

Brian Facey
Robert Kwinter
Nicole Henderson
Joe McGrade

Competition Tribunal Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Secure Energy Services Inc.*, 2021 Comp Trib 8
File No.: CT-2021-002
Registry Document No.: 59

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34 as amended.

BETWEEN:

The Commissioner of Competition
(applicant)

and

Secure Energy Services Inc.
(respondent)

Date of case management conference: October 6, 2021
Before: D. Gascon J. (Chairperson)
Date of order: October 12, 2021

SCHEDULING ORDER

[1] **FURTHER TO** the application (**"Application"**) filed on June 29, 2021 by the Commissioner of Competition (**"Applicant"**) against Secure Energy Services Inc. (**"Respondent"**), pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34, with respect to the acquisition by the Respondent of Tervita Corporation;

[2] **AND FURTHER TO** the jointly proposed timetable submitted by the parties on September 29, 2021, to the discussions with counsel for both parties at a case management conference held on October 6, 2021, and to the revised proposed timetable jointly submitted by the parties on October 8, 2021;

[3] **AND FURTHER TO** the Tribunal's *Practice Direction Regarding Timelines and Scheduling for Proceedings before the Tribunal* (**"Timelines Direction"**);

[4] **AND WHEREAS** the Tribunal is satisfied that the following scheduling order is appropriate and respects the principles found in subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd supp), which direct the Tribunal to deal with all matters as informally and expeditiously as the circumstances and considerations of fairness permit, as well as the Timelines Direction;

THE TRIBUNAL ORDERS THAT:

[5] The schedule for the discovery and pre-hearing disclosure steps of the Application shall be as follows:

Friday, October 29, 2021	Service of Affidavits of Documents and delivery of documents by both Parties
Monday, November 8, 2021	Deadline for filing any motions arising from Affidavits of Documents and/or productions, including motions challenging claims of privilege
Wednesday, November 17, 2021	Hearing of any motions arising from Affidavits of Documents, productions and/or claims of privilege
Friday, November 19, 2021	Deadline for delivery of mediation briefs
Monday, November 29, 2021	Mediation
Friday, December 3, 2021	Deadline for delivery of any additional productions resulting from any Affidavits of Documents, productions and/or claims of privilege motions
Monday, December 13, 2021 – Friday, December 24, 2021	Examinations for discovery according to a schedule to be settled between counsel

	The Tribunal will have a judicial member available on dates to be agreed to with counsel for the parties to rule on objections arising during the examinations for discovery
Friday, January 14, 2022	Deadline for fulfilling answers to discovery undertakings
Friday, January 21, 2022	Deadline for filing any motions arising from examinations for discovery, answers to undertakings or refusals
Friday, January 28, 2022	Hearing of any motions arising from examinations for discovery, answers to undertakings or refusals
Friday, February 11, 2022	Last day for follow-up examinations for discovery
Friday, February 25, 2022	Applicant to serve documents relied upon and witness statements
	Applicant to serve and file expert report(s), if any
	Applicant to serve list of documents proposed to be admitted without proof
Friday, March 11, 2022	Deadline for filing any motions relating to challenges to confidentiality designations
Friday, March 18, 2022	Hearing of any motions relating to challenges to confidentiality designations
Friday, March 25, 2022	Respondent to serve documents relied upon and witness statements
	Respondent to serve and file expert report(s), if any, on all matters including efficiencies
Friday, April 1, 2022	Deadline for delivering any Requests for Admissions
Monday, April 11, 2022	Applicant to serve reply documents relied upon and reply witness statements
	Applicant to serve and file reply expert report(s), if any, and responding report on efficiencies
	Deadline to provide the Agreed Books of Documents to the Tribunal, subject to the possibility to provide additional documents further to the filing of the Respondent's reply expert report(s) on matters related to efficiencies

	Tuesday, April 26, 2022 Respondent to serve and file reply expert report(s), if any, on matters related to efficiencies
	Deadline to provide witness statements to the Tribunal
Friday, April 29, 2022	Deadline for filing any motions related to the evidence (documents relied upon, witness statements and expert reports)
	Deadline for responding to any Requests for Admission
Monday, May 2, 2022	Pre-hearing case management conference
	Deadline to provide documents to the Tribunal for use at the hearing (e.g., additions to the Agreed Books of Documents, Joint Briefs of Authorities, slide presentations of experts, etc.), including read-ins from examinations for discovery
	Deadline for delivering any agreed statement of facts
Friday May 6, 2022	Hearing of any motions related to the evidence (documents relied upon, witness statements and expert reports)

[6] The hearing format for the motions contemplated at paragraph 5 will be by videoconference, at least for the motions scheduled to be heard on November 17, 2021 and for the rulings on objections arising from the examinations on discovery scheduled for December 2021. However, should the Tribunal decide to modify the conduct of its regular operations and to resume holding in-person hearings in 2022, the hearing format for the motions scheduled to be heard in 2022 could be modified to be in-person in the Hearing Room of the Tribunal located at 600-90 Sparks Street, Ottawa, after consultations with the parties.

[7] The evidentiary portion of the hearing of the Application shall commence at 10:00 a.m. on Monday, May 9, 2022 and is currently expected to be held in person in the Hearing Room of the Tribunal located at 600-90 Sparks Street, Ottawa. The schedule shall be as follows:

Monday, May 9, 2022 – Thursday, May 12, 2022	First week of hearing (4 days)
Monday, May 16, 2022 – Thursday, May 19, 2022	Second week of hearing (4 days)
Tuesday, May 24, 2022 – Friday, May 27, 2022	Third week of hearing (4 days)
Monday, May 30, 2022 – Thursday, June 2, 2022	Fourth week of hearing (4 days)

[8] The Tribunal will direct the date of delivery of written arguments and will hear oral arguments from Wednesday, June 15, 2022 to Friday, June 17, 2022 (3 days). The oral argument portion of the hearing is also expected to be held in person in the Hearing Room of the Tribunal located at 600-90 Sparks Street, Ottawa.

DATED at Ottawa, this 12th day of October 2021.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

COUNSEL OF RECORD:

For the applicant:

The Commissioner of Competition

Jonathan Hood
Paul Klippenstein
Ellé Nekiar

For the respondent:

Secure Energy Services Inc.

Robert Kwinter
Nicole Henderson
Brian Facey

Competition Tribunal | Tribunal de la concurrence

PUBLIC VERSION

Citation: *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18
File No.: CT-2019-005
Registry Document No.: 296

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34 as amended;

BETWEEN:

Commissioner of Competition
(applicant)

and

Parrish & Heimbecker, Limited
(respondent)

Dates of hearing: January 6-7, 11-15, 19-21, and 25 and February 3-4, 2021
Before: D. Gascon J. (Chairperson), A.D. Little J. and Ms. R. Samrout
Date of Reasons for Order and Order: October 31, 2022

REASONS FOR ORDER AND ORDER

Table of Contents

I. EXECUTIVE SUMMARY

[1] On December 19, 2019, the Commissioner of Competition ("**Commissioner**") filed a Notice of Application ("**Application**") against the Respondent Parrish & Heimbecker, Limited ("**P&H**"), pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34 ("**Act**"), following the acquisition by P&H of 10 primary grain elevators ("**Elevators**") located in Western Canada ("**Transaction**"). Prior to the Transaction, these 10 Elevators were owned and operated by Louis Dreyfus Company Canada ULC ("**LDC**"), one of P&H's competitors in the grain business. In his Application, the Commissioner challenges the acquisition by P&H of one of these Elevators, namely, the LDC Elevator located on the Trans-Canada Highway in Virden, Manitoba ("**Virden Elevator**"), near the Manitoba-Saskatchewan border.

[2] The Commissioner claims that by acquiring the Virden Elevator ("**Virden Acquisition**" or "**Acquisition**"), P&H causes or is likely to cause a substantial reduction of competition in the supply of grain handling services ("**GHS**") for wheat and canola for those farms that benefited from competition between the Virden Elevator and the nearby elevator owned by P&H and located in Moosomin, Saskatchewan, also on the Trans-Canada Highway ("**Moosomin Elevator**"). The Virden Acquisition is the only portion of the Transaction challenged by the Commissioner in this Application.

[3] The Commissioner's Application alleges that the anti-competitive effects caused by the Virden Acquisition require a remedy under section 92 of the Act. The Commissioner submits that farms in the area which had previously benefited from the competition between P&H and LDC are likely to pay materially more to obtain GHS from the Moosomin and Virden Elevators, and will thus receive less money for their wheat and canola. The Commissioner maintains that canola crushing plants ("**Crushers**") and more distant Elevators are not sufficient to constrain an exercise of market power by P&H, due to higher transportation costs for farms to deliver their grain to these competitors.

[4] P&H disputes the Commissioner's position. P&H submits that the Commissioner's Application improperly defines both the relevant product market and the relevant geographic market affected by the Virden Acquisition. According to P&H, the relevant product market is the purchase of wheat or canola from the farms, as P&H does not supply GHS. As to the relevant geographic market, P&H submits that it is much broader than the Commissioner alleges since the purchase prices set by the Moosomin and Virden Elevators are influenced by rival Elevators and Crushers located far beyond the respective individual draw areas of these two Elevators. P&H contends that in the face of vigorous and effective competition from competing Elevators, as well as from canola Crushers and other direct purchasers of wheat and canola, P&H's control of the Virden Elevator gives it neither the ability nor the incentive to exercise monopsony power in any properly defined market. Hence, says P&H, the Virden Acquisition does not lessen competition substantially in any relevant market, and is not likely to do so. Moreover, P&H argues that in any event, the efficiencies that the Virden Acquisition is likely to bring about will be greater than, and will offset, the effects of any alleged lessening or prevention of competition.

[5] 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 the elements of section 92 have been satisfied.

[6] The Tribunal[1] first concludes that in the circumstances of this case, the relevant product is not the sale of GHS to farms, as alleged by the Commissioner, but the purchase of wheat and canola by P&H. The definition of the relevant product market was a fundamental point of disagreement between the parties, and was highly influential in the Tribunal's overall analysis. The Tribunal finds that the Commissioner's proposed product market is not grounded in commercial reality and in the evidence. Moreover, in this case, the "value-added" approach to product market definition advanced by the Commissioner fails on the facts, from a precedential and legal standpoint, and from a conceptual and economic perspective. Turning to the geographic market, the Tribunal is of the view that the relevant geographic market for the purchase of wheat is more likely than not to be comprised of at least the Virden, Moosomin, Fairlight, Whitewood, Oakner, Elva, and Shoal Lake Elevators. As to the relevant geographic market for the purchase of canola, it includes at least the Moosomin, Virden, Fairlight, Oakner, Whitewood, Brandon (Richardson), Melville, Souris East, Shoal Lake, and Elva Elevators, as well as the Crushers at Harrowby, Yorkton (LDC), Velva, and Yorkton (Richardson). These relevant markets are somewhat closer to the geographic markets proposed by the Commissioner but are larger than the narrow "corridor of concern" between the Moosomin and Virden Elevators that he originally identified (discussed below).

[7] The Tribunal also finds that the Commissioner has not established that the Acquisition lessens competition substantially in any relevant market, or is likely to do so. The Tribunal reaches that conclusion after finding that the Virden Acquisition does not materially reduce, and is not likely to reduce materially, the degree of price or non-price competition in the purchase of wheat and canola in the relevant geographic markets, relative to the degree that would likely have existed in the absence of the merger. In particular, the evidence shows that the price effects of the Acquisition are immaterial for the purchase of both wheat and canola, that several effective remaining competitors will remain to constrain P&H's ability to exercise market power, and that the post-merger market shares are below the 35% safe harbour threshold. The Tribunal finds that the Virden Acquisition causes some lessening of competition for the purchase of wheat, but the evidence does not allow it to conclude that such lessening reaches the substantiality level required by section 92.

[8] In light of those conclusions, the Tribunal does not need to determine the issue of efficiencies claimed by P&H. However, considering the extensive submissions made by the parties on efficiencies and the nature of the issues raised, the Tribunal addresses the matter. The Tribunal concludes that P&H has not proven, with clear and convincing evidence, that the Virden Acquisition is likely to bring about cognizable gains in efficiency. As a result, P&H would not have met its burden of demonstrating, on a balance of probabilities, that its claimed gains in efficiency would be greater than, and would offset, the anti-competitive effects of any lessening of competition resulting from the Acquisition.

---

[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.

II. INTRODUCTION AND OVERVIEW

A. The parties

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

[10] P&H is a private, family-owned Canadian agribusiness headquartered in Winnipeg, Manitoba. P&H buys many varieties of grain, including wheat and canola, from farms and sells them to customers located in Canada, Europe, Asia, and South America. P&H has vertically integrated operations spanning across Canada in grain trading, handling, and merchandising, as well as in crop inputs retail, flour milling, and feed mills. It employs over 1,500 people with customers in 24 countries. Prior to the Transaction, P&H owned 19 Elevators in Western Canada. It also has ownership interests in a number of export terminals at Canadian ports located near Vancouver, British Columbia and in Thunder Bay, Ontario.

B. The Transaction

[11] Pursuant to an asset purchase agreement dated September 3, 2019, P&H agreed to purchase from LDC 10 Elevators and related assets in Western Canada, including the Virden Elevator. On December 10, 2019, P&H and LDC closed the Transaction, bringing the total number of Elevators owned by P&H to 29. The grain volumes purchased through the former LDC Elevators in the last full crop year when they were owned and operated by LDC was 1.6 million metric tonnes ("**MT**").

[12] The Transaction is part of P&H's growth strategy. P&H claims that it will improve its efficiency and effectiveness in competing with other grain companies in Western Canada.

C. The merger provisions of the Act

[13] A merger is defined by section 91 of the Act as referring to the acquisition or establishment, by one or more persons, of "control over or significant interest in the whole or a part of a business of a competitor, supplier, customer, or other person." It is not disputed that the Transaction is a merger covered by the Act.

[14] Mergers, along with matters such as restrictive trade practices, are reviewable by the Tribunal under Part VIII of the Act if they have anti-competitive effects (*Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 ("***Tervita SCC***") at para 43). With respect to mergers, section 92 identifies these anti-competitive effects as either substantially lessening competition or substantially preventing competition. More specifically, subsection 92(1) allows the Tribunal to intervene with respect to a merger or proposed merger if it finds that the merger prevents or lessens, or is likely to prevent or lessen, competition substantially "(*a*) in a trade, industry or profession; (*b*) among the sources from which a trade, industry or profession obtains a product; (*c*) among the outlets through which a trade, industry or profession disposes of a product; or (*d*) otherwise than as described in paragraphs (*a*) to (*c*)." The Tribunal is empowered to make a remedial order when a merger is found to either lessen or prevent competition substantially.

[15] Subsection 92(2) provides that the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially "solely on the basis of evidence of concentration or market share." However, the Tribunal has found that these two factors nonetheless may help in assessing whether or not a merger or proposed merger could result in a substantial lessening or prevention of competition (*The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14 ("***Tervita CT***") at para 360, rev'd 2013 FCA 28, rev'd 2015 SCC 3; *The Commissioner of Competition v Superior Propane Inc*, 2000 Comp Trib 15 ("***Superior Propane I***") at paras 126, 304–313; *Director of Investigation and Research v Hillsdown Holdings (Canada) Ltd* (1992), 41 CPR (3d) 289 (Comp Trib) ("***Hillsdown***") at pp 315–316, 318).

[16] Section 93 sets out a non-exhaustive list of market-specific factors that the Tribunal may consider in determining whether a merger prevents or lessens, or is likely to prevent or lessen, competition substantially. These factors include the following: foreign products as effective competition; failing firm considerations; availability of acceptable substitutes; removal of a vigorous and effective competitor; barriers to entry; remaining effective competitors; and change and innovation. The list is open-ended, as it includes at paragraph (*h*) "any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger."

[17] The Act also carves out certain exceptions to the application of the Tribunal's section 92 remedial powers. One such exception, which is relevant in this case, is what is commonly named the "efficiencies defence," in section 96 of the Act. This exception provides that the Tribunal shall not make an order under section 92 if it finds that the merger in respect of which the application is made is likely to bring about efficiency gains which are greater than and likely to offset the anti-competitive effects resulting from the merger.

[18] The Commissioner bears the burden of satisfying the elements of section 92, and the Tribunal must make a positive determination in respect of those elements before it may issue a remedial order. However, as will be discussed in more detail below, P&H bears most of the burden of proof under the efficiencies defence in section 96.

[19] The burden of proof is the civil standard, that is, the balance of probabilities. In that respect, the Tribunal remains guided by the principles established in *FH v McDougall*, 2008 SCC 53 ("***McDougall***"), where the Supreme Court of Canada ("**SCC**") held that there is only one civil standard of proof in Canada, the balance of probabilities (see also *Tervita SCC* at para 66). Speaking for a unanimous court, Justice Rothstein stated in his reasons that the only legal rule in all cases is that "evidence must be scrutinized with care by the trial judge" and that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall* at paras 45–46). In all civil cases, the trier of fact "must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred" (*McDougall* at para 49).

[20] The full text of the relevant provisions of the Act is reproduced in Schedule "A" to these Reasons.

D. The parties' pleadings

[21] In his Application, the Commissioner seeks an order requiring P&H to divest either the Virden Elevator or the Moosomin Elevator, as well as an order prohibiting P&H from acquiring any Elevator in the relevant markets for a certain period of time.

[22] The Commissioner submits that the relevant product is the supply of GHS. According to the Commissioner, GHS includes the following services: the elevation, grading, and segregation of the grain performed by the Elevators, as well as the cleaning, drying, blending, and storage that may be offered. The Commissioner pleads that the relevant markets should be defined as "the supply of [GHS] for wheat and the supply of [GHS] for canola for the aggregated locations of farmers that benefited from competition between the Virden Elevator and Moosomin Elevator." The Commissioner says that there are no functional substitutes for these GHS.

[23] Turning to the geographic dimension of the relevant markets, the Commissioner pleads that the wheat and canola purchased by an Elevator usually originate from nearby farms, and that the relevant geographic market is therefore local due to transportation costs, with the most affected farms being located in a narrow corridor between the Virden and Moosomin Elevators, within a one-hour drive of each Elevator.

[24] The Commissioner contends that the Virden Acquisition causes, or is likely to cause, a substantial lessening of competition in the relevant markets, due to the elimination of an important competitor[2]. The Commissioner alleges that, with the acquisition of the Virden Elevator, P&H can unilaterally exercise enhanced market power in the relevant markets, at the expense of farms located in certain parts of Saskatchewan and Manitoba. According to the Commissioner, P&H will be able to materially raise the implicit price that farms pay for GHS for wheat and canola in the Virden-Moosomin corridor, and farmers will be paid less for their wheat and canola.

[25] The Commissioner maintains that canola Crushers and more distant Elevators are not sufficient to constrain an exercise of market power by P&H owing to higher transportation costs for farms to deliver their grain.

[26] The Commissioner further claims that several section 93 factors support these conclusions, in that: 1) Elevators and direct purchasers in other countries cannot compete directly for the purchase of wheat and canola from farms in the relevant markets because of transportation costs; 2) for the vast majority of farms in the relevant markets, there are no viable substitutes; 3) barriers to entry and expansion are high, owing to significant capital costs and difficulty finding a suitable location to build an Elevator and accompanying access to rail transportation; 4) P&H no longer intends to expand the rail car capacity at the Moosomin Elevator, which would have increased this Elevator's ability to handle more wheat and canola and the level of competition in the relevant markets; 5) the closest remaining Elevator to the Virden and Moosomin Elevators is an Elevator owned by Viterra Inc. ("**Viterra**") in Fairlight, Saskatchewan ("**Fairlight Elevator**"), but it is insufficient to constrain an exercise of market power by P&H due to its location on a secondary

[2] The Tribunal pauses to note that the Commissioner is not claiming that the Acquisition substantially prevents competition. Hence, in these Reasons, the Tribunal's analysis will be limited to the Commissioner's alleged substantial lessening of competition.

road, 35 kilometers south of the Trans-Canada Highway; 6) the Virden Elevator, which has now been removed as a competitor, was previously a vigorous and effective competitor to P&H; and 7) the market for the delivery of GHS is not subject to material change through innovation.

[27] The Commissioner adds that, even if the relevant product markets were more broadly defined to be the purchase by Elevators of wheat and canola from farms, the Acquisition still causes, or is likely to cause, a substantial lessening of competition in these product markets due to P&H's ability to materially decrease the price of wheat and canola paid to farms.

[28] P&H opposes the Commissioner's Application and asks the Tribunal to dismiss it with costs. In P&H's view, the Commissioner improperly defines both the relevant product market and the relevant geographic market. Furthermore, P&H submits that the Acquisition does not enable it to materially lower the prices it pays to farms for their wheat or canola, nor does it lead to a substantial lessening of competition in any relevant and properly defined market.

[29] P&H submits that the relevant product market is the purchase of wheat or canola. It states that, contrary to what the Commissioner advances, it does not supply GHS to farms.

[30] P&H argues that the prices it pays for grain at the Virden or Moosomin Elevators are largely dependent on global prices, which are independent of changes to the local competitive landscape around the Virden and Moosomin Elevators. According to P&H, the prices that it offers to pay farms for grain are centrally set: they are derived from the demand and prices it receives from its sales to customers in international and domestic markets, as well as by the costs to transport grain from its network of Elevators to export terminals or to domestic buyers.

[31] P&H also disagrees with the relevant geographic market as defined by the Commissioner. P&H maintains that Elevators purchase grain from farms located farther away than what the Commissioner alleges. P&H contends that the Virden and Moosomin Elevators each purchase grain from hundreds of farms mostly located outside the geographic area between these two Elevators along the Trans-Canada Highway, well beyond a one-hour drive. According to P&H, the Virden and Moosomin Elevators must purchase grain at competitive prices against many other rival Elevators whose draw areas extend farther than the narrow "corridor of concern" and the proposed geographic markets identified by the Commissioner. Therefore, in P&H's view, the relevant geographic market is much broader than the Commissioner alleges since the purchase prices set by the Moosomin and Virden Elevators are influenced by rival Elevators located far beyond the respective individual draw areas of the two Elevators at issue. P&H claims that it does not hold or exercise monopsony power in a relevant geographic market as alleged by the Commissioner, or even in the broader area of Southeastern Saskatchewan and Southwestern Manitoba.

[32] P&H contends that in the face of vigorous and effective competition from competing Elevators, as well as from canola Crushers and other direct purchasers of wheat and canola, P&H's control of the Virden Elevator gives it neither the ability nor the incentive to exercise monopsony power in any properly defined market. Rival Elevators and other purchasers within and beyond the draw areas of the Virden and Moosomin Elevators already purchase grain from farms that also sell to the Virden and Moosomin Elevators, have significant excess capacity to purchase additional

grain, and can increase their purchases from those farms at low cost. In other words, says P&H, the Virden Acquisition will not substantially lessen competition.

[33] P&H further argues that barriers to entry and expansion are low, with the result that P&H's ability to exercise any monopsony power would be constrained by the expansion of existing Elevators' purchases and/or by new entry.

[34] Moreover, even if the Virden Acquisition were found to substantially lessen competition, P&H argues that the gains in efficiency that the Acquisition is likely to bring about will be greater than, and will offset, the effects of any alleged lessening of competition. According to P&H, it will not likely attain such gains in efficiency if the Tribunal makes the orders sought by the Commissioner. The efficiencies claimed by P&H from the Acquisition include the following: improved scale economies and cost savings at the Fraser Grain Terminal ("**FGT**") located in British Columbia; elimination of the margin that LDC formerly paid to use the Vancouver export terminal owned by Kinder Morgan; output expansion and improved scale economies at the Virden Elevator; and administrative synergies.

[35] In his reply, the Commissioner opposes P&H on this last point and submits that the Virden Acquisition will not generate cognizable gains in efficiencies to the extent alleged by P&H. The Commissioner further maintains that, if the Tribunal makes the orders sought, P&H's ability to achieve the alleged efficiencies being claimed would not be impacted. In any event, the Commissioner holds that any cognizable efficiencies that P&H may obtain through the Virden Acquisition and that would be lost if the orders sought were made will not be greater than or offset the anti-competitive effects of the Acquisition.

E. Procedural history

[36] Around the time the Commissioner filed the Application in December 2019, he stated that he would request an expedited scheduling order in accordance with the Tribunal's *Practice Direction regarding an Expedited Proceeding Process before the Tribunal*, dated January 2019. Under an expedited scheduling order, an application will typically be heard by the Tribunal within five to six months after the filing of the notice of application.

[37] P&H opposed the Commissioner's request and asserted that procedural fairness concerns would arise under an expedited process. P&H proposed an alternative schedule pursuant to which the hearing would take place approximately three to four months later than the hearing dates contemplated under the expedited process.

[38] On January 13, 2020, the Tribunal denied the Commissioner's request for an expedited process (*Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 1). The Tribunal was not persuaded that in the absence of P&H's consent, the expedited process was a reasonable option given the circumstances and fairness considerations arising in this case. Moreover, the period of three to four months that could be gained with the expedited process did not justify the imposition of the process over P&H's strong objections. The Tribunal adopted the alternative schedule proposed by P&H and issued a scheduling order in early March 2020, pursuant to which the hearing of the Commissioner's Application would start in November 2020 (*Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 2

("**Scheduling Order**")). Adjustments were subsequently made to various steps of the Scheduling Order as a result of the COVID-19 pandemic. The parties nonetheless continued to work towards the November 2020 hearing dates.

[39] In October 2020, P&H advised the Tribunal that its expert was no longer available in November because of unforeseen personal circumstances. The Tribunal agreed to adjourn the hearing with the consent of both parties. Eventually, the Tribunal issued an amended Scheduling Order, pursuant to which the hearing would now proceed in early January 2021 (*Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 13).

[40] In the course of the proceedings leading up to the hearing, counsel for P&H insisted on various occasions on an in-person hearing notwithstanding the COVID-19 pandemic and the implementation of various lockdowns. While counsel for the Commissioner initially accommodated P&H's request and agreed to a hybrid hearing, the Commissioner eventually opposed the request as the pandemic worsened. In December 2020 and early January 2021, the Tribunal ordered that the hearing would take place remotely by way of videoconference using the Zoom platform (*Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 14; *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2021 Comp Trib 1).

[41] In anticipation of the hearing, the parties exchanged witness statements in accordance with the schedule fixed by the Tribunal. These witness statements included statements from farmers in Western Canada, as well as initial and reply witness statements by John Heimbecker, the Chief Executive Officer ("**CEO**") of P&H.

[42] On November 27, 2020, the Commissioner moved to strike some paragraphs of the initial witness statement of Mr. Heimbecker on the basis that it contained inadmissible hearsay and inadmissible lay opinion evidence. In December 2020, the Tribunal granted this motion in part and ordered P&H to prepare a revised witness statement from Mr. Heimbecker (*Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 15 ("***Parrish & Heimbecker***")).

[43] Initially, both parties agreed to designate the identity of their respective farmer witnesses as Confidential Level B in accordance with the Confidentiality Order issued by the Tribunal (*Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 3). As the hearing approached, however, P&H revised its position. By way of letter, P&H advised the Tribunal at the end of November 2020 that witness statements prepared by three farmers on behalf of P&H would no longer be designated confidential. Moreover, P&H expressed doubts about the merits of the Commissioner's confidentiality designations and eventually asserted that the Commissioner should file a formal motion to designate as confidential the identities of his farmer witnesses. On December 7, 2020, the Commissioner moved for an order designating the identities of five farmers as confidential.

[44] On December 29, 2020, the Tribunal dismissed the Commissioner's motion and reasons for this decision were issued in early January 2021 (*Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2021 Comp Trib 2). The Tribunal found that the Commissioner had failed to present clear and convincing evidence sufficient to satisfy the Tribunal that the

requirements for the confidentiality designations were met. Further to that decision, only three of the five farmer witnesses originally identified by the Commissioner appeared at the hearing in a public setting.

[45] The hearing was held virtually between January 6 and February 4, 2021, and the witnesses testified by videoconference in accordance with a witness protocol that was developed by the Tribunal with the parties' input.

[46] Not only was this the first virtual hearing for the Tribunal, but this was also the first time that experts testified together as part of a panel of expert witnesses formed in accordance with Rules 75 and 76 of the *Competition Tribunal Rules*, SOR/2008-141 ("**CT Rules**"). CT Rule 76 provides that the Tribunal "shall direct the manner in which the panel [of witnesses] shall testify" and that counsel can cross-examine and re-examine the witnesses. The protocol for this concurrent expert evidence session (also known as "hot-tubbing") was set out in a specific Direction issued by the Tribunal with the parties' consent.

[47] The purpose of this "hot-tubbing" process is to streamline the testimonies of expert witnesses, and to allow experts to ask questions from each other and highlight their areas of agreement and disagreement. Pursuant to the Tribunal's Direction, the experts and counsel for the parties agreed on a list of five main issues to be addressed by the experts at the concurrent evidence session, and the experts identified their areas of agreement and disagreement on each issue. The parties also exchanged short statements of each expert's proposed expertise. Each expert was granted a full and fair opportunity to present and explain their respective position on each issue, and opposing counsel were able to cross-examine the experts. A significant benefit that flowed from this concurrent evidence session was that experts were able to rapidly focus on the key areas of disagreement between them. In the view of all members of the Tribunal, the process worked well and helped the Tribunal to have a solid understanding of each expert's position, while allowing the Tribunal and the parties to narrow the disputed issues between the experts.

III. FACTUAL BACKGROUND

A. The Canadian grain industry

[48] The grain supply chain in Canada involves an interconnected network of businesses and infrastructure that moves grain from individual farms to end customers, such as companies that manufacture food or feeds. The main participants include farmers who produce grain, grain companies that purchase grain from farmers, railways that transport grain from Elevators to export terminals or to domestic customers, and export terminals where the grain is delivered for storage and shipping.

[49] Canadian farmers grow a variety of grains such as wheat, barley, soybeans, peas, and canola. The Commissioner's Application in this case focuses solely on two types of grain, namely, wheat and canola. Wheat and canola are both commodity products.

[50] Farmers can sell their wheat to Elevators, and their canola to Elevators or Crushers. For many years before 2012, when the Canadian Wheat Board ("**CWB**") was in existence, grain

companies bought wheat and barley on behalf of the CWB on a toll basis. At the time, the CWB was, by law, the sole marketer of wheat and barley for export and domestic human consumption. Grain companies then acted as the agents of and service providers to the CWB. Grain companies purchased other grains such as canola directly from farmers, without the intervention of the CWB. However, in August 2012, the CWB's role ended and grain companies ceased being service providers to the CWB. The grain companies now purchase and sell wheat and barley from farmers on their own account for sale to their own customers, as they do for other types of grain. With the end of the CWB's role as a sole purchaser of certain grain, the historical tariffs and fees that had been in place for the service provided by grain companies ended. But, as will be discussed below, the heritage from the CWB days has an impact on certain purchasing and selling practices in the grain business.

[51] Canadian grain companies sell grain domestically or to overseas customers by transporting it by rail to export terminals located at Canadian ports. At the export terminals (and at some local Elevators), grain is segregated by type and quality attributes, stored, blended, and loaded onto vessels.

[52] In addition to P&H, there are several major grain companies that purchase wheat and canola in competition with P&H in Western Canada. The two largest are Viterra and Richardson International Limited ("**Richardson**"). Viterra is a privately-held subsidiary of Glencore, a British-Swiss multinational corporation; it has 79 Elevators and six port facilities across Canada and parts of the United States ("**U.S.**"). Richardson is a privately-held Canadian subsidiary of James Richardson & Sons, Limited which owns 73 grain Elevators and has ownership or partnership interests in the largest three grain terminals in Canada.

[53] Other major grain companies operating in Western Canada include Cargill Limited ("**Cargill**"), Paterson Grain Limited ("**Paterson**"), Ceres Global Ag Corp. ("**Ceres**"), Bunge Ltd ("**Bunge**"), Archer-Daniels-Midland Limited ("**ADM**"), and G3 Canada Limited ("**G3**"). Cargill is a vertically-integrated company with 31 Elevators and port terminals across Canada. Paterson operates more than 40 Elevators whereas G3 has 17 Elevators and four export terminals.

[54] In addition to these major players, other local grain companies such as GrainsConnect Canada also compete in Western Canada.

B. Elevators and Crushers

[55] Elevators are designed to stockpile and store the grain they purchase from spatially dispersed farms. The Elevators, upon receiving the grain from a farm, will grade it, elevate it, and segregate it; they may also clean, blend, dry, and store the grain at the Elevator until a railcar or a truck comes to take the grain to its next destination. This is what the Commissioner refers to as GHS. Elevators' staff will typically examine grain samples from the farms' trucks, assess for dockage as needed, grade the grain, unload the trucks delivering the grain, elevate the grain to the appropriate storage bins, store the grain and keep it in condition, blend the grain as appropriate, assist with weighover (i.e., inventory counts), dry the grain as needed, prepare cash settlements for farms, and load the grain into railcars for shipment to a port terminal or to a further processing mill such as flour mills. Grain companies incur costs for those activities, such as costs related to any

cleaning or drying, transportation from Elevators to export terminals or domestic locations, developing export and domestic customers, and managing risk with respect to fluctuations in exchange rates and commodity prices.

[56] Grain is graded in accordance with the Official Grain Grading Guide published by the Canadian Grain Commission ("**CGC**"). A grading factor is a physical condition of grain that indicates a certain quality level. For wheat, the highest quality grade under the CGC's classification system is grade 1 Canadian Western Red Spring Wheat ("**1CWRS**"). Turning to canola, the most common grade for harvested canola is 1CAN CANOLA. In the case of wheat, the protein content also affects the price. The base protein content commonly used by grain companies is 13.5%, and a higher protein wheat commands a higher price relative to 1CWRS 13.5. Protein spreads reflect the cash price adjustments (either up or down from the cash price for 1CWRS 13.5) based on the protein content of the wheat.

[57] Elevators have varying grain storage capacities. The storage capacity of P&H's Elevators ranges from 22,000 MT at the Glossop Elevator (located in Glossop, Manitoba) to 106,000 MT at the Weyburn Elevator (located in Weyburn, Saskatchewan).

[58] Elevators are often located close to railways, as the grain is typically loaded onto railcars and transported by rail. The term "rail car spots" is commonly used within the industry and refers to the number of railcars at an Elevator that can be accommodated for loading on a sidetrack (or spur line) off the main track line.

C. Farms

[59] Even though some farms will have storage and elevating capacity, farms typically rely on Elevators as they could not achieve the same efficiencies in moving their grain from the farm to the domestic customers or to export terminals for delivery to international end customers. Farms can sell their wheat and canola to multiple grain companies and are offered prices by Elevators and Crushers for their grain.

[60] In most instances, farms are responsible for hauling their grain to the Elevators. Some farms have their own trucks to transport their grain, while others employ commercial trucking companies to load, ship, and unload their grain. In certain circumstances, some Elevators or Crushers might offer pick-up service, which is charged to farms through a trucking allowance.

[61] The transportation costs incurred by farms to bring their grain to an Elevator will vary with distance but also with travel time, road conditions, and seasonal road weight restrictions that may affect certain secondary roads. All else being equal, most farms prefer to sell their grain to closer Elevators.

D. Pricing and contracts

[62] Grain companies such as P&H buy wheat or canola at their Elevators by paying farms a "net" or "cash" price for their grain ("**Cash Price**" or "**CP**"). The Cash Price is also sometimes referred to as the "flat" or "bid" price for the grain. No matter how it is worded or expressed, the

Cash Price represents the actual amount of money (per MT or per bushel) received by a farm for the net quantity of grain delivered and sold at an Elevator. P&H posts its Cash Price for grain for each of its Elevators. Farms can also use P&H's mobile application, named "P&H Direct," to see the Cash Prices at each of P&H's Elevators across Western Canada.

[63] The price of grain can be expressed in terms of dollars per MT or dollars per bushel. There are 36.744 bushels of wheat to the MT and 44.092 bushels of canola to the MT.

[64] The Cash Price that a farmer receives for grain is comprised of two components: the futures price ("**Futures Price**" or "**FP**") and what is commonly known in the grain industry as the "basis." The term "basis" refers to the difference between the Futures Price and the Cash Price ("**Basis**" or "**B**")[3].

[65] The Futures Price reflects the global commodity market price for the grain, set by global supply and demand forces. Neither the farms nor the Elevators have control over the Futures Prices, as these are global commodity prices. The world Futures Prices for wheat and canola are determinative of P&H's prices for those commodities. For wheat, P&H uses the Minneapolis Hard Red Spring wheat futures contract price for CWRS. This price trades in U.S. dollars ("**USD**") per MT. For canola, P&H uses the Intercontinental Exchange futures price for canola in Saskatchewan. This price trades in Canadian dollars ("**CAD**") per MT. Grain companies (including P&H) typically use 1CWRS as their base grade for wheat pricing and 1CAN CANOLA as their base grade for canola pricing.

[66] While both the Commissioner and P&H agree that the Cash Price, the Futures Price and the Basis are the three components of the pricing process for grain, they fundamentally disagree on the interrelation between these three components. The Commissioner claims that P&H has no control over the Futures Price and sets the Basis, and that the Cash Price paid to farms is the resulting amount. In other words, the Commissioner argues that FP - B = CP. P&H instead argues that the Basis numerically results from the difference between the Cash Price it sets and the Futures Price over which it has no control. In sum, P&H submits that FP - CP = B. The Commissioner claims that the relevant price for the purposes of a competition analysis is the price for GHS — which, he says, equates to the Basis —, whereas P&H is of the view that the relevant price is the Cash Price effectively paid to the farms.

[67] Farms can sell and deliver their grain at different times throughout the year and they can sell a portion of their crop before it is harvested. Some farms can store some or all of their grain on their farm if they have the proper elevating capacity, which allows them to sell their grain at a time of their choosing.

[68] The Cash Price ultimately received by the farms can sometimes be adjusted upwards when Elevators offer limited-tonne or limited-time pricing "specials" to fill remaining space in a train or a vessel or to obtain additional grain supplies to meet sales commitments. From time to time, the Cash Price or the Basis can also be adjusted to reflect individual negotiations between farms and the Elevators. P&H estimates that this occurs in approximately [redacted] of its grain purchase transactions.

[3] In his oral and written submissions, the Commissioner often refers to the Basis as the "basis price."

[69] In terms of contracts with Elevators and Crushers, farms can enter into different types of agreements to sell their grain. They can enter into fixed price contracts, grain pricing order agreements ("**GPOs**") — also known as grain purchase orders or target contracts —, and basis contracts.

[70] Under a fixed price contract, the Cash Price, Futures Price and Basis are fixed. Similarly, the quantity and quality of grain to be delivered, as well as the delivery period, are determined in the fixed price contract. Fixed price contracts are used for forward or deferred delivery purchase transactions as well as for spot purchase transactions. Forward or deferred delivery refers to a delivery of grain at some point in the future. Farms can enter into forward or deferred delivery contracts to deliver a specific quantity and quality of grain to an Elevator for an agreed Cash Price within a prescribed delivery window in the future. In P&H's fixed price contracts, the Cash Price appears as the "net" price.

[71] Under a GPO, a farm sets a targeted Cash Price above an Elevator's posted Cash Price ("**Target Cash Price**") at which the farm agrees to sell and deliver to that Elevator a specific type of grain in a specified delivery month. If the Elevator's posted Cash Price reaches a farm's Target Cash Price, the GPO is triggered and the Elevator must purchase the farm's grain at the Target Cash Price. If a GPO is triggered, it becomes a fixed price contract. Farms always keep the option to amend or cancel a GPO at any time before it is triggered. A farm chooses the expiry date for the GPO, which may be in effect for days, weeks, or months.

[72] The third type of agreement that farms can enter into is a basis contract. Under such a contract, the Basis is agreed upon and fixed in the contract, but the Futures Price for contracting purposes is taken from the international markets and fixed by the farms' actions at a later date. Such agreements allow farms to lock in what they consider to be a favorable Basis. Under a basis contract, the quantity and quality of grain to be delivered, as well as the delivery period, are set, but the Cash Price is determined once the farm triggers the basis contract, which sets the Futures Price.

[73] When P&H buys wheat or canola from a farm, it takes title to the grain at the time the farm delivers the grain to the Elevator. At that point in time, the farm receives the contracted Cash Price for its grain and ownership of the grain then passes to P&H. The Cash Price may be adjusted at the time of delivery of the grain to the Elevator if the quality of the wheat or canola delivered is different from the quality the parties had agreed upon in the contract.

E. P&H's business

[74] P&H operates within the grain business by buying and selling grain for its own account throughout the crop year, which spans from August 1 to July 31 of the following year.

[75] P&H buys wheat and canola from farmers via a network of 29 Elevators located throughout Western Canada, including the Moosomin Elevator and the 10 Elevators purchased from LDC in December 2019. P&H's 29 Elevators are the entry points to its grain network in Western Canada.

[76] P&H sells the varieties of grain it purchases, such as wheat and canola, to customers located in Canada, Europe, Asia, and South America. Just over half of P&H's total wheat and canola sales are for export. P&H's export customers pay for wheat and canola at the Canadian port.

[77] In order to move the wheat and canola it sells to its customers located overseas, P&H utilizes the rail network to ship grain from its Elevators in Western Canada to its export terminals located on the West Coast and in Thunder Bay, Ontario.

[78] P&H has an interest in three export terminals located near Vancouver in British Columbia, namely, the Alliance Grain Terminal ("**AGT**"), the Fraser Surrey Docks ("**FSD**"), and the FGT, where P&H has recently invested [redacted]. P&H also has an interest in the Superior terminal located in the port of Thunder Bay in Ontario ("**Superior**"). The vast majority of grain exported by P&H moves through its export terminals. The storage capacities are 102,000 MT at AGT, 18,000 MT at FSD, 176,000 MT at Superior, and 92,000 MT at FGT, where P&H has a partial entitlement to storage and throughput capacity.

[79] Export terminals are used to receive grain from rail, segregate and store grain by type and quality attributes, clean grain when required, blend grain, and load grain onto vessels. As with other commodities, wheat and canola of the same grade received from different P&H Elevators are commingled at the terminals. The cleaning and blending of grain occur principally at P&H's export terminals, rather than at its Elevators, given the greater economies of scale available at these terminals.

[80] P&H also operates a milling group that sources Canadian wheat to produce flour and cereal products. P&H moves the wheat supplied to its milling group by rail or truck from its Elevators to its mills in Western and Eastern Canada.

[81] Additionally, P&H operates a Crop Inputs and Services business, which supplies fertilizer, seed, and pesticides as well as agronomic services to farms through dual crop inputs and grain facilities at its Elevators across Canada. P&H has a "one-stop-shop" crop inputs retail and grain purchase business model. The former LDC Elevators purchased by P&H did not offer crop inputs services.

[82] P&H's audited consolidated financial statements for the 2018 fiscal year indicate that, across all of its lines of businesses, it generated consolidated revenues of approximately [redacted] and gross profit of [redacted]. By comparison, P&H reported consolidated revenues of approximately [redacted] and gross profit of [redacted] for the 2017 fiscal year.

[83] In March of every year, P&H sets its annual grain-purchasing budget for Western Canada for the upcoming fiscal year, which begins on May 1 of each year. Its grain purchase targets aim to increase P&H's total grain volumes and share over time.

F. The Moosomin and Virden Elevators

[84] Prior to the Transaction, P&H and LDC respectively owned and operated the Moosomin Elevator and the Virden Elevator, located in proximity to one another near the Manitoba-

Saskatchewan border. Then, LDC would send grain from the Virden Elevator westward by rail to its export terminals on the West Coast. Following the Transaction, these two Elevators were re-assigned to P&H's Thunder Bay catchment area, meaning that the grain purchased by these Elevators is shipped to the Superior terminal in Thunder Bay. However, the Moosomin Elevator, which is located west of the Virden Elevator, is also in a position to ship grain to P&H's West Coast terminals.

[85] For rail transportation, the Moosomin Elevator has 56-car spots while the Virden Elevator has 112-car spots. In terms of storage capacity, the Moosomin Elevator has a capacity of 26,000 MT and an annual throughput capacity in the range of [redacted] MT. For its part, the Virden Elevator has a storage capacity of 46,000 MT and an annual throughput capacity in the same range of [redacted] MT.

IV. EVIDENCE – OVERVIEW

[86] Over the course of the hearing, the Tribunal heard from 16 lay witnesses and three expert witnesses. Over 250 exhibits were filed.

A. Fact witnesses

(1) The Commissioner

[87] The Commissioner led evidence from three farmer witnesses located in Manitoba or Saskatchewan, namely:

- Alistair Pethick: Mr. Pethick and his brother operate a farm located in McAuley, Manitoba. They mainly grow wheat and canola, but also soybeans, oats, and hay as well as other speciality crops in some years. Mr. Pethick sold his wheat to the Moosomin, Virden, and Fairlight Elevators, as well as to the Ceres Elevator located in Northgate, Manitoba;

- Chris Lincoln: Mr. Lincoln and his family own and operate two farms located in Maryfield and Wawota, Saskatchewan. They grow wheat and canola. Mr. Lincoln's farms have the capacity to store 80-85% of his grain. The Fairlight Elevator operated by Viterra is the closest Elevator to Mr. Lincoln's farms. Since harvesting his crops in November 2019, Mr. Lincoln has sold all his crop to the Fairlight Elevator. In 2018, he sold 20% of his commodity crop to the Virden Elevator and the balance to the Fairlight Elevator; and

- Ian Wagstaff: Mr. Wagstaff owns a 6,000-acre farm approximately two miles south of Manson, Manitoba. He is a wheat and canola farmer. He harvests approximately 100,000 bushels of wheat and canola per year. Mr. Wagstaff can store 60,000 to 70,000 bushels of wheat at his farm, meaning that he must sell approximately 25-30% of his crop at harvest time. In the past two years, he has sold most of his crop to the Virden Elevator.

[88] The Commissioner had two other farmer witnesses, [redacted] and [redacted], who decided not to testify in public at the hearing. However, the parties filed an agreed statement of facts regarding the testimonies of these two farmer witnesses.

[89] The Commissioner also led evidence from Harvey Brooks, who is the General Manager of the Saskatchewan Wheat Development Commission ("**Sask Wheat**"). Sask Wheat is a producer-led organization established to grow Saskatchewan's wheat industry through research, market development, and advocacy. Mr. Brooks has been General Manager of Sask Wheat since 2014. Prior to joining Sask Wheat, Mr. Brooks served as Deputy Minister of Agriculture for the Government of Saskatchewan, Director of Policy and Economic research with the Saskatchewan Wheat Pool, and Head of Corporate Policy at the CWB. He holds a Ph.D. in Economics from Iowa State University and a Masters degree in Agricultural Economics from the University of Saskatchewan.

[90] Eight representatives of grain companies other than P&H also testified before the Tribunal for the Commissioner. These companies had provided data to the Commissioner during his investigation of the Transaction. These witnesses were:

- Dean McQueen: Mr. McQueen is the Vice President, Grain Merchandising and Transportation (North America) at Viterra. Viterra markets and handles grain, oilseeds, and pulses. It operates grain elevators and special crop facilities, port terminals, and processing facilities. Mr. McQueen is responsible for overseeing the merchandising and transportation of grain, oilseeds, and pulses, including procurement, through the Viterra country grain Elevator network;

- Ray Elliot: Mr. Elliot is a Manager for Seed Procurement at Bunge's Harrowby Crusher facility located in Russell, Manitoba. Bunge is an agribusiness and food company that buys oilseeds and softseeds from producers and sells finished products to customers. Mr. Elliot is responsible for managing all the seed purchases for Bunge's crushing plants in Western Canada;

- Brett Malkoske: Mr. Malkoske is the Chief Financial Officer of G3. He previously was the Vice President of Business Development and Communications at G3, where he was responsible for external communications and facilitating the development and execution of G3's strategic plans in Canada;

- Darcy Jordan: Ms. Jordan has been a Management Accounting and Reporting Senior Analyst at Cargill since 2019. Cargill is a merchandiser and processor involved in crop inputs product retailing, grain handling, milling, salt distribution, and merchandising. In her role, Ms. Jordan is responsible for Cargill's management reporting, supporting the Manitoba region for margins, and implementing the controls framework and profit and loss statements;

- Kara Hawryluk: Ms. Hawryluk is the Canada Operational Controller at LDC. Along with its parent company Louis Dreyfus Company B.V., LDC is a global merchant and processor of agricultural goods. Ms. Hawryluk is responsible for working with LDC's commercial

and operational teams to ensure timely and accurate reporting of Elevator and trading information;

- Jeff Wildeman: Mr. Wildeman is the Origination and Supply Chain Solutions Manager at Ceres. Ceres is involved in the procurement and provision of North American agricultural commodities, industrial products, fertilizers, energy products, and supply chain logistics services. Mr. Wildeman is responsible for the origination of Canadian agricultural commodities for Ceres's grain merchandising operations;

- Mark Irons: Mr. Irons is the Vice-President, Softseed Crush for ADM, an American global food processing and commodities trading corporation. Mr. Irons oversees the management of commercial activities related to ADM's softseed crush assets in North America; and

- Bryce Geddes: Mr. Geddes is a Marketing Specialist at Richardson, a worldwide handler and merchandiser of major grains and oilseeds, and a vertically integrated processor and manufacturer of oats and canola-based products. Mr. Geddes is responsible for collecting and analyzing transactional data for Western Canadian markets in which Richardson conducts its grain and crop inputs businesses.

[91] The Tribunal notes that the Commissioner obtained data from nine grain handling companies including 15 Elevators and five Crushers. This data was used in the preparation of the expert evidence filed by the Commissioner.

[92] The Tribunal generally found the Commissioner's farmer witnesses and Mr. Brooks to be credible, forthright, helpful, and impartial. They were knowledgeable about their respective businesses and farm operations. With respect to the representatives of competing grain companies and Crushers, the Tribunal found that these witnesses were reliable and gave no reasons to doubt the accuracy of the transaction data they provided.

(2) P&H

[93] Turning to P&H, it led evidence from the following three farmer witnesses, who are all based within the Commissioner's proposed geographic market and his narrower "corridor of concern" in Manitoba and Saskatchewan:

- Kristjan Hebert: Mr. Hebert owns a 22,000-acre farm located in Fairlight, Saskatchewan, which is operated through Hebert Grain Ventures. Mr. Hebert grows wheat and canola as well as malt barley, hybrid rye, and yellow peas;

- Tim Duncan: Mr. Duncan owns and operates an approximately 3,000-acre farm located west of Cromer, Manitoba. He grows wheat, canola, and oats. From year-to-year, he will also grow barley, peas, and/or soybeans; and

- Edward Paull: Mr. Paull owns and operates an approximately 3,400-acre farm located 4.5 miles outside of Elkhorn, Manitoba, a town located between the Moosomin and Virden Elevators. He grows wheat and canola every year.

[94] Mr. Heimbecker, the CEO of P&H, also testified at the hearing and was the only witness representing P&H itself. In addition to being CEO, Mr. Heimbecker is the President of P&H's Grain Division Canada. Mr. Heimbecker has been at P&H and in the grain business for his entire professional career, which started in May 1987. He was named CEO of P&H in September 2019. As President of Grain Division Canada, he is in charge of P&H's grain business for all of Canada. Mr. Heimbecker also acted as P&H's main witness on the issue of efficiencies.

[95] As was the case for the Commissioner's farmer witnesses, the Tribunal generally found P&H's farmer witnesses to be credible, forthcoming, helpful, and impartial. As to Mr. Heimbecker, the Tribunal also found him forthcoming and knowledgeable about P&H's business. The Tribunal, however, observes that Mr. Heimbecker was not close to the day-to-day operations of P&H's Elevators, and was of more limited assistance to the panel in this respect. In addition, some of his evidence was distinctly oriented towards a successful outcome for P&H in this proceeding and was therefore less helpful to the Tribunal in such instances.

B. Expert witnesses

[96] Three expert witnesses provided expert reports and testified at the hearing.

(1) The Commissioner

[97] Dr. Nathan Miller and Mr. Andrew Harington testified on behalf of the Commissioner.

(a) Dr. Miller

[98] Dr. Miller is the Saleh Romeih Associate Professor at the McDonough School of Business at Georgetown University in Washington, DC. He holds a B.A. in Economics and History from the University of Virginia and a Ph.D. in Economics from the University of California at Berkeley. He served as a Visiting Professor at Toulouse School of Economics in 2019-2020. Prior to joining Georgetown University in 2013, he served as a Staff Economist in the U.S. Department of Justice from 2008 to 2013. Dr. Miller's area of expertise is in industrial organization, with a specialization in antitrust economics and a focus on collusion and the competitive effects of mergers.

[99] The Commissioner asked Dr. Miller to prepare a report examining the competitive effects and the deadweight loss ("**DWL**"), if any, with respect to the acquisition of grain Elevators and related assets from LDC by P&H (namely, the Transaction). His report focused specifically on the Virden Acquisition. Dr. Miller was also asked to reply to the report filed by P&H's expert, Ms. Margaret Sanderson, in response to his initial expert report.

[100] With the parties' agreement, Dr. Miller was accepted as an expert qualified to give opinion evidence in industrial organization and competition law economics. The Tribunal generally found Dr. Miller to be credible, forthright, objective, and impartial. Dr. Miller was a cooperative witness and explained his models and analyses with clarity.

(b) Mr. Harington

[101] Mr. Harington is a Chartered Professional Accountant, a Chartered Financial Analyst charterholder, and a Chartered Business Valuator. He is a Principal in the Toronto office of The Brattle Group, an economic consulting firm with offices around the world. Mr. Harington has provided business and intellectual property valuation and merger and acquisition advisory services for over 25 years.

[102] Mr. Harington's mandate was to comment on the witness statements of Mr. Heimbecker as they relate to an assessment of efficiencies under section 96 of the Act. Mr. Harington was asked in particular to comment on whether, and if so the extent to which, the efficiencies that Mr. Heimbecker identified are cognizable under section 96 of the Act and would likely be lost if the Tribunal made the orders sought by the Commissioner.

[103] At the hearing, Mr. Harington was qualified as an expert in the quantification of efficiencies. The Tribunal found Mr. Harington to be credible, forthright, objective, and impartial, as well as willing to acknowledge the weaknesses/shortcomings in his own evidence or in the Commissioner's case. He was a reliable and knowledgeable expert.

(2) P&H

[104] Ms. Margaret Sanderson appeared on behalf of P&H as an expert witness.

[105] Ms. Sanderson is the Vice President and the global practice leader of the Competition and Antitrust Economics practice for the consulting firm Charles River Associates International Limited, a multinational firm that provides economic, financial, and business strategy consulting. She holds a M.A. in Economics and a B.Sc. in Economics and Quantitative Methods from the University of Toronto. Prior to joining Charles River Associates, Ms. Sanderson was Assistant Deputy Director of Investigation and Research within the Economics and International Affairs Branch of the Competition Bureau. She has 30 years of experience addressing the competitive effects of mergers and other firm conduct.

[106] Ms. Sanderson's mandate was to provide her opinion on the likely anti-competitive effects of P&H's Acquisition of the Virden Elevator and to respond to the initial expert report of Dr. Miller.

[107] With the parties' agreement, Ms. Sanderson was accepted as an expert qualified to give opinion evidence in industrial organization and competition law economics. The Tribunal generally found Ms. Sanderson to be credible, forthright, objective, and impartial. Ms. Sanderson was helpful to the panel in her explanations.

C. Documentary evidence

[108] The list of exhibits that were admitted in this proceeding is attached as Schedule "B" to these Reasons.

V. PRELIMINARY ISSUES

[109] At the hearing, counsel for P&H raised issues regarding the Commissioner's evidence and obligations in these proceedings. These preliminary matters must be addressed before dealing with the main issues in dispute in the Commissioner's Application. They are as follows: 1) challenges to the evidence provided by the Commissioner's experts; 2) adverse inferences and the Commissioner's duty of fairness and obligations regarding the gathering of evidence; and 3) the legal burden of proof in this Application. Each will be dealt with in turn.

A. Challenges to the Commissioner's experts

(1) Mr. Harington's evidence

[110] At the hearing, P&H challenged a number of paragraphs found in Mr. Harington's expert report on the issue of efficiencies. In particular, P&H asked the Tribunal to strike or give no weight to approximately 49 paragraphs of Mr. Harington's report, on the basis that they express opinions of law related to statutory construction or the interpretation of cases. P&H further asserted that a number of other paragraphs of Mr. Harington's expert report constitute inappropriate legal opinion evidence or inappropriate hearsay evidence related to the grain industry.

[111] The Commissioner responds that none of the challenged paragraphs should be struck. He submits that Mr. Harington set out his understanding of the legal framework as it informed his opinion on efficiencies. With respect to P&H's claim that some paragraphs of Mr. Harington's report should be struck because they constitute opinion evidence related to the grain industry, the Commissioner explains that efficiencies and economic experts need to set out their factual understanding of the industry before they can give their opinion. The Commissioner further notes that in this case, Mr. Harington cited all sources in support of the factual statements contained in his report.

[112] For the reasons that follow, the Tribunal agrees in part with P&H and will give limited weight to the legal opinions expressed by Mr. Harington as part of his expert report.

[113] As the Tribunal noted in *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 ("***VAA CT***"), it has consistently applied the principles articulated by the SCC in *R v Mohan*, [1994] 2 SCR 9 ("***Mohan***") and its progeny when it is tasked with determining the admissibility of expert evidence (*VAA CT* at para 107). In *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 ("***White Burgess***"), the SCC set out a two-step test for determining the admissibility of expert evidence. It held that in order to be admissible, expert opinion evidence must first meet the four threshold requirements established in *Mohan*, namely, relevance, necessity in assisting the trier of fact, absence of any exclusionary rule, and a properly qualified expert. At the second step, the decision maker engages in a balancing exercise and weighs the potential benefits of admitting the proposed evidence against the risks.

[114] It is well recognized that, under the principle of "necessity," expert evidence must provide the courts with information that is considered as being "outside the experience and knowledge of a judge" (*Mohan* at p 23). The proposed expert opinion evidence must be necessary to assist the

trier of fact, bearing in mind that necessity should not be judged strictly. This is notably the case where the expert evidence is needed to assist a court or a tribunal due to the technical nature of the issues at stake, or where the expertise is required to enable the decision maker 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.

[115] Experts, however, must not substitute themselves for the trier of fact (*Mohan* at p 24). As the Tribunal stated in *VAA CT*, "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" (*VAA CT* at para 109, referring to *Quebec (Attorney General) v Canada*, 2008 FC 713 at para 161, aff'd 2009 FCA 361, 2011 SCC 11 and to *Mohan* at p 24). In sum, expert witnesses are not entitled to opine on legal matters, which fall within the scope of the court or Tribunal's experience and knowledge. An expert opinion that is analogous to a memorandum of fact and law can become inadmissible as it "merely summarizes legal decisions, offers legal submissions on those decisions, and then expresses the author's personal views on the ultimate issue that is for this Court to decide" (*Es-Sayyid v Canada (Public Safety and Emergency Preparedness)*, 2012 FCA 59 at para 41). The closer the expert evidence approaches an opinion on the ultimate issue to be decided, the stricter the application of the principle will be.

[116] In many paragraphs of his expert report, Mr. Harington examines in detail the framework for quantifying cognizable efficiencies under section 96 of the Act. He does an extensive review of the provisions of the Act, of the case law, and of the Competition Bureau's 2011 *Merger Enforcement Guidelines*, Competition Bureau Canada, October 6, 2011 ("**2011 MEGs**")[4]. Relying on these legal sources, he provides his interpretation of section 96 of the Act dealing with efficiencies.

[117] It is not disputed that Mr. Harington is not a legal expert. The Tribunal agrees with P&H that the impugned paragraphs of his report constitute legal conclusions and opinion on an important issue that is up to the Tribunal to decide upon, namely, efficiencies. There is no doubt that the interpretation of section 96 and the determination of the proper legal framework to assess the efficiencies defence advanced by P&H falls within the Tribunal's experience, expertise, and knowledge. The legal opinion expressed by Mr. Harington on this issue, strictly speaking, intrudes on the role and functions of the Tribunal.

[118] At the same time, the Tribunal acknowledges the extensive and well-recognized experience and expertise of Mr. Harington regarding the complex issue of efficiencies in merger reviews. Section 96 of the Act is a very technical provision and the Tribunal appreciates that Mr. Harington's comments on how the jurisprudence has been thought through were made to provide the background of his analysis and to help the panel understand his reasoning. The Tribunal accepts that it would have been difficult for Mr. Harington to prepare his expert report and offer his opinion on P&H's claimed efficiencies without providing some legal assumptions or basis to anchor his assessment of the particular facts in this case. In these circumstances, the Tribunal will not declare the impugned paragraphs of Mr. Harington's report inadmissible as they are necessary to understand his opinion on efficiencies, but it will give them limited weight in the determination

[4] In these Reasons, the word "**MEGs**" will also be used to refer to the Competition Bureau's merger guidelines more generally.

that the Tribunal is called upon to make on the appropriate legal framework under section 96 of the Act.

[119] Turning to P&H's complaint about Mr. Harington's comments on the Canadian grain industry, the Tribunal accepts that Mr. Harington is not a grain industry expert. The Commissioner was indeed not offering Mr. Harington's evidence as such. However, the Tribunal is satisfied that, in making comments on the grain industry in his expert report, Mr. Harington was simply providing his factual understanding of the grain industry based on the documents contained in the evidence. P&H also had an opportunity to cross-examine him to expose the limits of his knowledge on this front. The factual references to the grain industry made by Mr. Harington are grounded on various portions of the evidence, and the Tribunal is not convinced that they should be declared inadmissible or given no weight. The Tribunal is not accepting what Mr. Harington says on the grain industry as a fact. It is simply taking note of the factual sources Mr. Harington relied on for his opinions.

(2) Objectivity of the Commissioner's experts

[120] P&H also asserted in its closing submissions that Dr. Miller failed to provide his expert opinion in an objective manner because he advanced a product market based on GHS, without examining the possibility of alternative product markets. P&H further submitted that neither Dr. Miller nor Mr. Harington opined objectively in their expert reports because of what it termed "their speculative approach" to what has occurred since the Transaction was completed. Echoing an observation made by Justice Moldaver (then at the Ontario Court (General Division)) in *R v Clarke Transport Canada Inc*, 1995 CanLII 7327, P&H claimed that the Commissioner's experts were "hired guns."

[121] The Tribunal does not agree.

[122] Nothing in Dr. Miller's and Mr. Harington's expert reports and testimonies, including in their respective cross-examinations, allows the Tribunal to conclude that these two experts did not provide their evidence objectively and in an impartial manner. Experts have a duty to provide independent assistance to a court at common law (*White Burgess* at para 26). Like many courts at the federal level and in provinces and territories, the Tribunal has also provided explicit guidance on the duty of experts by issuing its *Notice on Acknowledgement of Expert Witnesses* in December 2010. Pursuant to that Notice, experts appearing before the Tribunal have the obligation to sign a form acknowledging that they will comply with the Tribunal's code of conduct for expert witnesses.

[123] The Tribunal's code of conduct provides that experts must assist the Tribunal impartially, that they must be independent and objective, and that their role should not be conflated with that of an advocate for a party. In the Tribunal's opinion, this is exactly what both Dr. Miller and Mr. Harington have done in this case. P&H's claim that they were "hired guns" is entirely without merit and finds no support in the evidence heard by the Tribunal in this case.

B. The Commissioner's duty of fairness and adverse inferences

[124] A second area of preliminary issues relates to the Commissioner's duty of fairness and his obligations regarding the gathering of evidence in the context of this Application. More specifically, P&H asked the Tribunal to draw adverse inferences against the Commissioner. P&H's position is two-fold. First, P&H submitted that the Tribunal should draw an adverse inference against the Commissioner "generally" in this proceeding. Second, P&H argued that an adverse inference should be drawn against the Commissioner because he failed to obtain and produce evidence that was "peculiarly" within his power with respect to subsection 96(3) of the Act on efficiencies and the counterfactual test established in subsection 96(1).

[125] In its written submissions, P&H submitted that there are some circumstances in which a party who bears a burden of proof is not the party best situated to adduce the evidence related to the issue at stake, because the relevant facts lie particularly within the knowledge of the other party. The failure of a party to adduce evidence within its power may be considered as a matter of evidentiary weight and can lead to an adverse inference against it. In support of its position, P&H relied on the SCC's decision in *R v Jolivet*, 2000 SCC 29 ("***Jolivet***").

[126] P&H argued that in weighing the evidence in the record in this Application generally, and more specifically under section 96, the Tribunal must be "alive to what evidence is not in the record." P&H maintained that, if there are gaps in the evidence, and the missing evidence was uniquely within the ability of the Commissioner to obtain, the Tribunal should weigh this consideration and be prepared to draw an adverse inference that such evidence, had it been produced, would not support the Commissioner's position with respect to the Application generally and to efficiencies under section 96.

[127] In addition to the legal principles set out in *Jolivet*, P&H also referred to Tribunal decisions which, according to P&H, established a general duty of fairness owed by the Commissioner during proceedings under the Act (*Commissioner of Competition v Canada Pipe Company*, 2004 Comp Trib 2 ("***Canada Pipe 2004***") at paras 60–64, aff'd 2004 FCA 76; see also *Commissioner of Competition v Canada Pipe Company*, 2003 Comp Trib 15 ("***Canada Pipe 2003***") at para 53).

[128] During cross-examination of the Commissioner's witnesses, counsel for P&H posed questions designed to show that the witnesses had additional documents, or information, or both, that the Commissioner had not elected to obtain and disclose, or had not included in the individual's witness statement.

[129] During oral argument at the hearing, P&H further submitted that while the Commissioner had collected documents from the merging parties, made market contacts, and collected data from grain companies and Crushers prior to commencing this proceeding, the more important question was what the Commissioner did not obtain and file before the Tribunal. P&H contended that the Commissioner did not request nor obtain, from the grain companies or Crushers, any contemporary business documents related to market shares, markets, rail capacity and expansions, excess capacity, barriers to entry, or competition generally. According to P&H, it was incumbent on the Commissioner, acting in the public interest, to investigate the matter fully before commencing this proceeding and to put a full and proper evidentiary record before the Tribunal. The Commissioner

having failed to ask for and obtain the evidence, P&H claims that an adverse inference should be drawn by the Tribunal against him.

[130] Not surprisingly, the Commissioner disagrees with P&H's submissions. During the hearing, the Commissioner submitted that he had complied with his obligations. The Commissioner disagreed with P&H's characterization of Justice Blanchard's reasons in *Canada Pipe 2004* because in that case, the Tribunal considered the 1994 *Competition Tribunal Rules*, SOR/94-290, which are no longer in effect. Relying on *McIlvenna v Viebig*, 2012 BCSC 218, aff'd 2013 BCCA 411, the Commissioner argued that the decision to draw an adverse inference is discretionary and should not occur unless it is warranted in all the circumstances.

[131] At the hearing, the Commissioner further argued that *Jolivet* was a criminal case about whether the Crown's failure to call a witness at a criminal trial could be the subject of comment in the address to a jury by defence counsel. In the Commissioner's submission, the decision in *Jolivet* confirmed that the Crown was under no obligation to call a witness it considered unnecessary to its case.

[132] The Commissioner also countered P&H's arguments about best evidence with his own submission, stating that the best evidence of how P&H competes on a day-to-day basis at an Elevator through pricing should have come from grain merchants such as P&H's employees, rather than relying solely on the evidence of Mr. Heimbecker, a senior executive of P&H. The Commissioner noted that two specific P&H employees were exclusively within the control of P&H and that there was no legitimate explanation for not calling them as witnesses.

(1) Legal principles

(a) Adverse inferences

[133] The drawing of an adverse inference from the absence of evidence relies on the reasoning that the failure by a party to call certain evidence may, depending on the circumstances, amount to an implied admission that the evidence would be contrary to the party's case, or at least would not support it (*Jolivet* at para 28).

[134] In *Jolivet*, the SCC considered whether a jury was entitled to draw an adverse inference from the Crown's failure to call a witness. During the trial, the Crown had indicated to the jury, twice, that it would be calling the witness to corroborate important admissions allegedly made by the accused. Just prior to the close of the prosecution's case, the Crown advised the court that it no longer intended to call that witness and provided an explanation for this decision. Speaking for the SCC, Justice Binnie referred to the general rule developed in civil cases about adverse inferences from the failure to tender a witness, noting that a party may provide a satisfactory explanation for not doing so. A party may have no special access to the potential witness, or the missing proof may lie in the peculiar power of the party against whom the adverse inference is proposed — in which case the argument for an adverse inference is stronger (*Jolivet* at paras 25–27). The SCC also held that one "must be precise about the exact nature" of the adverse inference to be drawn. The SCC concluded that, because Crown counsel had announced to the jury its intention to call the allegedly corroborative witness, an adverse inference of "unhelpfulness"

would have been a fair result owing to the Crown's failure to substantiate its assertion of the existence of corroborative evidence (*Jolivet* at paras 29–30).

[135] The authors of Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 5th ed (LexisNexis Canada Inc, 2018) describe the situations in which an adverse inference may be drawn as follows:

> §6.471 In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. The inference should only be drawn in circumstances where the evidence of the person who was not called would have been superior to other similar evidence. The failure to call a material witness amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.
>
> §6.472 An adverse inference should be drawn only after a prima facie case has been established by the party bearing the burden of proof.

[136] The Federal Court of Appeal ("**FCA**") has applied this passage in *Deyab v Canada*, 2020 FCA 222 at para 46 and *Caron Transport Ltd v Williams*, 2020 FCA 106 at para 10.

[137] The FCA also considered adverse inferences in *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 ("***TREB FCA***") and *Apotex Inc v Canada (Health)*, 2018 FCA 147 ("***Apotex***"). In *TREB FCA*, the court concluded that the Tribunal made no error in declining to draw an adverse inference against the Commissioner in the circumstances. The FCA held that the requested inference was tantamount to finding that the Commissioner had a legal obligation to quantify anti-competitive effects under section 92, which he had not because of the binding precedent issued by the SCC in *Tervita SCC*. In addition, the FCA stated as follows with respect to the Commissioner's and the Tribunal's roles in the proceeding:

> [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.

[Emphasis added.]

[138] In *Apotex*, the FCA confirmed that recent decisions have treated the drawing of an adverse inference as a matter of discretion, to be exercised only where warranted in all of the circumstances. The court identified two reasons for this evolution. First, court rules now go a long way towards rendering witnesses and documents available to both sides, through discovery and other procedural mechanisms. Second, courts have recognized that whether or not an adverse inference is warranted on particular facts is bound up inextricably with the adjudication of the facts (*Apotex* at para 68, citing *TREB FCA* at para 107).

(b) Discovery under the current CT Rules

[139] Pursuant to Rule 60 of the CT Rules, a party to a proceeding has to serve an affidavit of documents on each other party, identifying the documents that are "relevant" to any matter in issue and that are or were in the possession, power, or control of the party. CT Rule 60 does not distinguish between the Commissioner and the other parties for the purposes of discovery, and parties are all subject to the requirement of disclosing what is "relevant." CT Rule 65 adds that access to what is disclosed must be provided.

[140] Relevance is determined by the way the issues are framed in the pleadings. A document of a party is considered relevant if the party intends to rely on it, if the document tends to adversely affect or support another party's case, or if the document might fairly lead a party to a "train of inquiry" that could have either of these consequences (Antonio Di Domenico, *Competition Enforcement and Litigation in Canada*, (Toronto: Emond Montgomery Publications Limited, 2019) ("***Di Domenico***") at p 736, referring to subsection 222(2) of the *Federal Courts Rules*, SOR/98-106 ("**FC Rules**")). The definition of relevance is therefore quite broad and applies to all parties.

[141] FC Rule 226 further provides that the disclosure obligation is continuous. This requirement has been imported by the Tribunal in its proceedings (*Tervita v Canada (Commissioner of Competition)*, 2013 FCA 28 ("***Tervita FCA***") at para 74; *The Commissioner of Competition v Air Canada*, 2012 Comp Trib 20 at para 22). The continuous disclosure obligation entails that the initial disclosure affidavit must be updated any time a party becomes aware that it is deficient.

[142] The most recent court decision to have considered the Commissioner's disclosure obligations is *Vancouver Airport Authority v Commissioner of Competition*, 2018 FCA 24 ("***VAA FCA***"), in which the FCA said the following:

> [30] The procedural fairness obligations require the Commissioner of Competition to disclose to the Airport Authority evidence that is relevant to issues in the proceedings. This is necessary for the Airport Authority to know the case it has to meet and to fairly defend itself against the allegations. Often — as the Commissioner has recognized in this case by releasing roughly 8,300 documents

> from his investigatory file — this includes exculpatory material or other material resting in the investigatory file that could assist the party whose conduct is impugned in testing the evidence called by the Commissioner or in building its own case. […] In some cases, there may be limits on the obligation to disclose based on materiality, proportionality, applicable legislative standards and the nature of the proceedings. […]
>
> [Citations omitted.]

[143] The FCA further noted that the Tribunal proceedings are adjudicative in nature, which typically commanded high procedural fairness requirements (*VAA FCA* at para 29).

(c) Disclosure and the Commissioner's duty of fairness

[144] In light of P&H's submissions, it is also important to consider the issue of adverse inferences in the context of the more general legal principles governing the Commissioner's disclosure obligations and duty of fairness. These go back to the Tribunal's decision in *Canada Pipe 2004*.

[145] In *Canada Pipe 2004*, the respondent had requested additional disclosure from the Commissioner and to examine witnesses before the hearing. The procedural rules governing Tribunal proceedings back then were different from today's; they applied a standard of reliance for the Commissioner's general disclosure obligations, as opposed to the standard of relevance currently in place. In that case, the Tribunal dismissed the motion for additional discovery of documents and persons.

[146] In the Tribunal's reasons, Justice Blanchard addressed the "duty of fairness" of the Commissioner (*Canada Pipe 2004* at paras 60–64). He found that, although the Commissioner's disclosure obligation was dictated by a standard of reliance under the then-rules, the Commissioner was "nonetheless required to act fairly in the exercise of her duties." He noted that the Commissioner is a public officer with significant statutory powers to gather information and exercise public interest privilege, and there was a presumption that the Commissioner was acting in good faith. He further found that in those proceedings, the Commissioner was not a normal adversary, but rather a public officer with a statutory obligation to act fairly (*Canada Pipe 2004* at para 62; see also *Canada Pipe 2003* at para 53). Justice Blanchard likened the Commissioner's obligations to that of a prosecutor who must act fairly, referring to the criminal law decisions in *Boucher v The Queen*, [1955] SCR 16 ("***Boucher***") at pp 23–24 and *R v O'Connor*, [1995] 4 SCR 411 ("***O'Connor***") at pp 477–478. He then stated:

> [64] It naturally follows that just as the Crown prosecutor must be motivated by fairness and not the notion of winning or losing, so too the Commissioner must be motivated by goals of fundamental fairness and not by achieving strategic advantage on the proceeding. This is not to say that the duties articulated in such landmark criminal cases as *Boucher, supra*, or *O'Connor, supra*, should be directly imported into an administrative law setting. The Tribunal is an administrative Tribunal with an administrative process and procedural fairness must be customized

> to accommodate the expedited process required by the legislation and rules which govern its proceedings. Though the standard of disclosure may justifiably be different in proceedings before the Tribunal than in criminal proceedings, the underlying notion of fairness must remain constant for both. It is in this context that the reliance standard is to be applied.

[147] The Tribunal pauses to note that Justice Rand's opinion in *Boucher* made comments about all available proof of facts being presented in a criminal matter. The passage from Justice L'Heureux-Dubé's reasons for the SCC in *O'Connor* further referred to "full and fair disclosure as a fundamental aspect of the Crown's duty to serve the Court as a faithful public agent, entrusted not with winning or losing trials but rather with seeing that justice is served" (*O'Connor* at para 101).

[148] P&H's arguments in this proceeding do not concern disclosure obligations of the Commissioner so much as whether the Commissioner has an obligation to collect evidence (*i.e.*, information, documents, and data) from third parties during an investigation or inquiry, and then to present that evidence fully to the Tribunal during proceedings commenced under section 92. The Tribunal observes that P&H cited no case dealing specifically with the Commissioner's obligation to gather evidence during an investigation or inquiry, nor about whether the Commissioner may have an obligation to obtain an order under section 11 of the Act before a hearing, in order to assist a respondent with its case. P&H also did not refer to any cases involving other statutory officers' or law enforcement officials' obligations to carry out full and fair investigations or to obtain court orders to gather information for a party whose transaction or conduct is under review.

[149] Neither party referred to any prior determination of the Tribunal or appellate courts about the scope of the Commissioner's obligation to present a full evidentiary record to the Tribunal, nor the obligations of any comparable statutory or law enforcement official (other than *Boucher*). Indeed, neither party referred to the remarks made by the FCA in *TREB FCA* at paragraphs 104–105, about the Commissioner's decisions in presenting a case to the Tribunal.

[150] In addition, since Justice Blanchard's decision, the procedural landscape during Tribunal proceedings, including disclosure rules, has changed. The Tribunal's procedural rules passed in 2002 have been replaced by the CT Rules issued in 2008, which now contemplate a relevance-based approach to documentary discovery of the Commissioner. Since *Canada Pipe 2004*, the FCA has also revised the characteristics of the public interest privilege that existed in 2004 and examined procedural fairness obligations during Tribunal proceedings (*VAA FCA* at paras 28–35).

[151] In this context, it is fair to consider whether, and how, the Commissioner's duty of fairness may have changed since *Canada Pipe 2004*, owing to a respondent's right to disclosure and production of all non-privileged records in the possession or control of the Commissioner under the current CT Rules and the respondent's ability to make its own comprehensive submissions and call its own evidence based on that same body of evidence. The Tribunal did not receive meaningful legal submissions on that question, nor does it have submissions on how the absence of the third party evidence in the present case adversely affected P&H's already-vigorous defence against the Commissioner's case — apart from general submissions criticizing the Commissioner's efforts to collect the evidence and examples of what else could have been requested.

(2) Tribunal's assessment

[152] With these considerations in mind, the Tribunal will now consider the adverse inferences requested by P&H.

(a) The "general" adverse inference

[153] For the following reasons, the Tribunal declines P&H's request to draw an adverse inference against the Commissioner "generally" in this proceeding.

[154] First, P&H provided no specifics as to the exact nature of the adverse inference to be drawn. During the hearing, it made submissions that criticized the Commissioner's investigation and lack of document production and data gathering, and it added generalized submissions of the same nature in oral argument. However, it did not specify that, because a particular piece of evidence was not tendered to the Tribunal or because a certain witness did not testify, the Tribunal should infer that some particular fact did occur, or that the Tribunal should draw an adverse inference of a specific nature against the Commissioner.

[155] The Tribunal finds it preferable to be asked much more precisely what inference to draw and on what basis, before deciding whether to draw an adverse inference (*Jolivet* at para 28). In the Tribunal's view, such specificity is particularly important when a party asks the Tribunal to draw an inference against a party based on the absence of evidence or the absence of a witness. In the case at bar, the generalized adverse inference requested by P&H is too amorphous for meaningful adjudication.

[156] Second, the Tribunal is unaware of anything that prevented P&H from attempting to obtain documents or information itself (setting aside additional data, discussed separately below). P&H could have interviewed the farmer witnesses and could have attempted to interview or send written questions to the grain companies' witnesses in advance of the hearing (or even while the merger review was occurring), and could have asked them for documents. There was no suggestion that P&H attempted to do so and was rebuffed, or that the Commissioner tried to interfere with any such attempts.

[157] Third, the Commissioner does not bear the exclusive or entire burden of adducing evidence for the Tribunal. In litigation in respect of a merger under section 92, the Commissioner is not required to present every bit of evidence at the hearing. Contested proceedings under section 92 are adversarial by nature. The Commissioner called some farmer witnesses to support his case under section 92 in relation to issues for which he had the evidentiary and legal burden of proof. It was the Commissioner's risk not to obtain and present specific evidence from them (*TREB FCA* at paras 104–105).

[158] This is also not a situation where the witnesses were not called to testify at all. P&H had the opportunity to cross-examine each of the Commissioner's farmer witnesses to expose missing or incomplete information, and it did so in several respects. The cross-examination revealed that there were additional inquiries that could have been made to the farmer witnesses and there were documents that could have been requested from them.

[159] In these circumstances, the Tribunal prefers a more surgical alternative instead of a general adverse inference against the party that called the witness to testify. Incomplete evidence gathered from or presented by a witness during examination-in-chief may adversely affect the credibility or reliability of the witness's testimony. Exposed during cross-examination at a hearing, it can sometimes be damaging to a party's case. Given that P&H could also have easily sought the same information and documents, apparently did not do so, but exposed the issues at the hearing, the Tribunal concludes that the Commissioner took on the risk of failing to discharge his burden under section 92 and of having adverse reliability or credibility findings made by the Tribunal against the witnesses.

[160] Fourth, the absence of data from rival Elevators is addressed separately, below. That analysis supports the Tribunal's conclusions on the requested general adverse inference.

[161] Finally, having considered the parties' submissions, the Tribunal is disinclined in this case to make a legal ruling with potentially far-reaching consequences concerning the Commissioner's general duty of fairness as it concerns either gathering evidence for a proceeding under section 92 or presenting that evidence. The Tribunal notes that P&H's pleading in response to the Application ("**Response**") did not express any concerns about the Commissioner's investigation or inquiry into the proposed merger. P&H did not later seek to amend its pleading after it received the Commissioner's Affidavit of Documents or after its oral discovery of the Commissioner. Nor did P&H raise any concerns to the Tribunal on receipt of the witness statements, or else seek any further order before the hearing. Considering how and when P&H raised the issue and the scope of the parties' submissions, the Tribunal considers it unnecessary and inappropriate to make more detailed comments.

[162] In light of the foregoing, the Tribunal exercises its discretion not to make a generalized adverse inference against the Commissioner. In stating this conclusion, the Tribunal should not be understood to express a view on the scope of the Commissioner's fairness duties as submitted by P&H and denied by the Commissioner in this case. Resolving issues related to the Commissioner's general fairness obligations in the disclosure process will be for another day.

(b) The adverse inferences related to efficiencies under section 96

[163] P&H also argued that the Tribunal should draw a more specific adverse inference against the Commissioner for his failure to obtain certain data from third-party grain companies that compete with it at the Virden Elevator, and which had an impact on the evidence relating to the efficiencies defence.

[164] P&H took the position that the Transaction would increase throughput at the Virden Elevator, resulting in cognizable efficiencies for the purposes of section 96. During the cross-examination of Mr. Harington, the Commissioner's expert on efficiencies, P&H drew attention to paragraph 130 of Mr. Harington's expert report. In that paragraph, Mr. Harington stated that the only way a redistribution of throughput between competing Elevators would result in an efficiency to the Canadian economy is if "the entity from which the increased throughput is being taken operates at a higher per unit variable operating cost" than P&H (Exhibits P-A-195, CA-A-196 and CB-A-197, Expert Report of Mr. Andrew Harington ("**Mr. Harington Report**"), at para 130). Mr.

Harington testified under cross-examination that he did not have the variable operating costs of the rival Elevators to the Virden Elevator. Without that, he said, he could not do the comparison contemplated by his paragraph 130. Because his mandate was to respond to the alleged efficiencies claimed by P&H in Mr. Heimbecker's initial witness statement on efficiencies, rather than to determine the efficiencies himself, Mr. Harington did not request or obtain the variable operating cost data of the rival Elevators.

[165] Mr. Harington testified that in fact, he would have required a lot more than the variable operating costs data: he would have needed all of the data on locations of farms that shifted volumes of grain from one Elevator to another, and what the transportation costs were for those farms. He would have looked at the efficiencies implications for all of Canada. Mr. Harington further noted that he would not reasonably expect P&H to have its competitors' variable cost data. However, Mr. Harington testified that he had all of the evidence he needed to do the job he was asked to do (*i.e.*, to respond to P&H's position on increased throughput at the Virden Elevator as an efficiency under section 96).

[166] P&H submitted that the Tribunal should draw an adverse inference against the Commissioner owing to the Commissioner's failure to request and obtain the variable operating costs data from rival Elevators because, without the data, a precise assessment could not be completed for the purposes of the counterfactual test contemplated in subsection 96(1) of the Act and the redistribution analysis under subsection 96(3). According to P&H, the Commissioner could have obtained the required data either by request or by obtaining an order under section 11 of the Act.

[167] The Commissioner responded that he had no such burden under section 96. Referring to paragraph 122 of the SCC's decision in *Tervita SCC*, the Commissioner observed that the merging parties bear the onus of establishing all elements of the efficiencies defence after the Commissioner has discharged his initial burden to prove the anti-competitive effects and the DWL for the purposes of section 96. A respondent's burden includes proof of the extent of the efficiency gains and whether the gains are greater than and offset the anti-competitive effects. The Commissioner noted that P&H's position, according to which the Commissioner did not collect evidence enabling it to prove an efficiency claim, was not raised in its own initial Response pleading. The Commissioner noted that P&H could have sought, but did not seek, discovery from third parties to obtain the information it now requires. P&H decided to discharge its burden to quantify cognizable efficiencies through a witness statement from Mr. Heimbecker, rather than from an expert witness. According to the Commissioner, P&H cannot shift the burden onto the Commissioner for its own failure to discharge its burden.

[168] The Tribunal agrees with the Commissioner and will not draw the specific adverse inferences requested by P&H against the Commissioner in relation to efficiencies. There are three reasons for this determination.

[169] First, it is not clear what exactly P&H seeks from the Tribunal by way of adverse inference. Again, P&H did not specify which rival Elevators' data were at issue, who owed them, what the variable costs data would necessarily or could reveal (by itself or in combination with other unidentified data), or what the outcome would be under subsections 96(1) or (3) following analysis and quantification.

[170] For example, P&H did not explain how the absence of variable operating costs data at one or more unnamed Elevators constitutes an implied admission against the Commissioner that the data will lead to a cognizable and quantifiable efficiency under section 96. It would be speculative to find that such an implied admission follows from the sole absence of unknown data. To do so would require making several assumptions about the contents of the data and the outcome of calculations using those data. As Mr. Harington's testimony confirmed, significant additional data would be required to do the analysis he envisioned. Accordingly, no inference is warranted based on an absence of the variable operating costs data.

[171] Second, P&H has not demonstrated that the Commissioner had an obligation to obtain the data. It has cited no case nor pointed to a principled basis for such an obligation. Apart from the initial burden on the Commissioner under section 96 to show and quantify anti-competitive effects as established in *Tervita SCC*, the legal burden under section 96 is on the respondent. While P&H sought to argue that *Tervita SCC* did not settle the evidentiary burden under section 96, it provided no compelling legal or factual reason to shift a further burden onto the Commissioner on the facts of this case.

[172] Third and relatedly, P&H has not shown that the Commissioner knew or should have known that P&H needed the data in the present case. There is no evidence that P&H made any efforts itself to request or obtain the variable operating costs data. While P&H may well be correct that its competitors would not voluntarily provide that data to a rival, it did not try to obtain the data by way of request to them or by filing a motion with the Tribunal.

[173] On the evidence, the Tribunal does not accept that the Commissioner should (or even could) have known that P&H required the data. P&H acknowledged during argument that it did not ask the Commissioner to obtain it. When asked by the Tribunal how the Commissioner would have known that P&H needed it, or whether the Commissioner should have filed an application for an order under section 11 of the Act to obtain it, P&H did not provide a clear answer.

[174] Moreover, based on the events leading up to the hearing, the Tribunal sees no realistic basis on which the Commissioner could have known that he should obtain the impugned data:

- At the pleadings stage in this proceeding, P&H did not raise possible efficiencies arising from increased throughput at the Virden Elevator, nor anything specific about subsection 96(3) of the Act. Its Response pleaded that the efficiencies from the Transaction "include: improved [FGT] scale economies and cost savings, elimination of the margin that [LDC] formerly paid to use the Vancouver export terminal owned by Kinder Morgan, outlay expansion and improved scale economies at the former [LDC] elevator and administrative synergies;"

- There was no suggestion that P&H noted the absence of the data and raised it after receiving the Commissioner's Affidavit of Documents;

- At the oral examinations for discovery, P&H declined to provide the Commissioner with any specific insight about its efficiencies defence. Counsel for the Commissioner asked several questions requesting information about efficiencies to Mr. Heimbecker. The answers provided by P&H's counsel were essentially that it was a matter for an expert

report to be filed later and that otherwise, no substantive answers would be provided at discovery;

- Mr. Heimbecker repeated that position in his subsequent responses to undertakings and questions taken under advisement;

- However, P&H did not file an expert report concerning efficiencies;

- Mr. Heimbecker's reply witness statement, delivered over two months before the hearing started, set out evidence to advance P&H's position on efficiencies. However, it made no reference to any need for variable operating costs data from rival Elevators;

- P&H also did not raise any need for data after it received a copy of Mr. Harington Report, also more than two months before the hearing commenced. As noted above, this expert report referred directly to variable operating costs of other entities;

- P&H did not file a motion to the Tribunal seeking an order to compel the Commissioner to obtain the data; and

- The issue did not come to light until Mr. Harington's cross-examination, near the end of the hearing.

[175] In these circumstances, the Tribunal finds it unrealistic to expect that the Commissioner would be or could have been aware that P&H required variable operating costs data of rival Elevators for its efficiencies defence. It was equally unrealistic to expect the Commissioner to be aware that P&H expected him to attempt to obtain that data either by request or under section 11 of the Act. Rather, the Tribunal finds P&H's position on the need for this data to be late-blooming and tactical, rather than based on a substantive need to support its position on efficiencies arising at the Virden Elevator.

[176] Exercising its discretion based on the evidence and arguments made, the Tribunal therefore declines to make any specific adverse inferences on issues related to efficiencies. To draw an adverse inference against the Commissioner in the present circumstances would be demonstrably unfair.

C. Legal and evidentiary burden applicable to sections 92 and 96 of the Act

[177] The last preliminary issue that needs to be briefly addressed is the legal burden of proof in this Application. In its submissions, P&H suggested that the allocation of the burden of proof established by the SCC in *Tervita SCC* has left some questions unanswered regarding the Commissioner's burden under section 96 of the Act.

[178] With respect, the Tribunal disagrees.

[179] It is not disputed that, under section 92, the Commissioner bears the burden of proving that the merger will create, maintain, or enhance market power through the merged entity's ability to profitably influence price, quality, service, or other dimensions of competition. However, there is

no requirement for the Commissioner to prove that the merged entity will, in fact, exercise these powers (*The Commissioner of Competition v Canadian Waste Services Holdings Inc*, 2001 Comp Trib 3 ("***Canadian Waste***") at para 108, aff'd 2003 FCA 131, leave to appeal refused, [2004] 1 SCR vii; *Superior Propane I* at para 258). In determining whether the Commissioner has met his burden on this point, a forward-looking analysis of 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 — must be conducted (*Tervita SCC* at para 51).

[180] With respect to section 96, Justice Rothstein in *Tervita SCC* clearly stated that "the [*Superior Propane* cases] established that the Commissioner has the burden under s. 96 to prove the anti-competitive effects" of a merger (*Tervita SCC* at para 122). Conversely, the merging parties bear the onus of establishing all the other elements of the efficiencies defence, including the extent of the efficiency gains and whether the gains are greater than and offset the merger's anti-competitive effects (*Tervita SCC* at para 122). To meet his burden, the Commissioner must quantify the quantifiable anti-competitive effects he relies upon. Where these effects are measurable, they must be calculated or at least estimated, and a failure to quantify quantifiable effects will not result in such effects being considered qualitatively or remaining undetermined (*Tervita SCC* at paras 125–133). Justice Rothstein explained that an approach that would permit the Commissioner to meet his burden without at least establishing estimates of the quantifiable anti-competitive effects would fail to provide the merging parties with the information they need to know the case they have to meet (*Tervita SCC* at para 124). Qualitative anti-competitive effects which are not quantifiable can also be taken into account, provided they are supported by the evidence and the reasoning for the reliance on the qualitative aspects is clearly articulated by the Tribunal (*Tervita SCC* at para 147).

[181] In the Tribunal's view, there is at present no legal precedent for the Commissioner to have any additional burden under section 96 beyond that established by the SCC in *Tervita SCC*. P&H has not provided any argument or sufficient supporting evidence that could allow the Tribunal to revisit, revise or enlarge the clear standard set out in *Tervita SCC* on the legal and evidentiary burden of the Commissioner under the merger provisions of the Act.

VI. ISSUES

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

- What is or are the relevant product market(s) for the purposes of this proceeding?;
- What is or are the relevant geographic market(s) for the purposes of this proceeding?;
- Has the Commissioner established, on a balance of probabilities, that the Virden Acquisition lessens, or is likely to lessen, competition substantially?;
- If the Commissioner has established that the Virden Acquisition lessens, or is likely to lessen, competition substantially, what is the remedy to be ordered?;

- Has P&H established, on a balance of probabilities, that the gains in efficiency will be greater than, and will likely offset, the effects of any lessening of competition pursuant to section 96 of the Act?;

- What costs should be awarded?

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

VII. ANALYSIS

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

[184] In order to determine whether the Virden Acquisition lessens competition substantially, or is likely to do so, the Tribunal must first identify the product and geographic dimensions of the relevant market(s) for the purposes of this proceeding. In this case, the fundamental dispute between the parties is how to properly characterize the product market — and more specifically, the relevant product and the relevant price — in a situation where the merging firms' alleged specific contribution of value is only a component of the final price of the product. The Commissioner claims that P&H supplies GHS for wheat and canola to farmers, whereas P&H submits that it purchases wheat and canola from farmers. The Commissioner submits that the relevant price is the "imputed" price for GHS — which, he says, approximates the Basis —, while P&H argues that it is the Cash Price charged to farmers for their grain.

[185] As acknowledged by both Dr. Miller and Ms. Sanderson during their respective testimony, the definition of the relevant product market is a key element that has an impact on the rest of the Tribunal's analysis in this case (*i.e.*, the geographic market, the competitive effects analysis, the market shares, the surplus calculations, etc.).

(1) Analytical framework

(a) The purpose of market definition

[186] In assessing whether, under section 92 of the Act, a merger lessens competition substantially or is likely to do so, the focus is on whether the merger is likely to create, maintain or enhance the ability of the merged entity to exercise market power, unilaterally or in coordination with other firms (*Tervita SCC* at para 44).

[187] Market power is not defined in the Act. Market power has been described by the Tribunal as the ability to "profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition" (*Canadian Waste* at para 7) or as "the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable" (*Hillsdown* at p 314). Both of these descriptions were cited with approval in *Tervita SCC*, at paragraph 44.

[188] The first step in measuring market power is to define the relevant market. Put differently, the purpose of identifying the relevant product (or geographic) market is to identify the possibility for the exercise of market power (*Canadian Waste* at para 39; *Superior Propane I* at para 47; *Director of Investigation and Research v Southam* (1992), 43 CPR (3d) 161 (Comp Trib) at pp 177–178). Market definition is often considered a critical component in assessing market power because it frames the context within which competitive effects can be analyzed (*Di Domenico* at p 408).

[189] The Tribunal and the courts have traditionally considered it necessary to define a relevant market before proceeding to assess the competitive effects of mergers under the Act (*Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748 at para 79; *Tervita CT* at paras 92, 360–364; *Superior Propane I* at para 56; *Hillsdown* at p 297). The relevant market is typically a predicate to a finding of substantial lessening or prevention of competition in merger cases because the merger must be one that will substantially lessen or prevent competition, or is likely to do so, within an area of actual or potential competition.

[190] However, the Tribunal has cautioned against losing sight of the ultimate inquiry and task of the Tribunal, which is to determine whether the merger being assessed prevents or lessens, or is likely to prevent or lessen, competition substantially (*Superior Propane 1* at para 48). Market definition is not an end in itself: it is merely an analytical tool to assist in evaluating anti-competitive effects (*Superior Propane I* at para 48; 2011 MEGs at para 3.2).

[191] It is further important to note that a competition market is an analytical construct, and neither the product market nor the geographic market needs to coincide with the market as it is considered by a business or industry (*Superior Propane I* at paras 67, 85, 101, 106). Relevant markets for the purpose of a merger analysis are not always intuitive and may not align with how industry participants use the term "market" or view their "market."

[192] Market definition is typically the subject of contested submissions and can often be outcome-determinative in merger matters under section 92.

(b) Rationale and tools for market definition

[193] When defining relevant markets in proceedings brought under section 92 of the Act, the Tribunal considers whether there are close substitutes for the product at issue. Market definition is based in part on substitutability, and it focuses primarily on demand responses to changes in relative prices after the merger. The ability of a firm to raise prices without losing sufficient sales to make the price increase unprofitable ultimately depends on the purchasers' willingness to pay the higher price. This is determined by analyzing evidence of the ability of purchasers to switch their purchases to substitute products and locations in response to a price increase (*Tervita CT* at paras 58–60). Close substitutes have been defined in terms of whether "buyers are willing to switch from one product to another in response to a relative change in price, *i.e.*, if there is buyer price sensitivity" (*Canada (Commissioner of Competition) v Tele-Direct Publications Inc* (1997), 73 CPR (3d) 1 (Comp Trib) ("***Tele-Direct***") at p 35, citing the test adopted by the FCA in *Canada (Director of Investigation and Research) v Southam Inc*, [1995] 3 FC 557, 63 CPR (3d) 1 (FCA) ("***Southam FCA***"), rev'd on other grounds [1997] 1 SCR 748).

[194] In assessing the extent of the product (and geographic) dimensions of relevant markets in the context of proceedings under the Act, the Tribunal has generally followed the well-established hypothetical monopolist analytical framework, or hypothetical monopolist test ("**HMT**") (*VAA CT* at para 300; *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp Trib 7 ("***TREB CT***") at paras 121–124; *The Commissioner of Competition v Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp Trib 10 ("***Visa Canada***") at para 173; *Tervita CT* at para 58; *Superior Propane I* at para 57).

[195] In *Tervita CT* and *Superior Propane I*, two merger cases, the Tribunal embraced the description of that framework set forth in the Competition Bureau's MEGs (see, for example, 2011 MEGs at para 4.3). Under this approach, a relevant product market is defined as the smallest group of products (including at least one product of the merging parties) in respect of which a sole profit-maximizing seller — the hypothetical monopolist — controlling all suppliers in the proposed market would find it profitable to 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. The purpose of the HMT is to determine the extent to which customers in the candidate market will switch to other products in response to a SSNIP (*Visa Canada* at para 198). In the determination of whether a SSNIP would be profitable, the HMT makes use of demand elasticity and cross-elasticity evidence as well as what are known as practical indicia. If a small price increase would drive purchasers to an alternative product, then that product must be reasonably substitutable for those in the proposed market and must therefore be part of the market, properly defined. The conceptual exercise is repeated to include a broader array of products until it defines a product set over which a hypothetical monopolist could profitably impose a SSNIP (Brian A. Facey and Cassandra Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations*, 3rd ed (Toronto: LexisNexis Canada Inc, 2020) ("***Facey and Brown***") at p 205).

[196] Pursuant to the HMT framework, 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 the merger. 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 (*VAA CT* at para 326; *TREB CT* at para 124).

[197] The SSNIP will be applied to the price that is being paid by the purchasers of the candidate product (*Visa Canada* at para 198), often referred to as the "base price" (see, for example, 2011 MEGs at para 4.6).

[198] Generally, for the purposes of determining the SSNIP, the objective benchmarks are as follows (and are reflected as such in the 2011 MEGs): an "increase in price" is typically one of 5% or more, and a "non-transitory" price increase is typically one that is maintained for at least one year. This 5%/one-year approach is generally treated as a "threshold" used to identify market power at the market definition stage, where the objective is to define the smallest market in which a substantial lessening of competition would be possible. 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 both the product and geographic dimensions of relevant markets.

[199] Indeed, the Commissioner and P&H both acknowledged that a 5% increase and a one-year time frame are the standard thresholds for a SSNIP, here in Canada and in many other jurisdictions. However, these benchmarks can be adjusted to reflect the specific realities of a given industry or business.

[200] The Tribunal agrees that the HMT approach adopted in previous Tribunal cases, consistent with the 2011 MEGs, should continue to be used in this case.

[201] 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 92 of the Act, market definition will often include not only the analysis of prices through the HMT framework but also other evidence of substitutability or customer switching. Market definition may therefore involve assessing indirect evidence of substitutability, including factors such as: functional interchangeability in end-use of the products; switching costs; the views, strategies, behaviour and identity of buyers; trade views, strategies and behaviours of other market participants; physical and technical characteristics; and price relationships and relative price levels.

(c) The language of section 92

[202] During final argument, the Tribunal raised an issue related to the interpretation of section 92. The Tribunal observed that, contrary to other provisions of the Act such as civil agreements between competitors (section 90.1), section 92 on mergers does not expressly refer to a substantial lessening or prevention of competition "in a market." Subsection 92(1) rather uses broader language incorporating the phrase "trade, industry or profession" in four paragraphs referring to the effect of the merger on competition: "(*a*) in a trade, industry or profession; (*b*) among the sources from which a trade, industry or profession obtains a product; (*c*) among the outlets through which a trade, industry or profession disposes of a product; or (*d*) otherwise than as described in paragraphs (*a*) to (*c*)."

[203] Both parties expressed the view that the absence of the word "market" in subsection 92(1) makes no difference, that the merger provision clearly relates to a substantial lessening or prevention of competition "in a market," and that determining the relevant "market" forms part of the analysis to be conducted by the Tribunal.

[204] The Tribunal agrees and finds that the absence of the word "market" in the opening part of section 92 should not be interpreted as implying that a relevant <u>competition market</u> does not need to be defined or utilized in merger analysis.

[205] The principled approach to statutory interpretation requires that section 92 be read in its entire context, in its grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (see, for example, *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 ("***Bell ExpressVu***") at para 26).

[206] Looking first at the wording of section 92, the Tribunal agrees with P&H that a merger as defined in section 92 clearly encompasses the concept of market or markets. A merger is defined in section 91 as the taking of control of a "business." The word "business" is in turn defined broadly in section 2 of the Act as "the business of (a) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles, and (b) acquiring, supplying and otherwise dealing in services" [emphasis added]. The French version of the Act uses the words "tout autre commerce" to translate the expression "otherwise dealing." The use of the word "business" in the definition of "merger" therefore makes it clear that a merger for the purposes of a section 92 assessment is with respect to the market or commercial activity of the "business." Moreover, since a "business" is defined in terms of activities dealing in articles or services, the definition must concern one or more articles or services (as each are defined in subsection 2(1)) that are bought or sold as part of a commercial activity.

[207] Importantly, there are also express references to the notion of "market" in subsection 92(2) and section 93 of the Act, which provide direction on how to assess whether a merger lessens or prevents competition substantially. Subsection 92(2) prohibits the Tribunal from making a finding and exercising its discretionary power to impose a remedy under subsection 92(1) solely on the basis of evidence of "concentration or market share." The assessment under section 92 is further informed and limited by section 93, which sets out factors that may be considered in determining whether a merger affects competition in a significant way for the purposes of section 92. Section 93 contains sustained references to the concept of "market" in paragraphs 93(*d*), (*e*), (*g*), (*g.1*), (*g.2*), and (*h*), and implies that such a market has been defined to make the competitive assessment. For example, paragraph (*h*) refers to "any […] factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger."

[208] Turning to the object and purpose of section 92, there is no doubt that the Tribunal's focus is on assessing the degree to which market power is created, maintained or enhanced by the merger at issue. The concept of a competition or antitrust market is implicit in many provisions of the Act for the identification of anti-competitive conduct and for the substantiality threshold that must be applied to the assessment of anti-competitive effects.

[209] The Tribunal further observes that since the Tribunal's first decision in a contested merger proceeding (*i.e.*, *Hillsdown*), subsection 92(1) has consistently been interpreted as synonymous with "market" by the Tribunal and the courts (*Tervita SCC* at para 44; *Hillsdown* at pp 297–314), and by the Commissioner. In *Tervita SCC*, the SCC made it clear that the assessment of the substantial effect on competition was an effect on the "market": it "involves assessing the degree and duration of any effect it would have on the market" [emphasis added] (*Tervita SCC* at para 78).

[210] In sum, section 92 does not have a different scope in its relationship to the substantial lessening of competition even if it refers to the effect of competition in a "trade, industry or profession," as opposed to a "market." Given the definition of "merger" and the fact that several factors listed in subsection 92(2) and section 93 expressly contemplate an evaluation made in relation to a "market," the Tribunal is satisfied that, even though section 92 does not expressly refer to a substantial lessening or prevention of competition in a market, "Parliament intended that competition must be shown to be likely to be prevented or lessened substantially in a competition

law or antitrust market" (Paul S. Crampton, *Mergers and the Competition Act*, (Carswell, 1990) ("***Crampton 1990***") at p 261).

(d) HMT and monopsony

[211] Finally, the Tribunal observes that the approach to market power and to market definition, which has mostly developed in matters involving the sale of a product, is similar in the context of the purchase of a product: the market power of buyers is the "ability of a single firm (monopsony power) […] to profitably depress prices paid to sellers […] to a level that is below the competitive price for a significant period of time" (2011 MEGs at para 2.4).

[212] The HMT framework therefore applies to define relevant markets for both the sale and the purchase of a product. For monopsony power, the 2011 MEGs describe the analytical process as follows, at paragraph 9.2:

> […] The conceptual basis used for defining relevant markets is, mirroring the selling side, the hypothetical monopsonist test. A relevant market is defined as the smallest group of products and the smallest geographic area in which a sole profit-maximizing buyer (a "hypothetical monopsonist") would impose and sustain a significant and non-transitory price decrease below levels that would likely exist in the absence of the merger. The relevant product market definition question is thus whether suppliers, in response to a decrease in the price of an input, would switch to alternative buyers or reposition or modify the product they sell in sufficient quantity to render the hypothetical monopsonist's price decrease unprofitable.

[213] In such cases, the SSNIP becomes "a small but significant and non-transitory decrease in price" ("**SSNDP**") below levels that would likely exist in the absence of the merger[5].

(2) Parties' positions

(a) The Commissioner

[214] The Commissioner submits that the proper way to characterize the relevant product market is to define it as the provision of GHS for wheat and canola to farmers who, prior to the Acquisition, benefited from competition between the Virden and Moosomin Elevators. He argues that the supply of GHS for wheat is a relevant product market and that the supply of GHS for canola is a separate one. According to the Commissioner, a hypothetical monopolist of GHS for each of wheat and canola could profitably impose a 5% SSNIP. Moreover, says the Commissioner, there are no functional substitutes for GHS for wheat or canola.

[215] The Commissioner maintains that local competition between Elevators for wheat or canola manifests itself through the Basis, and not through the final Cash Price that an Elevator pays to the

[5] Throughout these Reasons, all references to a SSNIP are meant to include a SSNDP when the context requires it.

farmer. He submits that, because P&H has no control over the Futures Price, the only component of the Cash Price it can control is the Basis, and that only the Basis component of the Cash Price is affected by local competition between the Elevators. The Basis, or the "imputed" price for GHS calculated by Dr. Miller, adds the Commissioner, represents the Elevators' specific contribution of value in the final Cash Price paid to farmers. The Commissioner argues that the relevant product market should therefore reflect an economic framework that analyzes the competition actually impacted by the Virden Acquisition.

[216] The Commissioner contends that P&H's approach to the product market allows it to mask and obscure the anti-competitive effects of its Acquisition by focusing on the grain itself and on the Cash Price it pays to the farmers, whereas the services effectively provided by P&H are only a small part of the overall value of the grain they purchase from the farmers and resell to their end customers.

[217] By the end of the hearing, both the Commissioner and Dr. Miller agreed that their proposed approach to the product market definition could be qualified or described as a "value-added" approach, even though the Commissioner did not use these specific terms in his pleadings or even in his opening submissions at the hearing, and even though Dr. Miller did not describe his analytical approach as such in his initial expert report.

[218] The Commissioner maintains that economics, the facts, and the law support his "value-added" approach to product market definition.

[219] With respect to economics, the Commissioner submits that defining the product market as the sale of GHS by P&H "facilitates" an economic analysis focused on the competition affected by the Virden Acquisition and the Elevators' contribution of value. On this point, the Commissioner mostly relies on Dr. Miller's initial and reply expert reports and on his testimony. Using common features of the market definition exercise, such as the HMT, diversion ratios, and upward pricing pressure ("**UPP**") calculations, Dr. Miller testified that he relied on the "imputed" price of GHS because, in his view, this aligns with the service that the Elevators effectively give to farmers. Dr. Miller opined that receiving GHS from Elevators is what is enabling the farmers to access the worldwide market. According to Dr. Miller, the price for GHS is an important factor in a farm's choice of Elevators, and price competition between Elevators is reflected in the Basis and the "imputed" price he calculated for GHS.

[220] With respect to facts, the Commissioner relies on four main elements to support his proposed product market: 1) P&H recognizes the role of the Basis in competition between Elevators, and as one of the two components of the Cash Price, along with the Futures Price; 2) the only component of the price of grain that P&H can set is the Basis. P&H claims that it uses its "**Workback Algorithm**" to determine its Cash Prices but, according to the Commissioner, this algorithm sets the Basis and not the Cash Price, which can fluctuate during the day with the variations of the Futures Price. Moreover, P&H sends mass communications about the Basis on a daily basis, through emails and on its P&H Direct application; 3) the Basis is also carried over to the contracts concluded between Elevators and farmers, and this is done by all grain companies with the exception of LDC; and 4) farmers are affected by local competition and they use the Basis to make comparisons between Elevators. In sum, argues the Commissioner, the provision of GHS is how the industry operates, and the Basis is an important industry-wide practice.

[221] Turning to the law, the Commissioner submits that characterizing the product market as GHS is consistent with the purpose clause of the Act, with previous merger cases, and with the 2011 MEGs. With respect to the so-called "value-added" approach, he claims that the U.S. Horizontal Merger Guidelines issued in 2010 (U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010 ("**US HMEGs**")) actually recognize that in situations where the price of a merging firm's contribution to value can be identified with "reasonable clarity," the price used to assess the merger can be a component of the final price of the product that the firms effectively compete on.

(b) P&H

[222] P&H responds that GHS is not a product supplied by P&H and the other grain companies. The relevant products, says P&H, are the wheat and canola purchased from farmers by P&H, for which the farmers receive the Cash Price. According to P&H, the so-called GHS are only internal processes that the grain companies may apply to the grain after the title to the grain has passed from the farmer to the grain company: in other words, the GHS claimed by the Commissioner are merely costs to the grain companies. Furthermore, it is export terminals that are used to do the following: to receive grain from rail; to grade, segregate, and store grains by type and quality attributes; to clean when required and blend; and to load grain onto vessels. Therefore, many of the GHS claimed by the Commissioner are not services that are performed at the Elevator level.

[223] P&H argues that the documentary and *viva voce* evidence shows that GHS are not actually transacted, contracted, or discussed between farms and P&H or other grain companies. P&H adds that Mr. Heimbecker's testimony and evidence clearly establishes that P&H does not supply any GHS, and this evidence was unchallenged on cross-examination.

[224] P&H further submits that there are no precedents in Canadian law for utilizing an imputed price for the merging firms' specific contribution to the value of a product and for determining the relevant market and the applicable SSNIP on the basis of the so-called "value-added" approach. In fact, adds P&H, the Commissioner has never publicly endorsed the "value-added" approach he is suddenly advancing in this case. Moreover, the Commissioner's approach would suffer from numerous flaws identified by economists with respect to the "value-added" approach advocated in the US HMEGs.

[225] While Dr. Miller asserts that the price for GHS drives the farmers' decisions, P&H points to the fact that the testimonies of farmer witnesses on both sides make it clear that farmers base their sale decisions on the posted Cash Price, which is what the grain companies actually compete on.

(3) Tribunal's assessment

[226] As the Commissioner rightly indicated, the fundamental disagreement in this case is how to define the product market, and more specifically the relevant product that is being exchanged when the farmers sell their grain to an Elevator. Ms. Sanderson indeed acknowledged that the main issue to be determined by the Tribunal is the choice between the Cash Price for grain and the "imputed" price for GHS.

[227] For the reasons set below, the Tribunal agrees with P&H on this issue and concludes that there are two relevant product markets in the present case, namely, the purchase of wheat and the purchase of canola by P&H.

[228] The Tribunal finds that the Commissioner's proposed product market (*i.e.*, the sale of GHS) is not grounded in commercial reality and in the evidence, and that in this case, the "value-added" approach advanced by the Commissioner fails on three fronts: on the facts, from a precedential and legal standpoint, and from a conceptual and economic perspective. It fails factually, because there is no clear and convincing evidence to conclude, on a balance of probabilities, that GHS effectively exist as a relevant "value-add" product or "add on feature" that is transacted and to which a price can be attached. The Commissioner created an analytical price for operational activities associated with the purchase of grain by Elevators. It further fails as a legal argument, because the Commissioner's position finds no support in the authorities he cites, including the US HMEGs, cases in Canada and elsewhere, and his own MEGs. Finally, it fails conceptually, because the Commissioner did not address the issue of the appropriate SSNIP threshold, as described by the current MEGs, despite the fact that adopting a "value-added" approach would profoundly change the HMT framework and the effective SSNIP level used for market definition purposes.

(a) The product and the price at issue

[229] At its core, four critical elements determine the characteristics and boundaries of a relevant competition market: 1) a product for which there is a source of demand and a source of supply; 2) a price at which the product is transacted; 3) a geography within which the product is transacted; and 4) the extent of available substitution between different sources of demand or supply for the product if there is a sufficient price incentive.

[230] Since products can be said to be in the same market if they are close substitutes (*Tele-Direct* at p 36), the debate around the product market definition has typically revolved around the issue of substitutability. However, this is not the case here, as the parties are not debating the extent to which there are functional substitutes to selling GHS to the farmers or to purchasing grain by the Elevators. The parties instead agree that there are no substitute products for either GHS or for grain (namely, each of wheat and canola).

[231] The debate around the product market definition in this case is about how to characterize what occurs when a farmer sells grain to an Elevator. The debate does not center on the definition of the product market, but rather on the definition of the relevant product itself, and of the relevant price attached to it.

[232] Before dealing with the product market — or the geographic market —, the Tribunal must first determine what the product at issue is and what its price is. It is important to distinguish the "product" and the "price" from the product "market." The Tribunal does not dispute that the product market is an analytical framework and an artificial construct, where the Tribunal needs to determine the presence and extent of substitutes (*Superior Propane I* at para 101). However, the underlying product or the underlying price for it are not analytical or theoretical constructs themselves. The product and the price attached to a product need to be anchored in the evidence

and, indeed, tied to commercial reality. Determining the relevant product and the relevant price is an inquiry that must be based on the evidence of each case.

[233] On the facts of this case, the relevant product is not the sale of GHS, but the purchase of grain.

(i) The notions of product and price

[234] In the legal and economic context relevant to merger analysis, the term "product" refers to the output that a producer (seller) provides to a purchasing customer, or the input that a producer (purchaser) acquires from a supplying customer.

[235] To identify the relevant product for the purpose of defining a relevant competition market, the starting point is to determine what the customer actually buys or sells, and at what price. In the context of a merger, it starts with the product(s) in respect of which, prior to the merger, the merging entities were competitors. In other words, what is the product that P&H and LDC sold or purchased in the marketplace, in competition with one another, prior to the Transaction?

[236] For a product to exist in the economic sense and in the context of the relevant market definition for the purpose of an application under section 92 of the Act, there must be a separate and identifiable supply and demand for it. It must be transacted and it must have a price attached to it. Product market definition is based on substitutability and focuses on demand responses to changes in prices. The SSNIP must therefore be applied to the price that is being received by the sellers or paid by the purchasers of the candidate product (*Visa Canada* at para 198). In fact, in order to apply the HMT, a relevant price for the relevant product must be identified. The focus is on the price of the good or service effectively being sold or bought. There can be no product, and no price for such product, if the product has no independent existence and market presence. The Tribunal further accepts P&H's view that an article or a service which would be neither bought nor sold cannot fall within the definition of a "business" under the Act (and hence, the definition of a merger in section 91), because it would not be a product that is acquired, supplied, or otherwise dealt in.

[237] According to the MEGs, the "base price" to be used for market definition purposes and to postulate a price increase in the HMT framework "is typically the prevailing price in the relevant market" (2011 MEGS at para 4.6). This, once again, refers to a price observed in a market. The base price is the price used in the normal course of business, namely, whatever price "is ordinarily considered to be the price of the product in the sector of the industry (e.g., manufacturing, wholesale, retail) being examined" (2011 MEGs at para 4.7). The MEGs therefore make it clear that the relevant price must echo what is effectively occurring in the industry being considered.

[238] The price that has been typically employed in the standard approach to market definition and in the HMT analysis is the "cumulative price," namely, "the total value of the product when it leaves the stage of the industry in question. This simply represents the sum of input costs plus value added" (*Crampton 1990* at p 265, fn 11). The author Crampton (now a judicial member of the Tribunal) also referred to alternative "prices" such as the "value added price" representing the difference between the cost of all inputs and the cumulative price, and he specified that this price "has been employed in situations where the value added is billed as a separate fee, with no mark-

up being applied to the product in relation to when the service is performed" (*Crampton 1990* at p 265).

[239] However, the Tribunal underlines that price and cost are two different notions. A price is the amount that a customer buying a product or a person supplying one is willing to pay or receive for it. The price is ascertained from the perspective of the customer or the purchaser. On the other hand, a cost is the expense incurred for making a product or offering a service that is sold. It is ascertained from the perspective of the producer. A cost cannot simply be equated with a price, though there is evidently a relationship between the two, since costs have a direct impact on the price of a product.

[240] The Tribunal has found no precedent, and the Commissioner has not referred to any, where it was recognized by the courts or by the economic literature that there can be a "market" for a product that is not sold and purchased as such, but is only a cost component of a final product. The Tribunal accepts that a specific part can be categorized as a separate product and can constitute the basis for a separate product market (see, for example, *Canada (Director of Investigation and Research) v Xerox Canada Inc* (1990), 33 CPR (3d) 83 (Comp Trib) ("***Xerox***")). But a product must have a price attached to it. In other words, the notion of product for market definition purposes and the calculation of a SSNIP implies a transacted price, not solely a theoretical price derived from allocating revenue to the cost of selected activities associated with the purchase or sale of a product.

(ii) GHS is not a transacted product

[241] The evidence indicates that GHS, as defined by the Commissioner, is not a product that actually exists in the grain industry or that is being supplied by the Elevators and purchased by the farmers: GHS are not transacted or contracted between the farms and the grain companies.

[242] The Tribunal has found no reference to GHS in P&H's materials nor a description of any service provided by P&H or other grain companies under the label of GHS. Neither the Elevators, the Crushers, nor even the farmers themselves recognize GHS as a separate, identifiable product. It is not even a term of art used in the grain industry. There is no evidence that farmers and grain companies transact on the basis of the sale and purchase of GHS.

[243] More specifically, none of the six farmer witnesses who testified at the hearing on behalf of either the Commissioner or P&H referred to GHS as an actual service they receive from the Elevators and pay for. Farmers do not talk in terms of GHS.

[244] Similarly, the Elevators do not refer to the notion of GHS. Mr. Heimbecker, for P&H, and the witness from Cargill, Ms. Jordan, both confirmed that in the industry, grain companies do not charge farmers for GHS and rather consider the services covered by the Commissioner's definition of GHS as costs. At one point in his submissions, the Commissioner mentioned the fact that P&H refers to its grain handling and trading business in its own financial reporting documents. However, the Commissioner has pointed to no evidence, whether from P&H or from any other grain company, containing a reference to grain handling services. The "grain handling business and trading" is not to be confused with "grain handling services" (as a product). P&H purchases grain

for the purpose of trading it in national and international markets and grain handling is an operational process in the purchase and resale of the grain.

[245] While the Tribunal agrees with Dr. Miller that the participants and competitive constraints at each stage of an industry are distinct, the Tribunal finds that GHS is not a product that is transacted as such between farmers and Elevators, at any stage of the grain handling and trading business. It is an artificial bundle of services that the Commissioner and Dr. Miller have constructed for the purposes of this proceeding.

[246] Mr. Heimbecker testified that P&H does not supply GHS in the post-CWB era (Exhibits CA-R-115 and P-R-116, Witness Statement of Mr. John Heimbecker ("**Heimbecker Statement**"), at para 115). This evidence was not contradicted and the Tribunal accepts the evidence of Mr. Heimbecker on this point.

[247] In sum, GHS, or the "value-added" product identified by the Commissioner in this case, is not a product that farms and grain companies recognize and effectively buy and sell. Moreover, GHS is not a separate value-added product that farms transact separately from the grain, and for which they could find substitute sources of supply (*i.e.*, sellers offering just the GHS value-added service).

[248] The Tribunal pauses to observe that, from an industry perspective, the notion of GHS advanced by the Commissioner corresponds to a historical nomenclature that disappeared when the CWB was dismantled on July 31, 2012 (Heimbecker Statement at paras 113–117). Before its dismantling, the CWB purchased certain types of grain — including wheat — from farms and grain companies handled that grain on behalf of the CWB on a "toll basis," effectively providing the type of services included by the Commissioner in his definition of GHS. However, with the end of the CWB, grain companies are no longer intermediaries between the CWB and farmers, and the market interrelation between the farmers and the grain companies has changed. As a result, grain companies have assumed part of the role of the CWB in the supply chain, namely, as purchaser of grain with the risks attached to the marketing and sale of the product. With the end of the CWB, the historical tariffs and fees that used to be charged for a service also came to an end. In the post-CWB world, P&H (like other grain companies) buys wheat and canola from farms, taking title to the grain at the time the farm delivers it to the Elevator. At that point in time, the farm receives the contracted Cash Price for its grain and ownership of the grain passes to P&H or the other Elevators. From that point on, the farm has no right or interest in the grain and bears no risk in relation to the purchase transaction. Instead, P&H is fully responsible for the costs, risks, and rewards of aggregating, transporting, and selling the grain to a customer.

[249] True, as will be discussed below, the farmers and Elevators sometimes negotiate on one component of the Cash Price (namely, the Basis) because information on the Basis is provided by the Elevators. The Tribunal is satisfied that this reflects a historical heritage from the CWB days (or, as argued by P&H, a linguistic vestige of the CWB era). But what were services at the time of the CWB are now costs to the Elevators, not GHS to which a price can be attached.

[250] For the purpose of this Application, the only products that are exchanged and transacted between the farms and the Elevators are wheat and canola.

(iii) There is no price for GHS

[251] Furthermore, the Tribunal concludes that there is no "price" associated with GHS.

[252] As was the case for GHS as a product, the Tribunal finds no evidence of a "price" for GHS. The evidence from the farmer witnesses indicates that they do not talk about receiving GHS and are not charged any fees or price for GHS. All farmer witnesses testified that there are no separate charges for GHS. In addition, no price exists for GHS in the contracts or agreements concluded by P&H and other grain companies with the farmers.

[253] Nor is a price for GHS recorded or kept in the transaction data reported by the grain companies in the usual course of business. The transaction data obtained from the grain companies provides address information for farms delivering canola or wheat to the Elevators and Crushers, with some exceptions. The farm address information allowed Dr. Miller and Ms. Sanderson to identify deliveries to the Elevators from farms with addresses in the various regions used in their respective analyses, as well as any other location. The transaction data report Cash Prices and deliveries to each grain company but they do not include any information on GHS or on a price for such alleged bundle of services.

[254] It is of note that, just as they do not consider GHS to be a separate product offered for purchase and sale, the grain companies do not keep an amount representing the price of GHS — or even the Basis, as will be discussed below — in their transaction data set. If GHS were meaningful for the Elevators or the farmers from a transactional perspective, the grain companies would likely keep track of its price in their transaction data.

[255] Indeed, the Commissioner recognized at the hearing and in his written submissions that the farmers are not charged for GHS as a separate, added service to the purchase of grain. Moreover, a witness for the Commissioner in the discovery process and Dr. Miller in his testimony each confirmed that the price for GHS had to be "imputed" and that it is a constructed price.

[256] As GHS is neither observed as an added service feature nor transacted as such, Dr. Miller had to create a measure for the price of it. In his expert report, Dr. Miller imputed the price of GHS for each transaction as the difference between the Cash Price and the Futures Price from the financial market, as of the transaction date, adjusting for exchange rates in the case of wheat. Dr. Miller sometimes referred to the price of GHS as the Basis, although he admitted that his constructed price of GHS is not equal to the Basis used by Elevators for wheat or canola for each transaction. Dr. Miller's transaction-level prices of GHS were estimated with error, in part because the contract date (which often determines the relevant Futures Price) is unobserved in the transaction data.

[257] In sum, there is no observed or observable added feature for GHS, no price is attached to it, and none appears in the transaction data or can be otherwise identified. The evidence from the Commissioner reveals that the "imputed" price for GHS is a constructed price, and not an explicit or implicit price transacted between buyer and seller. Here, there is no doubt that it is not a situation where a farmer pays a price for an actual specific service, such as delivery, transportation or processing fees.

[258] The farmer witnesses (*i.e.*, Mr. Lincoln, Mr. Wagstaff, Mr. Pethick, Mr. Paull, Mr. Duncan, and Mr. Hebert) all testified that the Cash Price they ultimately receive for their grain drives their decisions to sell their grain to an Elevator. As admitted by the Commissioner, farmers care about the money they receive from the sale of their grain, and they never talk about GHS as separately transacted.

[259] In his witness statement, Mr. Pethick stated that he considers the "basis price" but also the overall price (*i.e.*, the Cash Price) communicated by the Elevators when deciding where to deliver his grain (Exhibit P-A-001, Witness Statement of Mr. Alistair Pethick ("**Pethick Statement**"), at paras 19–20). Similarly, Mr. Lincoln also referred to the importance of "competitive prices" and to being offered a "higher price," generally, without suggesting that this was limited to the Basis (Exhibits CB-A-025 and P-A-026, Witness Statement of Mr. Chris Lincoln ("**Lincoln Statement**"), at paras 13, 15). The Agreed Statement of Facts for the two farmer witnesses who did not testify at the hearing indicates that [redacted] "regularly checks the prices" at various Elevators, without limiting his comment to the Basis (Exhibits CA-R-242 and P-R-243, Compilation of Additional Documents Added to Agreed Book, Agreed Statement of Facts re [redacted] and [redacted]). For their part, each of Mr. Hebert, Mr. Paull, and Mr. Duncan said in their respective witness statements that the Cash Price is what drives their decisions to sell to Elevators or Crushers.

[260] The evidence from Mr. Heimbecker also reveals that most pricing-related communications made by P&H to farmers refer to the Cash Price, with no mention of the Basis (Heimbecker Statement at para 61; Exhibits CB-A-134 and P-A-135, Read-in Brief of the Commissioner ("**Commissioner Read-In**")). Industry participants also use the Basis and the Cash Price interchangeably, to refer to the net final price that farmers effectively receive for their grain. Mr. Hebert, for example, testified that when he is using the Basis, he is "calculating it back to the cash price that [he is] going to deposit" (Consolidated Transcript, Confidential B, at p 870). In short, he is using the Basis to compare the Elevators' net prices for the grain.

[261] In the Tribunal's view, on the facts of this case, the only "base price" for market definition purposes is the Cash Price paid to farmers to purchase their wheat or canola, not the "imputed" price of GHS that is never separately or identifiably charged to farmers by Elevators to handle their grain. Farms sell grain to Elevators and Crushers for a single Cash Price. Elevators and Crushers purchase grain from farms for a single Cash Price. The Cash Price paid to farms to purchase grain is the ordinary and prevailing price in the relevant markets.

(iv) The Basis differs from GHS and is not the price of GHS

[262] In his submissions on the product market and on GHS, the Commissioner relied heavily on the Basis and on the evidence related to it.

[263] The Commissioner argues that the Basis is a component of the Cash Price, along with the Futures Price. Both combine to form the Cash Price paid to the farms. According to the Commissioner, the Basis component of the Cash Price is the mechanism that P&H uses to ensure that the price at which it buys the grain from the farmers is a price that allows it to cover the expenses of operating the Elevator where the farmers deliver their grain. The Commissioner

maintains that the Basis "is an amount subtracted from the Futures Price in the case of canola (and added to the Futures Price in the case of wheat to account for exchange rate differences) that covers the grain company's costs to operate the Elevator while also providing the grain company with a margin." He claims that it is not a simple mathematical construct, as alleged by P&H and Mr. Heimbecker. According to Dr. Miller, the Basis covers the costs of the Elevators and allows for a profit. Dr. Miller claims that it is the relevant price "in terms of how competition plays out" in the grain industry, "in terms of the value added" by the Elevators, and "in terms of just the profitability of the [grain handling] business" (Consolidated Transcript, Public, at p 1430).

[264] The Commissioner further submits that all contracts entered into by the Elevators and the farms refer to the Basis, or even to the "basis price," and that farmers use the Basis in their dealings with the Elevators. The Commissioner adds that the problem with GHS and the Basis is an "implementation issue" as neither the Basis nor the price of GHS appear in the transaction data of the grain companies. In sum, throughout his submissions, the Commissioner effectively equates GHS to the Basis to justify his approach to the product market definition.

[265] The Tribunal is not persuaded by the Commissioner's arguments and finds that the existence of the Basis is not sufficient to transform GHS into a relevant product to which a relevant and reliable base price can be attached. The evidence does not support that the Basis can be equated with the notion of GHS advanced by the Commissioner and Dr. Miller. There is a distinction and a difference between the use of the Basis by farmers and grain companies in the sale and purchase of grain on the one hand, and GHS as an operational cost to the grain companies on the other.

[266] The Tribunal acknowledges that the Basis is an industry benchmark, recognized and used by the participants in the grain handling business. But the Basis is not a product that is transacted as such. The Basis is not a price either. Despite the repeated references made by the Commissioner to a "basis price" in his oral and written submissions, the Tribunal is not persuaded that, on a balance of probabilities, the evidence supports a conclusion that the Basis represents a price attached to a product. Mr. Heimbecker testified that the Basis is not a price expressed in dollar terms, even though there is often a dollar sign apposed to its numerical figure in some of P&H's own documents. In the Tribunal's view, the Basis is best described as the numerical difference between the Cash Price and the Futures Price, as determined by P&H's Workback Algorithm. The Workback Algorithm is only run once a day by P&H, but the Cash Price that a farmer sees in P&H Direct will adjust instantaneously to reflect any changes in the Futures Price. This evidence has not been contradicted, and was confirmed by farmers such as Mr. Duncan and Mr. Hebert in their respective testimony (see, for example, Consolidated Transcript, Confidential B, at p 929). Yes, the Basis is a metric used in the grain business, but it is not a price for a product.

[267] One of the farmer witnesses, Mr. Paull, testified that the Basis is just a tool used to track or monitor the Cash Price that he will receive when he delivers his grain to the Elevators. One of P&H's customer service representatives, since promoted to managing an Elevator, explained the Basis in emails sent to hundreds of customers as follows: "[t]his premium or discount to the futures value is commonly referred to as a basis. The basis reflects each grain company's own particular handling, transportation and marketing costs, combined with the bid values from their own-end use customers" (Exhibit CB-A-149, P&H Email Subject: Gain From You Grain, dated February 16, 2017).

[268] The Tribunal observes that the Basis is not identified by the farms or the grain companies as a price associated with GHS or with any specific service. The grain industry participants instead refer to the Basis, without more. It is never the "Basis for GHS" or for any other specific product. Nowhere in the evidence is there a reference to a Basis for something. It is a concept and a notion used in the grain industry, but there is no evidence that the Basis refers to or is attached to a particular product. As is the case for GHS, and even though it is an information communicated by the Elevators in their dealings with the farms, the Basis is not recorded in the transaction data by the grain companies.

[269] Moreover, when the farmers refer to the effect of changes in the Basis, they always refer to changes expressed in terms of cents per bushel or per MT. The bushel or the MT is a unit of measurement for the grain, not for GHS. In other words, the farms always refer to the impact that a change in the Basis will have on the price for the grain itself, expressed in terms of a dollar value per bushel or MT. The changes to the Basis are never expressed in terms of cents for GHS or for any type of service provided by an Elevator.

[270] Even if a change to the Basis offered is the subject of negotiations between grain companies and farmers, what ultimately changes is the Cash Price from which the Basis is derived. What changes is the price expressed in dollars and cents per bushel or MT, for the grain being purchased by the Elevator and sold by the farmer.

[271] Further to its review of the evidence, the Tribunal therefore concludes that the Basis is best described as a component of the price of grain, not as a price attached to a specific product or a separate value added. In fact, the Tribunal finds that the evidence from P&H and the grain companies establishes that the Basis is not a price of a product by itself but a cost element for the Elevators.

[272] The Tribunal adds that merely displaying the components of a price, itemizing the price of a product, or providing the breakdown of the components of a product being sold or purchased, does not have the effect of creating a separate product if such an itemized component does not have an economic life of its own, and is not transacted in a market for a price. This is exactly the case for the Basis and the GHS.

[273] In his final argument, the Commissioner submitted that this is not even a case where the price for GHS is implicit. He claims that there is nothing implicit about GHS and that its price or value appears in the contracts that P&H and other grain companies enter into with farmers. The Commissioner claims that the price for GHS is in fact explicit and only appears to be implicit because the Basis is not subsequently recorded in the transaction data of the grain companies. The Commissioner argues that the explicit price underlying his product market is the Basis being charged to the farmers by the Elevators. And that the problem is strictly one of implementation because the Basis sets the price for GHS.

[274] The Tribunal does not agree. This is not a situation where there is an explicit price for GHS that is part of the contract price between the farmers and the Elevators.

[275] First, the Commissioner confuses the price of GHS and the Basis. The evidence clearly establishes that the Elevators do not post a price for GHS; they post a Basis. The Basis sometimes

shows up in the information posted by P&H and other grain companies, as well as on some invoices and in some contracts. But not GHS. The Basis and GHS are not the same thing, and Dr. Miller clearly acknowledged that he had to "impute" the price of GHS from the Basis information (Exhibits P-A-169, CA-A-170 and CB-A-171, Expert Report of Dr. Nathan Miller ("**Dr. Miller Report**"), at para 173). Dr. Miller used a computed price as a proxy for the Basis, because neither the Basis, nor a price for GHS, appears in the transaction data. Dr. Miller and a representative of the Commissioner indeed acknowledged, in their testimony and on discovery, that the imputed price for GHS is a "subset of the Basis" (Exhibits CA-R-242 and P-R-243, Compilation of Additional Documents Added to the Agreed Book, P&H Read-in Brief ("**P&H Read-In**"), at pp 21–22). Dr. Miller further admitted that the imputed price for GHS does not always correspond to what the Basis component of the Cash Price actually is.

[276] Second, a calculated or imputed price is not a price that can be correctly described as being observed or observable. Here, Dr. Miller has not used the observed Basis; he has estimated a price for GHS (which he sometimes refers to as a Basis) for each transaction from the difference between the Cash Price and an assumed Futures Price at a given date. Dr. Miller testified that at a transaction level, the estimation leads to variance between the observed Basis of which a corresponding Cash Price was transacted and the constructed price for GHS for that transaction.

[277] The Commissioner submits that the price of GHS imputed by Dr. Miller is a good approximation of the Basis. For the Virden and Moosomin Elevators, Dr. Miller takes the median of the transaction-level prices of GHS and he uses the Virden Elevator median price to calculate his mark-up. The median prices calculated by Dr. Miller are the benchmark prices he uses in his HMT analysis.

[278] Dr. Miller and Ms. Sanderson agree that taking a median over thousands of observations measured with error reduces the measurement error. However, they disagree about whether the median prices for GHS obtained by Dr. Miller for the Virden and Moosomin Elevators are reliable estimates for the Basis.

[279] Referring to the contracts of [redacted], a farmer, Dr. Miller said that the difference between his computed median price of CAD $31.02 per MT for GHS for wheat and the corresponding value of the Basis in [redacted] contracts of CAD $34.83 per MT was "reasonably close," using 37 deliveries made by [redacted]. The Tribunal observes that it is still a significant difference of 12% — namely, CAD $3.76 per MT or 10.23 cents per bushel of wheat. And that difference is a variance of only a few transactions out of thousands. However, when Dr. Miller compares the median for all wheat transactions at the Moosomin Elevator, calculated by his own model as being CAD $34.78 per MT, to the actual Basis in the contracts of [redacted] (*i.e.*, CAD $ 34.83), the two values are very similar. In light of that, the Commissioner claims that the price for GHS imputed by Dr. Miller represents a good approximation of the actual Basis found in the contracts.

[280] Ms. Sanderson testified that the large difference in the median between the Moosomin and Virden Elevators for both wheat and canola is likely due to a larger error between Dr. Miller's predicted median and the median of the actual Basis. Ms. Sanderson points to the fact that for wheat, the GHS median value is 20% lower at the Virden Elevator than at the Moosomin Elevator, whereas in the case of canola, the Virden Elevator median value is 60% higher than the Moosomin

Elevator value, in a situation where the Virden Elevator had larger sales than Moosomin. Ms. Sanderson attributed these differences to the uncertainties in the methodology used by Dr. Miller.

[281] Like Ms. Sanderson, the Tribunal does not share the Commissioner's confidence in Dr. Miller's calculations. The Tribunal is not persuaded that using a median to correct for the error terms between the estimated and the actual values is sufficient, in this case, to correct for the high uncertainty in the estimated values. The median calculated by Dr. Miller includes several sources of uncertainty stemming from the fluctuation of the Futures Price and exchange rates within a day that may not be correlated with the actual transactions, the choice for delivery dates, and negotiations on delivery. The Tribunal agrees that in theory, using the median of a very large data set (in this case, thousands of transaction data) provides a much smaller error than the error of each observation. However, in his attempt to correlate a Futures Price for an estimated delivery date for each transaction, Dr. Miller did not provide convincing evidence to give the Tribunal the level of confidence or precision needed to conclude that the median predicts the actual Basis. The Tribunal adds that if the measurement errors are systematically skewed from actual delivery periods or Futures Price and exchange rates spot price reflected in the application at the time of sale, the results will also be skewed. Dr. Miller did not provide the Tribunal with evidence that this did not occur.

[282] In any event, whether Dr. Miller's "imputed" price of GHS is a good or not so good approximation of the Basis is not a determinative issue in this case. The Tribunal finds that neither the "imputed" price of GHS nor the Basis can be used as the foundation of a product market definition since neither is a transacted price attached to an identifiable product.

[283] The Tribunal pauses to note that, if in a given case, the evidence enabled it to isolate or identify a value-added component or feature of a product with sufficient precision, and to find a value-added price from business records, the Tribunal may conclude that the computed price is the price of that value-added component. In this case, the evidence does not permit to make such a conclusion.

(v) The Basis plays a role in competition

[284] That being said, the Tribunal appreciates that the Basis is a touchstone of competition between the Elevators, and that it is an important factor to understand the rivalry between Elevators as well as the competitive dynamics in the grain industry. One cannot ignore what is going on at the Elevator's level (including competition on the Basis) when determining whether there is an increase in market power and a substantial lessening of competition.

[285] The evidence supports a conclusion that the Basis component of the price of grain is affected by local competition. Farmers such as Mr. Pethick, Mr. Paull, and Mr. Hebert testified that they can play Elevators against each other based, among other things, on the Basis. Mr. Paull and Mr. Hebert admitted on cross-examination that they use not only the Cash Price to compare Elevators, but also the Basis. Even Mr. Heimbecker admitted that farmers use the Basis to compare grain prices between Elevators. There was also evidence that P&H sends email blasts to customers containing references to the Basis. The vast majority of grain companies also incorporate references to the Basis as well as the Futures Price and the Cash Price in their contracts with

farmers. Farmers can also enter into Basis contracts, though Mr. Heimbecker testified that these were rare in the grain industry. Furthermore, P&H can and does adjust the Basis to account for local competition from Elevators: P&H and other grain companies will offer limited-time or limited-tonnage specials to farms to attract their grain, and such premiums above the posted Cash Price are sometimes expressed through changes in the Basis.

[286] The Tribunal accepts that the Basis captures an aspect of competition between the Elevators. The Basis is one part of competition between the Elevators and, as will be discussed below, it is an element to consider in the substantial lessening of competition analysis. However, this does not mean that the Basis, or Dr. Miller's "imputed" price for GHS, can constitute the base price for market definition purposes, or that the existence of the Basis is sufficient to transform GHS into a relevant product.

[287] The Commissioner is urging the Tribunal to adopt, for its product market definition, an economic framework that allows for and facilitates an analysis focused on the local competition allegedly impacted by the Acquisition. This is what led the Commissioner and Dr. Miller to identify GHS as a product and to "impute" a price for it, derived from the Basis. Dr. Miller opined that, economically, constructing an imputed price to approximate the Basis was the right way to analyze the "effects" of the Virden Acquisition. However, in an effort to define a relevant product market, the Commissioner developed a theoretical framework that does not reflect the commercial reality of the grain industry, where GHS does not exist as a product, does not have a "price," and is not transacted. In short, the Commissioner's position ignored the fundamental premise of product market definition, which requires the existence of a transacted product whose price is the ordinary price in the sector of the industry being examined.

[288] In sum, the Tribunal finds that the evidence does not support the existence of a separate relevant "market" for the sale of GHS. GHS is an artificial product, with an artificial price, that cannot form the foundation of an acceptable relevant product market for the purpose of the Tribunal's analysis. On the facts of this case, the relevant products are the purchase of wheat and canola and the relevant price is the Cash Price.

(b) The "value-added" approach

[289] The Commissioner submits that the law acknowledges it can be appropriate to define the relevant product market around a component of the price of the final product which represents the specific value provided at an intermediary level by the merging firms. In this case, the Commissioner maintains that an Elevator's specific contribution of value, namely, providing GHS as part of the Cash Price farmers receive for their grain, can be identified with reasonable clarity. According to the Commissioner, a product market definition focused on the competition affected by the merger and on the merging firms' contribution to value is an approach supported by the jurisprudence from Canada, the U.S., and the European Union.

[290] The Tribunal disagrees. Further to its analysis, the Tribunal instead concludes that there are no precedents, in Canada or in any other jurisdiction, where the "value-added" approach referred to in the US HMEGs has actually been used and applied by an adjudicating court or tribunal to define a relevant product market in a merger case. Moreover, the "value-added"

approach advocated by the Commissioner cannot be reconciled with the history of the MEGs and the current 2011 MEGs issued by the Commissioner himself.

(i) The US HMEGs

[291] In support of his "valued-added" approach to the product market definition, the Commissioner relies heavily on the US HMEGs. These guidelines describe the approach to merger review by the U.S. antitrust agencies and were adopted in 2010. In his reply expert report, Dr. Miller referred specifically to them, drawing an analogy between the present case and the examples used in the US HMEGs (Exhibits P-A-172, CA-A-173 and CB-A-174, Reply Expert Report of Dr. Nathan Miller ("**Dr. Miller Reply Report**"), at paras 34–36 and fn 33).

[292] In its section 4 on "Market Definition", the US HMEGs contemplate that in certain situations, the benchmark price used for analyzing a product market — *i.e.*, the base price — can be different from the price effectively charged for a final product. The US HMEGs indicate that, in a situation where explicit or implicit prices for the merging firms' contribution to the value of the final product can be identified with reasonable clarity, the price used to assess the merger and define the relevant market can be the component of the price that the firms compete on. Similarly, the SSNIP threshold can also be adjusted. In paragraph 4.1.2 on "Benchmark Prices and SSNIP Size," the US HMEGs state as follows:

> The Agencies most often use a SSNIP of five percent of the price paid by customers for the products or services to which the merging firms contribute value. However, what constitutes a "small but significant" increase in price, commensurate with a significant loss of competition caused by the merger, depends upon the nature of the industry and the merging firms' positions in it, and the Agencies may accordingly use a price increase that is larger or smaller than five percent. Where explicit or implicit prices for the firms' specific contribution to value can be identified with reasonable clarity, the Agencies may base the SSNIP on those prices.
>
> [Emphasis added.]

[293] The US HMEGs then refer to three specific examples, illustrating situations where implicit prices for the firms' specific contribution to value can be identified. These examples read as follows:

> *Example 8:* In a merger between two oil pipelines, the SSNIP would be based on the price charged for transporting the oil, not on the price of the oil itself. If pipelines buy the oil at one end and sell it at the other, the price charged for transporting the oil is implicit, equal to the difference between the price paid for oil at the input end and the price charged for oil at the output end. The relevant product sold by the pipelines is better described as "pipeline transportation of oil from point A to point B" than as "oil at point B."
>
> *Example 9:* In a merger between two firms that install computers purchased from third parties, the SSNIP would be based on their fees, not on the price of installed

> computers. If these firms purchase the computers and charge their customers one package price, the implicit installation fee is equal to the package charge to customers less the price of the computers.
>
> *Example 10:* In Example 9, suppose that the prices paid by the merging firms to purchase computers are opaque, but account for at least ninety-five percent of the prices they charge for installed computers, with profits or implicit fees making up five percent of those prices at most. A five percent SSNIP on the total price paid by customers would at least double those fees or profits. Even if that would be unprofitable for a hypothetical monopolist, a significant increase in fees might well be profitable. If the SSNIP is based on the total price paid by customers, a lower percentage will be used.

[294] The US HMEGs therefore contemplate two situations where the usual base price and/or SSNIP threshold could be modified. The first one looks at the explicit or implicit price of the value added by the merging firms and, in cases where the value-added component can be identified with reasonable certainty, a base price other than the usual total price of the product may be used. The second refers to situations where the SSNIP remains based on the total price paid for the product, but the usual 5% SSNIP threshold is adjusted to deal with the realities of an industry.

[295] However, the US HMEGs provide no guidance as to when the contribution to value, as opposed to the total price of a product, would be appropriate for the purposes of the relevant market definition. Nor do they contain any guidance on how and when the usual 5% SSNIP threshold should be adjusted. The Tribunal finally notes that the US HMEGs simply mention that the U.S. antitrust agencies "may base" the SSNIP and the HMT analysis on the price for the value added by the merging firms.

(ii) No court or tribunal has ever applied the "value-added" approach

[296] As correctly pointed out by P&H in its submissions, a review of the existing jurisprudence reveals that, contrary to the Commissioner's submissions, there are no legal precedents, in Canada, in the U.S., or in any other jurisdiction, where a court or a tribunal has effectively applied or recognized the "value-added" approach set out in the US HMEGs. While the concept advanced by the Commissioner has been argued in a few cases in the U.S., the European Union and Australia, it has either been rejected by the courts or applied by competition agencies to facts which are distinguishable from the facts of this case. The Tribunal further observes that the "value-added" approach has never been considered or applied in respect of an "imputed" price. In other words, the Tribunal has not found any situation where a court or tribunal has accepted and retained an implicit price for the merging firms' specific contribution to the value of a product to determine the relevant product, the relevant price, the SSNIP, and the relevant market in a merger case.

[297] In essence, on this issue of the "value-added" approach, the Commissioner is asking the Tribunal to go where no other court or tribunal has yet agreed to go.

- Canada

[298] As far as Canadian cases are concerned, the Commissioner relies on *Hillsdown* and *Xerox*. He claims that these cases both demonstrate that the value added by the merging firms can form the basis of a product market definition and that, to define the relevant product market, the Tribunal can focus on the portion of the final price that is impacted by the merger.

[299] The Tribunal is not persuaded by the Commissioner's arguments.

[300] In *Hillsdown*, the first contested merger review proceeding under section 92, the Tribunal analyzed the merger of two companies that operated rendering businesses for the by-products from slaughterhouses and other entities. On the product market definition, the Tribunal had to decide whether to characterize the relevant market as the supply of "renderable material" from slaughterhouses to the renderers, or as the provision of the specific services that contribute to the end product's value, namely, "rendering services" offered by the renderer to the slaughterhouses, meat processing plants, grocery stores, etc. Since the Tribunal decided to characterize the market as the provision of rendering services, claims the Commissioner, it recognized that the product market can be limited to the services capturing the value provided by an intermediary.

[301] The Tribunal considers that *Hillsdown* is of no assistance to the Commissioner on the "value-added" approach since in that case, the Tribunal expressly said that there was no difference between the two contemplated approaches to the product market, even though it decided to characterize the market as the provision of rendering services. If the first characterization was used, then the analysis for competition purposes would have focused on the possible monopsony power of the renderers as buyers of the raw materials. If the second characterization was used, then the analysis would have focused on the possible market power of the renderers as sellers of the rendering services. But, said the Tribunal, no significant difference resulted from the two characterizations. Moreover, there was clearly a price paid for the renderable materials or for the services provided (*Hillsdown* at pp 293 d-h, 299). In light of the foregoing, the panel finds that the *Hillsdown* decision is at best inconclusive on the issue of the "value-added" approach.

[302] In *Xerox*, a non-merger case, the Tribunal found that the relevant product market was the provision of intermediary services, namely, servicing copier parts that were not constrained by the sale of copiers to end customers. It is true that the Tribunal then recognized that a subset of a final product (*i.e.*, the servicing of parts for copiers) can constitute a relevant product. However, in that case, there was a specific price charged for the specific service offered by the parties. Again, this precedent therefore offers at best weak support to the "value-added" approach contemplated by the Commissioner in this case, as no specific price is charged for GHS.

- U.S.

[303] Turning to the U.S., even though the US HMEGs were adopted more than 12 years ago in August 2010, the Commissioner has not referred the Tribunal to any decision of a U.S. court where the "value-added" approach set out in the US HMEGs was accepted and actually applied.

[304] In his submissions to the Tribunal, the Commissioner referred to a matter involving Conagra Foods (*United States of America v Conagra Foods, Inc, et al*, 14-CV-000823 "***Conagra***")) and to *FTC v Whole Foods Market, Inc*, 502 F.Supp. 2d 1 (2007) ("***Whole Foods***"). The Tribunal concludes that neither of these matters constitutes a convincing precedent to assist the Commissioner on the "valued-added" approach.

[305] The *Conagra* example was a case in the flour business, where a fee was charged by the millers for converting wheat into flour. The Commissioner claims that this was a situation where the U.S. Department of Justice applied the SSNIP to a component of the final price for the flour, namely, the converting fee, because this component was the subject of the effective competition at issue between the merging flour mills. However, this precedent is of no value to the Tribunal as the Commissioner was strictly relying on the argument presented to the court by the U.S. antitrust agency itself, and not on a decision issued by a U.S. court. This case is therefore not a legal authority but instead solely reflects the position taken by another competition authority on the "value-added" approach.

[306] With respect to *Whole Foods*, it was not a case where a "value-added" approach was applied or even considered by the U.S. court. It was instead a matter where the court mentioned that in the context of the HMT framework, lower SSNIP levels may be more appropriate for mergers in markets or industries characterized by high-volume sales but low-profit margins (*Whole Foods* at pp 9–11). This case therefore did not involve the application of a "value-added" approach to a component of a product but turned instead on the possible use of a smaller SSNIP threshold on the final product sold by the grocers. The Tribunal points out that in *Whole Foods*, the U.S. court did not analyze nor provide any guidance on the factors to take into account or the evidence required in order to determine the appropriate level of such a lower SSNIP level.

- <u>European Union</u>

[307] The Commissioner also referred to two cases issued by the European Commission ("**EC**") in the European Union, where the US HMEGs were approved and followed by the EC. These decisions dealt with extruded metals and, according to the Commissioner, recognized the value-added by an intermediary as a relevant and separate product market.

[308] In *Norsk Hydro/Orkla/JV* (Case No COMP/M.6756), 13 May 2013 ("***Norsk Hydro***"), two companies had operations in the aluminum sector where extrusion premia were charged. The extrusion premia represent the price paid by customers for the value added by companies that extrude the aluminum. In *Norsk Hydro*, the EC noted that there was a significant and persistent difference in the extrusion premia charged by soft-alloy extrusion suppliers in two different geographic markets. Therefore, in analyzing the merger between extruders, the EC considered that the relevant benchmark price was the actual price for the premium charged for the extruding process, and not the full price of the aluminum eventually sold to customers. The EC concluded that "in the presence of a similar price structure, it seems appropriate to take as a relevant benchmark price the extrusion premia rather than the full price" — citing with approval the US HMEGs (*Norsk Hydro* at paras 66–67). The EC found that the price negotiations were only on the extrusion premium, as other factors such as the price of aluminum or the billet conversion costs were typically fixed.

[309] The second European Union case relied on by the Commissioner is *Inco/Falconbridge*, (Case No COMP/M.4000), 4 July 2006 ("***Inco***"). In that case, the EC considered the market for high-purity nickel, stating that "the price increase must be seen in relation to the added value provided by the firms in the relevant market" (*Inco* at para 379). The EC observed that a price increase of an input good may have only a minor effect on the price of the final product (depending on the share of total input cost represented by the input good), but can nonetheless be considered significant from a competition perspective. Since the premium charged was directly negotiated with the customers, the EC determined that it was a separate product, with a separate price.

[310] The Tribunal pauses to note that P&H also referred to a third similar EC matter, also dealing with extruded metals, namely, *Glencore/Xstrata* (Case No COMP/M.6541), 22 November 2012. In that case, a premium applicable to the extruded metal differentiated the extruded product from the raw metal price, and was also the main element of the price negotiated between buyers and sellers.

[311] The Tribunal finds that these European Union cases are of no real precedential value. In any event, they are clearly distinguishable from the present case.

[312] Regarding their precedential value, the Tribunal underlines that these three matters are decisions issued by the EC, which is the European competition agency and the equivalent of the Commissioner in the European Union. These EC decisions are not decisions issued by an independent adjudicative court or tribunal. Under the European Union competition law regime, and in merger matters in particular, the EC is not strictly an investigator and law enforcer as is the Commissioner under the Act. The EC has the dual role of being not only the investigative authority but also the first-instance decision-maker. The EC decisions relied on by the Commissioner thus represent the position of the competition authority itself, as opposed to a decision by an independent judicial body like the courts or the Tribunal. The Tribunal is thus of the view that such decisions of the EC, while informative, carry less persuasive weight. They can certainly not be qualified as legal precedents on the issue of the "value-added" approach.

[313] The Tribunal further concludes that the *Norsk Hydro* and *Inco* precedents are of limited assistance to the Commissioner as they are distinguishable from the present case: according to the evidence in those cases, the premia were a separate price charged for a separate product, and were openly negotiated between the suppliers and the customers. These were situations where there was a specific price for the premia at issue. In other words, the price of the value-added product was not constructed or implicit. It was explicit and transacted.

- Australia

[314] In its final submissions, P&H referred to an Australian case, *Australian Competition and Consumer Commission v Metcash Trading Limited*, [2011] FCA 967 ("***Metcash***"), aff'd [2011] FCAFC 151. This was in response to a Direction the Tribunal had issued prior to final oral argument, where it notably invited counsel for both parties to identify legal precedents in which a court or tribunal considered situations where it was proposed that an implicit price for the merging firms' specific contribution to the value of a product should be used to determine the SSNIP and the relevant market, as well as legal precedents which considered situations where in applying the

HMT and in defining the relevant market, a SSNIP smaller or larger than 5% should be used, and/or reviewed the factors to take into account in determining the appropriate level of the SSNIP.

[315] In the *Metcash* case, the Australian Competition and Consumer Commission ("**ACCC**") challenged a merger of wholesale grocery suppliers. The ACCC sought to use an imputed price purporting to represent the value added by grocery wholesalers at their stage in the supply chain as the basis for considering the impact of a SSNIP in defining markets. The ACCC's approach, which echoed the US HMEGs, was soundly rejected by the Federal Court of Australia (and affirmed on appeal). The Australian court found that the purported value-added services for which the ACCC sought to use an imputed price were not the extent of what the wholesaler actually provided, and that an imputed price solely for these services could therefore not be used as the basis for defining the relevant market. The court noted that "the associated services provided by [the wholesaler] are not available in the absence of the acquisition by a retailer of packaged groceries from [the wholesaler]" (*Metcash* at para 196).

[316] The Commissioner argues that this case is distinguishable as it involves a considerably more complex market structure, in an industry characterized by a mixture of self-supplying retailers and independent retailers, and involving different categories and types of products across multiple levels of the supply chain.

[317] The Tribunal does not share the Commissioner's view. As admitted by counsel for the Commissioner at the hearing, *Metcash* is the sole judicial precedent identified by the parties that actually dealt directly with the so-called "value-added" approach exposed in the US HMEGs and advocated by the Commissioner in the present case. In *Metcash*, the Australian courts clearly rejected the "value-added" approach to product market definition and the use of an imputed price covering only a subset of the product effectively sold by the merging parties, as it did not reflect the commercial activity of the merging firms. Moreover, the alleged value added by the grocery wholesalers was not independently transacted.

[318] In the Tribunal's view, this Australian case bears a number of striking similarities with the present case: like the situation in *Metcash*, the so-called value-added for GHS does not have a commercial life of its own, and the "imputed" price for GHS — or the Basis — is not the price ordinarily used in the grain industry for the product being transacted between the farmers and the Elevators. The Tribunal considers that the reasoning in this Australian decision, while not binding, is persuasive and is generally consistent with the Tribunal's analysis in the present case.

(iii) The "value-added" approach is not supported by the Commissioner's own MEGs

[319] The Commissioner finally submits that the "value-added" approach he is proposing finds support in his own MEGs.

[320] With respect, the Tribunal again does not agree. The Tribunal instead finds that the Commissioner's proposed approach to the application of the HMT and the choice of the price of GHS for market definition purposes cannot be reconciled with the removal, in 2004, of the "value-added" language that existed before then and the continued absence of such language in the current 2011 MEGs.

[321] It is worth reminding that the MEGs articulate the analytical framework that the Competition Bureau and the Commissioner apply in determining whether a merger is likely to substantially lessen or prevent competition. The MEGs were first introduced in 1991 to provide guidance to the Competition Bureau's enforcement approach to the new merger provisions enacted in 1986 ("**1991 MEGs**"). The Competition Bureau's 1991 MEGs were superseded in September 2004 with the release of the 2004 MEGs, which were themselves replaced by new, revised guidelines in October 2011, when the 2011 MEGs were issued. The Tribunal pauses to note that the 2011 MEGs followed the issuance of the revised US HMEGs in August 2010.

[322] Since the first adoption of the MEGs in 1991, several important changes have been made to the product market approach presented by the Commissioner. More specifically, the "value-added" approach, which the Commissioner is apparently attempting to resuscitate in this case, was expressly abandoned in the most recent iterations of the MEGs.

[323] In the 1991 MEGs, the Commissioner discussed the conceptual framework for market definition. With respect to the base price, the 1991 MEGs stated the following (1991 MEGs at p 9):

> In general, the base price that is employed in postulating a significant and non-transitory price increase is whatever is ordinarily considered to be the price of the product at the stage of the industry (e.g., manufacturing, wholesale, retail) being examined. This is typically the cumulative value of the product, inclusive of the value added (mark-up) at the industry level in question. However, in certain industries, the value added is billed as a separate fee, and no mark-up is applied to the product in relation to which the service (or other value added) is performed. In such cases, the price increase will usually be postulated in relation to the fee.
>
> [Emphasis added.]

[324] The 1991 MEGs therefore made an express distinction between the "cumulative price" and the "value added" price. They specifically identified a "value added" approach as an exception to the typical approach of using the cumulative price, and specified that this exception would apply if two conditions were met: "the value added is billed as a separate fee, and no mark-up is applied to the product in relation to which the service (or other value added) is performed." The 1991 MEGs thus established that the value-added price could "be employed where it is billed as a separate fee and no mark-up is applied to the product in relation to which the value-added is applied" (Paul S. Crampton, *Canada's New Enforcement Guidelines: a "Nuts and Bolts" Review*, 36 *Antitrust Bulletin* 883, 1991) ("***Crampton 1991***") at p 914), The author, who was the drafter of the 1991 MEGs, used a pipeline example — similar to what the US HMEGs would use some 20 years later — to illustrate a situation where the value-added price could be used as the base price for market definition purposes: when two pipeline operators simply charge a tariff for transporting the oil, such billed fee can be used as the base price for the HMT analysis (*Crampton 1991* at p 914).

[325] However, it is clear from the 1991 MEGs that the mainstream approach was to use the "cumulative value of the product" as the base price to postulate a SSNIP: the 1991 MEGs adopted the "common sense approach of using cumulative prices except where it is industry practice to bill

the value added as a separate fee" (A. Neil Campbell, *Merger Law and Practice: The Regulation of Mergers under the Competition Act*, (Scarborough, Ontario: Carswell, 1997) ("***Campbell***") at p 61).

[326] In the 2004 and 2011 MEGs, this reference to the alternative value-added price approach was taken out of the MEGs, and the sole reference to the base price remained the price "ordinarily considered to be the price of the product at the stage of the industry (e.g., manufacturing, wholesale, retail) being examined." The Tribunal underlines that, even though the 2011 MEGs were adopted 14 months after the US HMEGs, they did not revive the value-added price abandoned in 2004 or echo the "implicit or explicit price" exceptions described in the US HMEGs.

[327] The Tribunal further understands that, before the present case, not a single merger was judicially contested by the Commissioner on the basis of a value-added price or the "value-added" approach.

[328] On March 10, 2021, the Tribunal sent a Direction to counsel inviting the parties to provide submissions regarding the specific reference that was contained in the 1991 MEGs to a "value-added" price and its absence from the subsequent iterations of the MEGs published by the Competition Bureau in 2004 and 2011.

[329] In his submissions to the Tribunal, the Commissioner did not identify a particular reason why the paragraph discussing the value-added approach was not explicitly retained in subsequent iterations of the MEGs. He noted that most commentators remained silent on the issue when the new version of the 2004 MEGs was discussed in draft form. The Commissioner submitted that even though the explicit reference to the value-added price was removed, the concept remains embedded in the subsequent versions of the MEGs. He added that a significant change in the 2004 MEGs was to explain that market definition is based on substitutability and focuses on demand responses to changes in relative prices, and that the focus of the market definition exercise is on those dimensions of competition that purchasers of the product value.

[330] The Commissioner further argued that, despite their silence on the "value-added" approach, the 2011 MEGs define the notion of price in a way that encompasses such a "value-added" approach, and that the language of the MEGs provides "latitude on what price is analyzed in a merger." According to the Commissioner, the 2011 MEGs contemplate flexibility on the SSNIP test to be applied and on the 5% threshold. He added that in paragraph 4.2 of the 2011 MEGs, the reference to price is intended to capture any market that may be anti-competitive, and that the guidelines are agnostic as to how the price to supply the product is defined. The Commissioner also relied on the fact that the MEGs are also clear that in terms of the SSNIP, 5% is generally appropriate but "market characteristics may support using a different price increase" (2011 MEGS at para 4.3).

[331] The Tribunal is not convinced by the Commissioner's arguments.

[332] The Tribunal first observes that the Commissioner's references to the apparent flexibility in the 2011 MEGs language strictly relate to the level of the SSNIP threshold, not to the definition of the base price. In the 2011 MEGs, the Competition Bureau refers to the notion of "base price" at paragraphs 4.6 and 4.7. It expressly states that the base price used to postulate a price increase

is "typically the prevailing price in the relevant market" (2011 MEGs at para 4.6). The Competition Bureau may elect not to use the prevailing price when market conditions (absent the merger) would likely result in a lower or higher price in the future. It then states that "[i]n general, the base price used to postulate a price increase is whatever is ordinarily considered to be the price of the product in the sector of the industry (e.g., manufacturing, wholesale, retail) being examined" (2011 MEGs at para 4.7). The Tribunal is unable to read in those provisions any direct, oblique, or implied reference to a value-added price or to the situations alluded to in the US HMEGs.

[333] Furthermore, the Tribunal does not accept the Commissioner's disconcerting contention that the 2011 MEGs could or should somehow continue to be read as implicitly containing the express language of the 1991 MEGs that the Commissioner explicitly removed and abandoned in 2004, and did not re-insert when he issued his revised MEGs in 2011.

[334] In fact, as the panel indicated at the hearing, the Tribunal is left with the distinct impression that the Commissioner is urging the Tribunal to follow the US HMEGs and to prefer them to his own 2011 MEGs. This is not a path that the Tribunal will follow.

[335] The Tribunal instead agrees with P&H that the evolution of the MEGs since 1991 reinforces its position that the base price to be used for purposes of market definition is "whatever is ordinarily considered to be the price of the product at the stage of the industry […] being examined," which is "typically the cumulative value of the product, inclusive of the value added (mark-up) at the industry level in question" (1991 MEGs at p 9; see also 2004 MEGs at para 3.8 and 2011 MEGs at para 4.7). In the present case, what is ordinarily considered to be the price of the product in the sector of the industry being examined, and what is the cumulative value of the product, is the Cash Price received by the farmers for their grain, be it wheat or canola.

[336] What is more, the conditions of the "value added" price once recognized by the Commissioner in the 1991 MEGs — namely, that the value added be "billed as a separate fee" with "no mark-up […] applied to the product in relation to which the […] value added is performed" — would not be met in this case. These conditions speak of a separate price attached to the value-added product and imply that the value-added element must be more than a simple cost component and must be transacted. Here, the Commissioner's proposed price for GHS is founded on an imputed price equal to only a fraction of the total value-added provided by grain companies, there is no separate fee (either explicit or implicit) for the alleged value-added provided by grain companies for GHS, and P&H does not charge and bill a separate fee for GHS, or even for the Basis.

[337] The Tribunal is mindful of the fact that the MEGs are neither sacrosanct nor legally binding (*Southam FCA* at p 41). The MEGs do not restate or revise the law, nor do they substitute for professional advice (*Canada (Commissioner of Competition) v Superior Propane Inc*, 2001 FCA 104 ("***Superior Propane II***") at paras 144–146). However, published guidelines such as the MEGs do provide guidance and notice to the public of how the Commissioner interprets the Act (*Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233, at paras 33, 39; *JD Irving Ltd v General Longshore Workers, Checkers and Shipliners of the Port of Saint John*, 2003 FCA 266 ("***JD Irving***") at para 37). The Tribunal agrees with P&H that the MEGs serve as an important tool for the public and the business community to understand the application of the Act. While not legally binding, they serve as a meaningful element to delineate legal and economic principles that

are not fully reflected in the Act itself, and they may be considered as an aid to the Act's interpretation (*Eli Lilly and Co v Apotex Inc*, 2005 FCA 361 at para 33). The Tribunal has indeed often noted that the MEGs provide "important enforcement guidelines reflecting the Commissioner's view on how the Act should be interpreted" (*Superior Propane I* at para 393).

[338] It is worth repeating the comments made by the Tribunal at paragraph 397 of *Superior Propane I*:

> It must not be forgotten that the point of view put forward in the MEGs represents the considered opinion of the Commissioner, the official appointed by the Governor in Council to administer and enforce the Act. That view, it goes without saying, is the view arrived at by the Commissioner following careful advice given to him by his legal and economic advisers regarding the meaning of the various provisions of the Act. Although the Commissioner is not bound by the MEGs nor are they binding upon this Tribunal, the MEGs should be given very serious consideration by this Tribunal. Needless to say, the Tribunal can disagree and in fact should disagree if it is of the opinion that the interpretation proposed in the MEGs is wrong. However, when referring and considering the MEGs, one should bear in mind the comments in the preface to the MEGs made by Howard Wetston, then Director of Investigation and Research. He stated that the MEGs were published to promote a better understanding of the Director's merger enforcement policy and to facilitate business planning. He also noted the extensive consultation process which was followed in their preparation.

[339] It cannot be said that the Commissioner was unaware of the fact that the "value-added" approach was expressly removed from the 2004 MEGs and is absent from 2011 MEGs, even if this most recent iteration was issued after the US HMEGs had been adopted in the U.S.

[340] The Commissioner provided no satisfactory explanation or compelling argument to convince the Tribunal that it should now depart from the 2011 MEGs, revive a "value-added" approach the Commissioner abandoned and removed from the MEGs in 2004, and embrace a new standard for product market definition that no longer forms part of the MEGs and the Commissioner has not publicly endorsed since at least 2004.

[341] The Tribunal is of the view that parties to transactions in Canada should be able to rely reasonably on statements of principle made by the Commissioner in published enforcement guidelines, including the MEGs, in order to know the rules applicable to their future activities and planned transactions. As the official responsible for the administration and enforcement of the Act, the Commissioner has a particular responsibility to provide guidance to parties through the publication and consistent application of relevant principles and approaches. Although the MEGs are not legally binding on the Tribunal or the Commissioner, if the Commissioner proposes to depart materially from them in litigated proceedings, the departure should be recognized, explained and justified (for example, by noting an amendment to the Act, or a recent Tribunal or court decision on point, or an advance in economic thinking or methodology) (see also *JD Irving* at para 37). The Commissioner did not do so with respect to the proposed new "value-added" approach to product market definition that he is inviting the Tribunal to adopt.

[342] In sum, from a legal standpoint, the Tribunal finds no support in adjudicated precedents or in the MEGs for the "value-added" approach to product market definition advocated by the Commissioner in this case. If anything, both the existing precedents and the MEGs instead reinforce the conclusion that, in this case, the relevant products are the purchase of wheat and canola and the relevant price is the Cash Price.

(iv) The US HMEGs do not apply to this case

[343] The Tribunal makes one last observation on the US HMEGs. In his submissions, the Commissioner tries to draw a parallel between the present case and the hypothetical situations described in those guidelines. He argues that, just as in the US HMEGs, the Elevators' specific contribution to value can be "identified with reasonable clarity," through the Basis.

[344] The Tribunal is not persuaded that, even if they were retained, the US HMEGs' requirements would be met in this case.

[345] The US HMEGs expressly require that in order to base a SSNIP on the value added by the merging firms, the firms' specific contribution to value must be identifiable with reasonable clarity. In the Tribunal's view, this is not a situation where an Elevator's specific contribution of value (by providing GHS) to the Cash Price farmers receive for their wheat or canola can be identified with reasonable clarity. As discussed above, the evidence indicates that the price of GHS, as "imputed" by Dr. Miller, cannot be identified explicitly by the grain companies or the farmers, nor is it implicitly observable by industry participants, as it is not the actual Basis. And if the price for GHS is neither observed nor observable, the "value-added" approach must fail.

[346] The Commissioner's price for GHS is neither implicit nor explicit; it is a constructed price. In the present case, the two observed or observable prices are the Futures Price and the Cash Price. Not the price for GHS. Moreover, the US HMEGs' "value-added" approach requires a transacted price, not only a cost component.

(c) The HMT framework and the SSNIP test

[347] The "value-added" approach proposed by the Commissioner also raises concerns from a conceptual perspective. As proposed, applying a 5% price increase as part of the SSNIP test only to the value-added portion of the price of a product would effectively alter the price change that a hypothetical monopolist must be able to sustain. That alteration to the HMT, without more, would have the effect of seriously modifying the current well-accepted economic analysis underlying market definition and the HMT framework. Since no consideration was given by the Commissioner to whether or how the applicable SSNIP threshold would have to be modified in a value-added scenario, adopting his proposed approach to the product market definition would imprint a profound change to the review of mergers and would significantly recalibrate the current HMT framework governing the market definition exercise.

[348] The Tribunal points out that such impact can be significant. Where the value-added component of a product accounts for 10% of the final price, applying a 5% SSNIP threshold to the value-added component is equivalent to applying a *de minimis* 0.5% SSNIP to the final price of

the product. Conversely, in order to keep the usual well-accepted 5% SSNIP benchmark applied to the final transacted product, it would require applying a 50% SSNIP threshold when considering a component representing a 10% value-added to the final transacted product.

[349] As demonstrated by Ms. Sanderson in her testimony and by P&H in its final argument, the 5% SSNIP threshold used by Dr. Miller in his HMT analysis based on the "imputed" price of GHS (as a proxy for the Basis) translates into an unprecedentedly low SSNIP level when transposed to the total price of grain: the "value-added" approach of the Commissioner would mean that the equivalent SSNIP percentage calculated by Dr. Miller would vary between 0.6% and 0.8% for the purchase of wheat when expressed in terms of the Cash Price, and between 0.1% and 0.2% for the purchase of canola.

[350] The Tribunal is not convinced that in the circumstances of this case, the Commissioner has provided clear and convincing evidence, or arguments, supporting such a fundamental change to the market definition exercise. The Commissioner provided no submissions nor evidence on what the appropriate SSNIP threshold should be in the context of his "value-added" approach, or why it should nonetheless be kept at 5% when a smaller component of the final price is used as the base price. The Commissioner's position simply assumed that the usual 5% SSNIP threshold should remain, and he applied it in the HMT analysis. These gaps in the conceptual framework undermine the approach he is proposing in this case.

[351] Antitrust economists in the U.S. have voiced concerns about the revised US HMEGs, pointing out that the "value-added" approach would lead to fewer potential substitutes and to lower effective SSNIP thresholds. In response to the draft version of the US HMEGs, some economists identified a fundamental flaw in the "value-added" approach to product market definition proposed in the guidelines, indicating that in many cases, "the value-added service is not actually purchased by customers on a standalone basis" and "customers are not able to substitute to sellers of just the value-added service" (E.M. Bailey, G.K. Leonard and L. Wu, "Comments on the 2010 Proposed Horizontal Merger Guidelines", *HMG Revision Project – Comment, Project No. P092900*, June 3, 2010 at p 5). This is precisely the case here with GHS or the Basis. Other economists observed that "one implication of applying the [HMT] using a value-added approach is that it will tend to produce more narrowly defined markets whenever the threshold used for the value added test is not sufficiently increased to account for the ratio of value added to prices" [emphasis added] (P Davis and U Haegler, "Should competition agencies focus on 'value added' instead of final prices?", March 1, 2016 http://ssrn.com/abstract=2740706 at p 16). Again, in the present case, neither the Commissioner nor Dr. Miller turned their mind to the impact of their proposed "value-added" approach on the effective SSNIP threshold.

[352] In *Metcash*, the Federal Court of Australia noted that on the facts of that case, applying a 5% SSNIP to the imputed value-added price (*i.e.*, the wholesaler profit margin) would reflect approximately a 0.26% increase in the final retail price. The Australian court did not accept that such a small price increase could be used to define a product market, and refused the proposed "value-added" approach.

[353] The Tribunal is unaware of any precedent — and the Commissioner has not mentioned any — where a price increase of less than 5% has been utilized as the SSNIP threshold in applying the HMT analysis. The Tribunal finds that the "value-added" approach as proposed would profoundly

change the current HMT framework, and it is not ready to accept that minimal price increases of less than 1% can become the yardstick to justify an intervention in the market. Lower effective SSNIP thresholds lead to narrower product markets, and to a higher likelihood of intervention in mergers.

[354] The Tribunal notes that in response to a question from the panel, Dr. Miller acknowledged that the "value-added" approach, whereby a component of the final price of a product is used as the base or benchmark price for a HMT analysis, is not really addressed in the broader empirical industrial organization literature (Consolidated Transcript, Public, at pp 1431–1432).

[355] In the Tribunal's view, espousing the "value-added" approach cannot simply be a question of modifying the base price that will be used for the product market definition. Given its impact on the effective price increase it entails for the final product, it also implies, at a minimum, a consideration of the appropriate SSNIP threshold that should be used and an explanation or justification for the selected SSNIP threshold. One cannot dissociate the issue of the "value-added" approach from the issue of the SSNIP threshold. Here, the Commissioner has not presented any evidence nor any economic analysis or authority that would support keeping the 5% SSNIP threshold in the context of his "value-added" approach. Even though the scientific or economic foundation for adopting and using a 5% level remains unclear, the Tribunal underlines that this 5% SSNIP threshold was developed in a context where the base or benchmark price was the cumulative price for the final product sold or purchased. In this case, Dr. Miller and the Commissioner simply transposed this 5% threshold to a value-added price and to their HMT analysis, without explaining or justifying why such threshold could be imported as is in this different context.

[356] In light of this shortcoming in the Commissioner's economic analysis and evidence, the Tribunal is not persuaded that the Commissioner's proposed "value-added" approach can be sustained in the circumstances.

[357] The Tribunal makes one other observation.

[358] As acknowledged by Dr. Miller at the hearing, the US HMEGs refer to two possibilities for dealing with market definition in situations where the value added by the supplier of a product allegedly relates to a small portion of the total price of the product. The first option is resorting to a smaller component of the final price corresponding to the value-added to determine the base price, when the explicit or implicit price of the value-added can be identified with reasonable clarity, with an appropriate SSNIP threshold. The second option, when the merging firms' specific contribution to value is not an implicit or explicit price, is to keep the overall final price of the product as the base price, but use a lower SSNIP threshold in the HMT analysis, adapted to the realities of the industry being examined.

[359] Since the constructed price for GHS, or the Basis, is a small component of the total price of grain that is not transacted in itself, the Commissioner could therefore have argued — as was alluded to in *Whole Foods* — that a lower SSNIP should be used in a HMT analysis based on the final price of the grain. However, this second option was not considered by the Commissioner nor by Dr. Miller in this case. At the hearing, the Tribunal asked Dr. Miller and Ms. Sanderson about

the issue of using a smaller SSNIP threshold on the Cash Price, but did not receive clear answers from either expert.

[360] Resorting to this second option would have required evidence and some economic analysis supporting the different SSNIP threshold to be used. The Tribunal notes that no legal precedent has been identified where, in applying the HMT and in defining the relevant market, a court or a tribunal has discussed the factors or the evidence to be taken into account in order to adjust the appropriate level of the SSNIP threshold in light of the realities of a particular industry. Similarly, the Commissioner has not provided economic or antitrust literature pointing to analyses that could have been done to determine the appropriate SSNIP threshold to be used in the context of a small value added by the supplier or purchaser of a product.

[361] Given the profound change that adopting the "value-added" approach would entail for the current well-accepted HMT analysis underlying market definition, the Tribunal is of the view that no change can be adopted without addressing the SSNIP threshold, in one form or another. The failure to address the SSNIP threshold leaves the Tribunal with no clear and convincing evidence to assess whether either of the two options mentioned in the US HMEGs (*i.e.*, the "value-added price component" or the "reduced SSNIP") should or could be retained and applied in this case.

(4) Conclusion on relevant product market(s)

[362] For all the reasons detailed above, the Tribunal concludes that the relevant product markets for the purpose of these proceedings are the purchase of wheat and the purchase of canola. Considering the evidence on the record in this proceeding, the Commissioner has not established, on a balance of probabilities, that there is a distinct relevant market for the supply of GHS for each of wheat and canola. When it comes to the value added by P&H and other Elevators further to their purchase of grain from farmers, there is no separate relevant "market" associated with it in which to conduct the necessary quantitative analysis.

[363] The main considerations weighing in favour of a conclusion that there are distinct relevant markets for the purchase of wheat and canola include the factual evidence as well as the absence of legal foundation or SSNIP threshold analysis supporting the "value-added" approach argued by the Commissioner.

[364] For greater clarity, the Tribunal is not saying that a "value-added" approach to product market definition could never be contemplated or applied. But if the Commissioner intends to resort to such an approach in future cases, he should first clarify the MEGs in that respect. Furthermore, for the Tribunal to be in a position to assess the merits of a "value-added" approach in any given case, the Commissioner would need to present clear and convincing evidence and submissions showing that the contemplated component of a final product is transacted, that it has a price attached to it or a measurable one, and that consideration is given to the SSNIP threshold to be used.

[365] As will be discussed below, this product market issue significantly influences many elements in the remainder of the Tribunal's analysis.

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

[366] The parties took different approaches to the geographic scope of their respective proposed competition markets. The Commissioner initially proposed a local geographic market in which the Virden, Moosomin, and Fairlight Elevators provided GHS to farmers for their wheat and canola. In its pleadings, P&H submitted that in the competition markets for the purchase of wheat and/or canola, the proper geographic area was at least Southeastern Saskatchewan and Southwestern Manitoba, comprising more than 20 Elevators and Crushers.

(1) Analytical framework

[367] When identifying the geographic dimension of a competition market, the Tribunal typically applies the HMT, as it does for the product dimension. The HMT is designed to assist the Tribunal in identifying the smallest geographic area in which the merged entity, acting as a hypothetical monopolist or monopsonist, may profitably impose a SSNIP or SSNDP respectively — that is, the smallest geographic area over which it could exercise market power (*Tervita CT* at para 94; *Canadian Waste* at paras 61, 68, 69, 73; *Superior Propane I* at paras 84–85; see also *VAA CT* at paras 300–301; *TREB CT* at paras 121–124; *Facey and Brown* at pp 226–230; John S. Tyhurst, *Canadian Competition Law and Policy*, (Toronto: Irwin Law Inc., 2021) at pp 172–180).

[368] Given the practical challenges associated with determining the base price in respect of which the SSNIP or SSNDP assessment must be conducted, the market definition exercise will sometimes need to go beyond the analysis of prices through the HMT framework and to consider other evidence of substitutability or customer switching. Geographic market definition may therefore involve assessing indirect evidence of substitutability, including factors such as: switching costs; transportation costs; the views, strategies, behaviour and identity of buyers; trade views, strategies, and behaviours of other market participants; price relationships and relative price levels; and shipment patterns (2011 MEGs at paras 4.17–4.24).

[369] In defining the geographic scope of the relevant competition market, the Tribunal has previously concluded that it may be neither possible nor necessary to establish geographic boundaries with precision. The boundaries may well overlap with adjacent markets and be indistinct from those adjacent markets at many geographic points (*VAA CT* at para 305; *Hillsdown* at pp 301–302, 310; *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289 (Comp Trib) at p 324). The Tribunal has also held, in particular, that there may be restraints on a merged firm's market power that come from both inside and outside the defined geographic market (*VAA CT* at para 305; *Hillsdown* at p 310).

[370] It should once again be emphasized that business markets, service or trade areas, or operational areas used by company management, are not necessarily the same as a geographic market for the purposes of a competition analysis (*Canadian Waste* at para 72; *Superior Propane I* at paras 85, 101, 106).

(2) Parties' positions

(a) The Commissioner

[371] Supported by expert testimony from Dr. Miller, the Commissioner submitted that the relevant geographic market is local in nature. The Commissioner's principal position was that the Moosomin, Virden, and Fairlight Elevators constituted a relevant market. More precisely, the Commissioner proposed a geographic market around these three Elevators in which a hypothetical monopolist could impose a SSNIP for GHS. Dr. Miller's expert evidence included a HMT analysis (for the purposes of the Commissioner's proposed product market for the delivery of GHS) and concluded that the Moosomin, Virden, and Fairlight Elevators, acting as a hypothetical monopolist, would have the ability and incentive to impose a SSNIP for GHS in the geographic area served by these three Elevators. Dr. Miller used a 5% SSNIP threshold in his analysis.

[372] In addition, at the hearing and in response to Ms. Sanderson's critique on the product market definition, Dr. Miller testified that the geographic area around the Virden, Moosomin, Fairlight, and Whitewood Elevators could serve as the relevant geographic dimension of a competition market for the cash sale of wheat, again based on his HMT analysis (Exhibits CA-A-192 and P-A-193, Relevant Results from Ms. Sanderson's HMT Calculations ("**Dr. Miller Revised HMT**").

[373] To support the argument for a local market, the Commissioner emphasized the importance to farmers of the distance between their farm and the point of delivery, and the associated transportation costs, when deciding on an Elevator or Crusher for the sale of their grain. The Commissioner submitted that most farms analysed by Dr. Miller deliver their grain to Elevators located less than 100 kilometers away. The Commissioner submitted that the size of the service areas from which the Moosomin and Virden Elevators draw at least 90% of the wheat or canola they handle demonstrated that most of the volumes are drawn from farms located near each of those Elevators.

[374] Dr. Miller developed a model of demand to understand how farms make decisions as between Elevators and Crushers to sell their grain. In his expert report, Dr. Miller relied on four qualitative elements, namely, a review of case documents, the distances that farms tend to send their grain, the distances between the Elevators, and the profit margins. He also relied on his HMT analysis (Dr. Miller Report at para 4).

[375] Dr. Miller testified that in his opinion, proximity is an important factor in a farm's choice of a "primary" Elevator for the sale of its grain. Dr. Miller considered the driving distance between the Moosomin and Virden Elevators, and calculated the drive time and drive distance from farms to Elevators using various data, including data from the Elevator operators.

[376] During his analysis, Dr. Miller identified farms that were customers of the three Elevators (*i.e.*, Moosomin, Virden, and Fairlight) in his proposed geographic market for the delivery of GHS. In developing a model for demand, Dr. Miller considered the "draw areas" for the Elevators and used available data to determine each Elevator's "service area" — described as the set of closest Census Consolidated Subdivisions from which each Elevator draws at least 90% of its total wheat or canola intake. Dr. Miller used the service areas for these three Elevators to define a "Farmer

Region,"namely, a collection of farms useful for understanding the pricing incentives at the three Elevators and how their current and prospective customers would respond to price changes ("**Farmer Region**")[6].

[377] In Dr. Miller's analysis, the respective service areas for the Moosomin and Virden Elevators were contiguous with each Elevator. In addition, the service areas for the two Elevators substantially overlapped, suggesting that both Elevators expect to purchase grain from similar or geographically clustered farms. After determining the service areas for other Elevators and for more distant Crushers, Dr. Miller's analysis of service areas also found that the median farm selling canola may be more willing to travel longer distances to sell to Crushers.

[378] Dr. Miller also quantified the role of distance in his demand model and considered internal documents from the merging parties to support a conclusion that the Moosomin, Virden, and Fairlight Elevators were close competitors. He also observed the margin (or mark-up) earned by the Virden Elevator, both for wheat and for canola, which supported a conclusion that the Virden Elevator faced a relatively small set of competitors.

[379] Turning to his HMT analysis, Dr. Miller determined that a HMT using a merger simulation model showed that the Moosomin, Virden, and Fairlight Elevators comprised a relevant geographic competition market where a hypothetical monopolist would find it profitable to impose a SSNIP on the price of GHS. For GHS for wheat, Dr. Miller's predicted price increase of a hypothetical monopolist was CAD $9.03 per MT at the Moosomin Elevator and CAD $5.88 per MT at the Virden Elevator, representing changes in price (compared to his constructed pre-Acquisition price for GHS at each Elevator) of 26.0% at Moosomin and 21.6% at Virden. With respect to GHS for canola including Crushers, his predicted price increase of a hypothetical monopolist was CAD $2.76 per MT at the Moosomin Elevator and CAD $1.51 per MT at the Virden Elevator, representing changes in price (compared to his constructed pre-Acquisition price for GHS) of 22.2% at Moosomin and 7.6% at Virden (Dr. Miller Report at paras 74–79 and Exhibit 9). According to Dr. Miller, his simulation and the resulting projected price changes demonstrated that a hypothetical monopolist of the Moosomin, Virden and Fairlight Elevators would "increase price by far more than a typical SSNIP" (*i.e.*, 5%) (Dr. Miller Report at para 79).

(b) P&H

[380] P&H submitted that the relevant geographic area for competition market purposes was much larger. P&H submitted that all farmer witnesses can and do haul their wheat and canola significant distances to Elevators and (for canola) to Crushers because it is financially worthwhile to do so. P&H submitted that farms closer to a particular Elevator receive a premium for their products, because they do not have high costs associated with hauling their grain to that Elevator. In P&H's submission, transportation costs do not provide any kind of constraint on competition in the relevant geographic market that shields the Virden and Moosomin Elevators from competition.

[6] To assist the reader of these Reasons, the Tribunal reproduces at Schedule "C" a map representing the location of farms and the location and identity of the Elevators and Crushers operating in Dr. Miller's geography (Exhibit P-R-250, Map with Farm Locations in Dr. Miller's Geography).

[381] P&H first relied on Mr. Heimbecker's evidence. Mr. Heimbecker testified that in the area surrounding the Virden and Moosomin Elevators, P&H competes with numerous Elevators and Crushers to purchase wheat and canola from farms. For wheat in that area, Mr. Heimbecker identified over 20 rival Elevators owned by six competing grain companies. For canola in that area, he identified at least 27 rival purchasing locations owned by nine grain companies. Mr. Heimbecker also referred to P&H's internal documents, including business plans, internal emails, and the competitors identified in "Draw Analysis Reports" prepared by third party consultants for P&H.

[382] P&H also relied on the expert evidence provided by Ms. Sanderson. Ms. Sanderson initially proposed a geographic market of "(at least) southeastern Saskatchewan and southwestern Manitoba" (Exhibits P-R-180 and CA-R-181, Expert report of Ms. Margaret Sanderson ("**Ms. Sanderson Report**"), at para 14). She adopted a monopsony framework, analysing the market for the purchase of wheat or canola by Elevators and Crushers. Ms. Sanderson's view was that the Virden and Moosomin Elevators were small buyers in an unconcentrated market or industry and, specifically, that the geographic market is wider than merely the area around the Moosomin, Virden, and Fairlight Elevators. She did not conduct a formal HMT analysis to support her broad proposed geographic market but relied on other quantitative and qualitative evidence and draw areas.

[383] However, Ms. Sanderson did comment on hypothetical monopolist issues in responding to Dr. Miller's HMT analysis in her hearing slides and during her testimony (Exhibits P-R-182, CA-R-183 and CB-R-184, Slides of Ms. Sanderson ("**Ms. Sanderson Slides**"), at pp 72, 74–75). While she did not do her own HMT analysis, Ms. Sanderson did a recalculation of Dr. Miller's model to generate new values based on a different denominator — namely, the Cash Price instead of the constructed price for GHS —, using Dr. Miller's diversion ratios and his Virden margin. Ms. Sanderson's revised HMT analysis resulted in the same absolute price changes calculated by Dr. Miller, but with different relative price variations in light of the different denominator she used.

[384] Ms. Sanderson's recalculation of Dr. Miller's HMT analysis suggested that when the Cash Price is used as the denominator, a market made up of the Moosomin, Virden, Fairlight, Oakner, Whitewood, Elva, Shoal Lake, and Carnduff Elevators would be a relevant geographic competition market for wheat. The relevant geographic market for canola would be larger and would include other Elevators as well as several Crushers such as Bunge Harrowby and LDC Yorkton (Ms. Sanderson Slides at pp 74-75). Ms. Sanderson based her HMT results on the same diversion ratios as Dr. Miller and on the weighted average price changes for the Moosomin and Virden Elevators (as calculated by Dr. Miller), but she used the wheat prices prevailing at the Virden Elevator as the reference price to calculate her relative price decreases. Ms. Sanderson indicated in her testimony that she used the Virden prices because Virden was the Elevator from which Dr. Miller had calculated the margin he used in his economic model (Consolidated Transcript, Confidential A, at p 1782).

[385] In addition to her HMT recalculations, Ms. Sanderson studied the evidence in the transaction data and witness testimonies to provide an opinion on the relevant geographic market based on the number of competing buyers (Elevators and Crushers) P&H faced in purchasing wheat or canola, farms' switching alternatives amongst the Elevators and Crushers, and the distance farms were prepared to travel to sell their products.

[386] Ms. Sanderson prepared "draw area" maps for the Elevators in Southeastern Saskatchewan and Southwestern Manitoba, and so-called "heat maps" derived from the overlapping draw areas. The draw areas for the Moosomin and Virden Elevators substantially overlapped.

[387] Ms. Sanderson also studied the Farmer Region identified by Dr. Miller as well as the "corridor of concern" identified by the Commissioner prior to the commencement of this proceeding. As described by Ms. Sanderson, the corridor of concern was a geographic polygon focused on approximately 80 farms located between the Virden and Moosomin Elevators on either side of the Trans-Canada Highway. (By definition, the "corridor of concern" included farms within a one-hour driving distance from both Elevators using commercial trucking roads. It included two small non-contiguous areas south of the main polygon.) The Moosomin and Virden Elevators' draw areas both covered this "corridor of concern."

[388] Ms. Sanderson observed that given the range of options available to farms for the sale of their crops, the Cash Prices set by P&H to purchase wheat and canola must be competitive with the Cash Prices set by numerous Elevators operated by many competitors, because they are all buying from the same farms.

[389] Ms. Sanderson also referred to internal documents of P&H and LDC. Ms. Sanderson's report noted that P&H and its customer service representatives at the Moosomin Elevator referred to and tracked prices of more than a dozen other Elevators and Crushers, in addition to the Virden Elevator. LDC's documents also showed that the Virden Elevator competed with almost a dozen other competitor purchase locations in addition to the Moosomin and Fairlight Elevators. Ms. Sanderson made specific reference to Elevators and Crushers identified by P&H before the Virden Acquisition in its fiscal 2019 and fiscal 2020 business plans for the Moosomin Elevator.

[390] Ms. Sanderson concluded that the transaction data, testimonies and documentary evidence demonstrated that there was a large set of relevant competing Elevators buying as much or more volume than the Moosomin or Virden Elevators from farms within Dr. Miller's Farmer Region, that the geographic market had many participants, and that P&H had a small share of that market.

[391] In his reply expert report, Dr. Miller addressed the geographic market analysis of Ms. Sanderson. He testified that farms in the towns close to the Moosomin, Virden, and Fairlight Elevators were particularly likely to rely on those Elevators for the sale of their grain. Dr. Miller concluded that the desirability of travelling to a particular Elevator differs for farms located at different points within each Elevator's draw area. Looking at the percentage of MT sold and the quantity sold on a town-by-town basis, Dr. Miller found that farms close to the centre of the geographic area served by the three Elevators had a "distinct preference" for working with the Moosomin, Virden, and Fairlight Elevators. He also found that while it was rare for a farm located directly between the Moosomin and Virden Elevators to choose a more distant Elevator, the frequency increases for farms farther from this centralized location — both for wheat and for canola, including Crushers.

[392] During the experts' concurrent evidence session at the hearing, Ms. Sanderson agreed that distance matters to an individual farm and that farms preferred to sell closer and to travel a shorter distance to sell their wheat and canola. She also agreed that the transaction data, supported by the testimony of the farmer witnesses, were helpful in understanding what makes an Elevator attractive

to a farm for the sale of wheat or canola. Dr. Miller and Ms. Sanderson agreed that the diversion ratios summarized the information about farmers' sale behaviour in relation to the Elevators available and the relative distance to be travelled for delivery.

[393] As mentioned above, at the hearing and in response to Ms. Sanderson's recalculation of his HMT analysis using the Cash Price, Dr. Miller also testified that the geographic area around the Virden, Moosomin, Fairlight, and Whitewood Elevators could serve as the geographic dimension of a competition market for the "cash sale of wheat." In response, Ms. Sanderson observed that her analysis of the purchases from farms within Dr. Miller's Farmer Region concluded that several other Elevators had higher wheat purchases than the Whitewood Elevator from the farms in that Farmer Region, and that two other Elevators (in addition to Whitewood) were located within it. Ms. Sanderson testified that an application of the HMT in Dr. Miller's alternative geographic market would engage a larger set of Elevators than just the Moosomin, Virden, and Fairlight Elevators, but that the question was how many more.

[394] Both experts agreed that neither the Moosomin nor the Virden Elevator have any special or unusual competitive significance in the marketplace.

(3) Tribunal's assessment

[395] After considering all the evidence in this case, the Tribunal is able to describe the geographic dimension of the relevant competition markets based on the factual and expert evidence.

[396] Although Dr. Miller's proposed product market (i.e., the delivery of GHS to farms by Elevators and Crushers) has not been accepted by the Tribunal, the panel nonetheless found his geographic market analysis to be helpful and persuasive in understanding certain aspects of the behaviour of farms in selecting an Elevator or Crusher to sell their grain. The panel also found Ms. Sanderson's evidence useful, including her recalculation of Dr. Miller's HMT analysis on the basis of the Cash Price, and incorporated it into its assessment.

[397] In addition to the evidence on the HMT analyses conducted by the two experts, the Tribunal also assessed a number of factors in determining the geographic scope of the relevant competition markets. The salient evidence concerned the purchases of wheat and canola by the Moosomin and Virden Elevators and other Elevators and Crushers in the area, and the corresponding selling behaviour of farms. It included the following: the experts' analysis of transaction data in relation to the purchase and sale of wheat and canola to those Elevators and Crushers, and the oral testimony of the farmer witnesses; the evidence related to the distance that must be travelled to deliver grain to an Elevator or Crusher (and relatedly, the transportation costs and time it takes to travel that distance) and the volume and frequency of those purchases by Elevators from farms; expert evidence as to draw areas, heat maps, and diversion ratios; evidence as to prices paid to farms at the Elevators, including price-setting and prices that are negotiated and therefore depart from the Cash Price or Basis offered for each Elevator; and internal documents from the merging parties suggesting the perceived scope of the geographic market, including communications with farms about the purchase of their crops.

[398] In the result, the Tribunal's analysis of the geographic dimension of the competition markets is not restricted to the geographic area identified in Dr. Miller's analysis. However, the Tribunal does not agree with the much wider region initially advocated by P&H and described in Ms. Sanderson's testimony (*i.e.*, Southeastern Saskatchewan and Southwestern Manitoba). Like certain aspects of both Dr. Miller's and Ms. Sanderson's analyses, the Tribunal finds that the geographic area relevant to a competition analysis for wheat is different from the relevant geographic area for canola.

[399] The Tribunal concludes that, in general, Elevators that are closer to a farmer's crop are more attractive to farms for the purchase of their wheat. Considering in particular the farmers' testimonies concerning their selection of purchaser Elevators and the role of transportation costs, the setting and negotiation of prices, and the expert evidence, the Tribunal finds that the key competitors to the Moosomin and Virden Elevators are rival Elevators nearby to them, particularly the Fairlight Elevator. By contrast, Elevators that are farther away are not part of the relevant geographic market for competition purposes. Although more distant Elevators may purchase some quantity of grain and may provide some degree of competitive discipline on the Cash Price (including specifically, on the Basis) offered to farms by the Moosomin and Virden Elevators, that does not necessarily lead to the conclusion that those Elevators are all within the relevant competition market.

(a) HMT analyses

[400] Three different HMT analyses have been presented to the Tribunal by Dr. Miller and Ms. Sanderson.

[401] Dr. Miller's initial HMT analysis, summarized at Exhibit 9 of his expert report, concluded that the Moosomin, Virden, and Fairlight Elevators formed a relevant geographic competition market where a hypothetical monopolist would find it profitable to impose a SSNIP on the price of GHS. For GHS for wheat, Dr. Miller's model predicted that a hypothetical monopolist could impose an increase of 26.0% on the constructed pre-Acquisition price for GHS for wheat at the Moosomin Elevator, and of 21.6% on the price for GHS for wheat at Virden. With respect to GHS for canola including Crushers, Dr. Miller's predicted price increase of a hypothetical monopolist was 22.2% at the Moosomin Elevator and 7.6% at the Virden Elevator. In each case, Dr. Miller compared his projected price increase to his computed price for GHS prevailing at each of the Moosomin and Virden Elevators. Since all of his projected price increases clearly exceeded the typical 5% SSNIP threshold — they ranged from 7.6% to 26.0% —, Dr. Miller arguably did not have to calculate weighted average reference prices for GHS for wheat or canola, or weighted average price increases representing the combined average price increase for the Moosomin and Virden Elevators (which, in the Tribunal's view, would be a more accurate basis for price change analysis under the HMT framework).

[402] Given the Tribunal's finding on the relevant product market, and its conclusion that the relevant products are the purchase of wheat and canola and that the relevant base prices are the Cash Prices of wheat and canola paid to the farms by P&H, the Tribunal cannot entirely retain Dr. Miller's initial HMT analysis: his projected price increases, expressed in terms of percentages, are based on the wrong base price, namely, the computed prices for GHS for wheat and canola.

[403] The second HMT analysis is the recalculation of Dr. Miller's model done by Ms. Sanderson as part of her presentation at the hearing (Ms. Sanderson Slides at pp 72–75). This recalculation replicated Dr. Miller's model, including the diversion ratios and the Virden Elevator margin calculated by Dr. Miller, but determined the relative values of the projected price changes based on a different denominator, namely, the Cash Prices instead of the constructed prices for GHS. The Tribunal observes that both experts agree on the absolute figures of the predicted price variations for each of wheat and canola (expressed in dollars per MT) coming from Dr. Miller's HMT analysis (Consolidated Transcript, Confidential A, at p 1795).

[404] Ms. Sanderson's revised HMT analysis used the same absolute price changes as those calculated by Dr. Miller but resulted in different relative price variations in light of the different denominator she used. Ms. Sanderson's recalculation concluded that a hypothetical monopsonist controlling each of the Moosomin, Virden, and Fairlight Elevators could impose a price change of only 3.9% on the pre-Acquisition Cash Price for wheat at the Moosomin Elevator (*i.e.*, CAD $9.03 on CAD $229.73 per MT), and of 2.5% on the Cash Price for wheat at the Virden Elevator (*i.e.*, CAD $5.88 on CAD $239.11 per MT) (Ms. Sanderson Slides at p 72; Ms. Sanderson Report at Figure 49). As the price variations would be in the purchase of grain, these would be price decreases. With respect to canola including Crushers, Ms. Sanderson's predicted price decrease was 0.6% on the pre-Acquisition Cash Price at the Moosomin Elevator (*i.e.*, CAD $2.76 on CAD $461.46 per MT), and 0.3% to the Cash Price at the Virden Elevator (*i.e.*, CAD $1.51 on CAD $452.80 per MT). None of the resulting price decreases exceeded the usual 5% SSNIP or SSNDP threshold, which led Ms. Sanderson to conclude that, based on her revised HMT analysis using Cash Prices, the relevant geographic market had to be larger than the Moosomin, Virden, and Fairlight Elevators.

[405] In her presentation at the hearing, Ms. Sanderson provided results for more Elevators than in Dr. Miller's HMT analysis, using the Cash Prices (Ms. Sanderson Slides at pp 74–75). She concluded that, when the Cash Price is used as the denominator, a market made up of the Moosomin, Virden, Fairlight, Oakner, Whitewood, Elva, Shoal Lake, and Carnduff Elevators would be a relevant geographic competition market for the purchase of wheat. The relevant geographic market for the purchase of canola would be larger and would include the Moosomin, Virden, Fairlight, Oakner, Whitewood, Brandon (Richardson), Melville, Souris East, Shoal Lake, and Elva Elevators as well as the Crushers at Harrowby (Bunge), Yorkton (LDC), Velva (ADM), and Yorkton (Richardson). Ms. Sanderson based her HMT results on the same diversion ratios as Dr. Miller and on the weighted average absolute price changes for each of wheat and canola. In terms of average relative price changes, she expressed the price variations as a percentage of the weighted average wheat and canola prices calculated for the Virden Elevator (*i.e.*, CAD $239.11 per MT and CAD $452.80 per MT, respectively).

[406] The third iteration of the HMT analyses prepared by the experts is Dr. Miller's response to Ms. Sanderson's recalculation, presented at the concurrent evidence session and summarized in Dr. Miller Revised HMT. This Revised HMT analysis only looked at the geographic market for the purchase of wheat, and did not consider canola. Since the HMT framework dictates that additional candidates for market definition purposes must be ordered by their diversion ratios, Dr. Miller determined that, for wheat, the next closest competitor Elevator to the Moosomin and Virden Elevators (other than the Fairlight Elevator) was the Whitewood Elevator. Dr. Miller testified that, based on his analysis, the diversion ratios for wheat were higher at the Whitewood

Elevator than at the Oakner Elevator, when these ratios are weighted by sales from the Virden and Moosomin Elevators, or weighted by sales from the Virden, Moosomin, and Fairlight Elevators. Dr. Miller concluded that, even using the Cash Price as a denominator in his Revised HMT analysis, the relevant geographic market for wheat would be a smaller market comprising only the Moosomin, Virden, Fairlight, and Whitewood Elevators, as such relevant market would reach the 5% SSNIP threshold.

[407] The Tribunal pauses to note that Dr. Miller did not discard the recalculated HMT analysis made by Ms. Sanderson based on his data, model, and framework but using the Cash Prices — as opposed to his constructed price for GHS — as a denominator. On the contrary, in his Revised HMT analysis, Dr. Miller simply redid Ms. Sanderson's recalculation by looking at additional Elevators using their respective weighted averaged diversion ratios (Consolidated Transcript, Confidential A, at pp 1787 ff). He also used a different "reference price" as the basis to calculate the relative price changes he observed: instead of solely using the prevailing pre-Acquisition price for wheat at the Virden Elevator as Ms. Sanderson did, he developed the weighted average HMT price change relative to the pre-Acquisition price for each of the Moosomin Elevator (CAD $229.73 per MT) and the Virden Elevator (CAD $239.11 per MT). He then selected the Moosomin Elevator price change and this led him to conclude that a geographic market comprised of the Moosomin, Virden, Fairlight, and Whitewood Elevators would meet the 5% SSNIP threshold, since his relative price change based on the lower Moosomin Elevator price was 5.06%. Dr. Miller's table reproduced in his Revised HMT analysis indicates that, had he used the higher prevailing wheat price at the Virden Elevator, the relative price change would have been 4.86% and would thus have been below the 5% SSNIP threshold.

[408] It thus appears that the two experts disagree on the "reference price" to use for the calculation of the relative HMT price variations: Dr. Miller relied on the lower Moosomin Elevator price in his Revised HMT analysis, whereas Ms. Sanderson used the higher Virden Elevator price in her recalculation. Neither Dr. Miller nor Ms. Sanderson apparently considered using a weighted average of the Moosomin and Virden Elevators prices, which would be a more accurate base for price change analysis under the HMT framework. This is especially true in a case like the present one, where the results of adding candidate markets in the HMT analysis are each very close to the 5% benchmark. The purpose of the HMT analytical framework is to assess how a "hypothetical monopolist" (or "hypothetical monopsonist") controlling a hypothetical group of entities would behave; as such, the proper relevant "reference price" of a product has to be the weighted average price of all entities controlled by such hypothetical monopolist or monopsonist that are supplying or purchasing the product. The Tribunal notes that in this particular case, changing the "reference price" has a direct impact on the conclusions to be drawn from the HMT analyses based on the Cash Price, as it significantly modifies the group of Elevators needed to meet the 5% SSNIP/SSNDP threshold. The Tribunal further observes that, even though Dr. Miller opted to calculate a weighted average of the Moosomin and Virden Elevators to determine the appropriate diversion ratios to the rival Elevators and used weighted average dollar price changes in his Revised HMT analysis, he relied solely on the lower Moosomin price for wheat as a denominator to determine his estimated price variations. During the concurrent evidence session, Dr. Miller provided no explanation for not also using a weighted average reference price in his calculations.

[409] At the hearing, Dr. Miller relied on his reading of paragraph 4.4 of the 2011 MEGs to state that the HMT is satisfied "if any price of the merging firms goes up by five per cent" (Consolidated

Transcript, Confidential A, at p 1784). With respect, the Tribunal does not agree with Dr. Miller's interpretation of the MEGs. What the 2011 MEGs say is that the HMT is met when "the price increase of at least one product of the merging parties" [emphasis added] exceeds the SSNIP threshold (2011 MEGs at para 4.4). It does not say the price of a product of one of the merging firms. Here, all the Elevators purchase the same product, namely, wheat or canola. And what the Tribunal needs to assess is the predicted price variation for wheat or canola for the selected Elevators acting as a hypothetical monopolist. In the Tribunal's view, this has to be measured in relation to the weighted average price variation of wheat and canola for all Elevators involved — not to the price of just one of the merging firms.

[410] The Tribunal has not found in the evidence what the weighted pre-Acquisition average price for wheat would be for the Moosomin and Virden Elevators taken together, or for any larger group of Elevators. However, the Tribunal underlines that the simple arithmetical average between the weighted average base price for wheat at the Moosomin and Virden Elevators would be CAD $234.42 per MT (*i.e.*, ($229.73 + $239.11) ÷ 2). Moreover, since the evidence indicates that, pre-Acquisition, the Virden Elevator handled relatively more wheat than the Moosomin Elevator (see, for example, Ms. Sanderson Report at Figure 62 and Consolidated Transcript, Confidential A, at p 1789), it is a mathematical certainty that the weighed average price for wheat for the Moosomin and Virden Elevators would be higher than the straight arithmetical average mentioned above, since the Virden Elevator has both the higher weighted average price and the higher volume quantity. Had Dr. Miller used a weighted pre-Acquisition average price for wheat, or even the more conservative arithmetical average of CAD $234.42 per MT, in his Revised HMT analysis, it is clear from his evidence that the results of his Revised HMT analysis for wheat using the Cash Prices would have concluded that even a geographic market made up of the Moosomin, Virden, Fairlight, Whitewood, and Oakner Elevators would not be large enough to satisfy the 5% SSNIP/SSNDP threshold: using the more conservative arithmetical average, the predicted price changes would not have exceeded 4.96% in a geographic market including the Whitewood Elevator, and 4.90% in a market including both the Whitewood and Oakner Elevators.

[411] Turning to Ms. Sanderson's HMT analysis, had she used a weighted pre-Acquisition average price for wheat as a "reference price," instead of the higher Virden Elevator price, the results of her recalculated HMT analysis for wheat using the Cash Prices would have yielded slightly higher relative changes. For example, for the group of seven Elevators ending with the Shoal Lake Elevator, her estimated price change of 4.86% would have been 4.96% (i.e. CAD $11.63 / CAD $234.42) and suggest that the 5% SSNIP/SSNDP threshold would have been close to be met with one less Elevator (i.e., without the need of adding the Carnduff Elevator).

[412] The Tribunal is mindful of the fact that Dr. Miller's (and Ms. Sanderson's) calculations twirl around the 5% threshold as soon as four or five Elevators are included in the geographic competition market for wheat, and that there are margins of error in these calculations.

[413] In light of the foregoing, based on the evidence before it regarding the HMT analyses using the Cash Prices, and considering possible margins of error regarding the median of the Basis, the Tribunal concludes that a geographic market for wheat including only the Moosomin, Virden, Fairlight, and Whitewood Elevators, or even those four Elevators plus the Oakner Elevator, has not been established on the evidence. In sum, in his HMT analyses, the Commissioner has not adduced clear and convincing evidence that the relevant geographic market for wheat could be

limited to those four or five Elevators. Thus, further to its review of the HMT analyses, the Tribunal is of the view that, on a balance of probabilities, the relevant geographic market for wheat is more likely than not to include at least the following Elevators listed in Ms. Sanderson's recalculated HMT analysis: the Moosomin, Virden, Fairlight, Oakner, Whitewood, Elva, and Shoal Lake Elevators. The Tribunal says "at least" because determining whether the Carnduff Elevator identified by Ms. Sanderson should also be included in the relevant geographic market is too close to call in light of the above discussion on the weighted pre-Acquisition average price for wheat.

[414] In the competition market for the purchase of canola, the Tribunal accepts that Crushers play a more significant role in the competitive process and reduce the likelihood that the Moosomin and Virden Elevators, acting as a hypothetical monopsonist, could impose a SSNDP in the purchase of canola. The evidence suggests that Crushers are able to attract some canola purchases from a longer distance than Elevators and that some canola deliveries to Crushers by-pass Elevators that are closer in distance to a farm. A Crusher may therefore have greater competitive impact on the merged entity's prices and limit its ability to impose a SSNDP than would have an Elevator that buys canola. Furthermore, the Tribunal notes that in the concurrent evidence session, Dr. Miller did not respond to Ms. Sanderson's recalculation HMT analysis for canola using the Cash Prices, found at page 75 of Ms. Sanderson Slides. In her analysis, Ms. Sanderson concluded that the relevant geographic market for the purchase of canola would include at least the Moosomin, Virden, Fairlight, Oakner, Whitewood, Brandon (Richardson), Melville, Souris East, Shoal Lake, and Elva Elevators as well as the Crushers at Harrowby (Bunge), Yorkton (LDC), Velva (ADM), and Yorkton (Richardson). Even for this larger group of Elevators and Crushers, Ms. Sanderson's predicted price decrease of a hypothetical monopsonist would only be 3.08% (*i.e.*, a weighted average price change of CAD $13.94 per MT on the pre-Acquisition price of CAD $452.80 at the Virden Elevator), significantly below the usual 5% threshold for market definition purposes. Here, the pre-Acquisition price for canola at the Moosomin Elevator (*i.e.*, CAD $461.46) is higher than at Virden, and Virden's purchases of canola are much higher than Moosomin's (Ms. Sanderson Report at Figure 62). In light of the foregoing, and based on the evidence before it regarding the HMT analyses using the Cash Prices, the Tribunal concludes that, on a balance of probabilities, the relevant geographic market for canola is more likely than not to include at least all the Elevators and Crushers listed in Ms. Sanderson's recalculated HMT analysis. Again, the Tribunal says "at least" because Ms. Sanderson's HMT analysis stopped at a 3.08% SSNIP level, and it is uncertain how many other Elevators and/or Crushers would need to be added to reach the typical 5% SSNIP threshold.

(b) Distance, transportation costs, and farms' preferences

[415] Turning to other factors, the Tribunal accepts that most farms deliver grain to Elevators located less than 100 kilometers from the location of their crops. Like both Dr. Miller and Ms. Sanderson, the Tribunal finds that farms prefer to travel shorter distances to sell their grain. Most of the volume of grain purchased by the Moosomin and Virden Elevators comes from farms located in proximity to them. The Tribunal also finds, based on Ms. Sanderson's data, that in the "corridor of concern," a significant number of farms sell their wheat exclusively or substantially to the Moosomin, Virden, and Fairlight Elevators.

[416] At the hearing, several farmers testified about the sales of their grain to Elevators and Crushers. In general, they expressed a preference to sell to Elevators closer to their farms unless a more distant Elevator or Crusher made it worthwhile financially to travel the extra distance. The three farmers called to testify by the Commissioner generally stated their preference to sell most of their grain to the Virden and Moosomin Elevators, and sometimes to the Fairlight Elevator, rather than to more distant Elevators and Crushers. In several cases, the witnesses acknowledged in cross-examination that they have also delivered some proportion of their wheat and canola crops to purchasers more distant than the Moosomin, Virden, and Fairlight Elevators. When selling canola to Crushers, their canola crops would also travel past a number of possible Elevators to which they could have sold while en route to a Crusher location.

[417] When selecting an Elevator or Crusher for a shipment of their grain, the farmers' principal considerations were price, timing (*i.e.*, when grain could be accepted by the Elevator), the grade of the grain to be sold, and the travel distance to the purchase point. Additional factors included the farmers' business relationship with each Elevator, each farmer's ability to store grain at their own farm, road conditions including restrictions on the use of some highways in the springtime, and whether an Elevator was located on a main or a secondary highway (which affects the number of trips, speed of the truck en route, and the wear and tear on the vehicle).

[418] The testifying farmers called by the Commissioner and P&H generally indicated that a higher price is necessary to cause them to sell to a more distant location — to make it worthwhile to travel the extra distance to deliver the crop. Mr. Lincoln advised that his transportation cost was approximately CAD $8 per MT, with each additional 15 minutes drive costing CAD $1 per MT. Mr. Paull testified that he would not leave a local Elevator for a few pennies per bushel, but would do so for CAD $0.10, $0.15 or $0.20 per bushel. Sometimes, he could even get CAD $0.30 or $0.40 more per bushel to go a longer distance. He would sell to a more distant Elevator if there was "enough profit" in it. Mr. Wagstaff testified that his decision to do so also depended on his own time and the efficiency of deliveries. From his farm, he could deliver four loads per day with his own trailer to the Virden Elevator, but could only make one trip per day to the Crusher located in Bloom, Manitoba, which is much farther away from his farm. Mr. Duncan, Mr. Paull, and Mr. Hebert all testified that Crushers made it financially worthwhile to sell canola at a longer distance away from their respective farms.

[419] The Tribunal found Dr. Miller's evidence concerning farms' behaviour in selecting a purchaser to be helpful in assessing the geographic dimension of the markets for the purchase of wheat and canola by Elevators and Crushers. Dr. Miller's analysis found that farms select anElevator for the sale of their grain based on proximity to the farm, because it decreases delivery costs and because they may have a relationship with personnel responsible for the Elevator. The farms' travel time and cost to deliver the grain to the purchase point were important factors in the choice, together with price. Farms incur delivery costs by crop weight and by kilometre, whether they deliver themselves or hire commercial trucks to do so.

[420] Dr. Miller's analysis considered travel distance and time between Elevators and from farms to the Moosomin and Virden Elevators, to identify close competitors to the merged entity. He used data collected from the merging parties and several other grain companies comprising over 20 Elevators, as well as census data and other source data. Dr. Miller found that the Fairlight Elevator was the most proximate competitor to the Moosomin and Virden Elevators.

[421] Dr. Miller also calculated the range of travel time for the delivery of each of wheat and canola, representing a percentage of deliveries. In general, the range of travel time for 50% of deliveries was longer for canola than for wheat. Based on travel distance and time, and weighted by quantity of grain sold, Dr. Miller analysed the range of time taken by 90% of farms to travel to each of the Moosomin, Virden, and Fairlight Elevators, all other Elevators, and Crushers. Dr. Miller's analysis showed that the median, representing 50% of farms, was approximately half an hour drive time for both wheat and canola. Dr. Miller's analysis also showed that 90% of farms travelled from four to 79 minutes to deliver wheat to all chosen Elevators in the model and from four to 75 minutes to deliver canola to Elevators. The time range to canola Crushers increased to 44 minutes up to a maximum of 147 minutes. Recognizing that this analysis occurred over one crop year, the Tribunal accepts Dr. Miller's evidence to show that close proximity of a delivery point is important to farms when selling wheat and canola.

(c) Draw areas and heat maps

[422] As noted, both Dr. Miller and Ms. Sanderson used draw areas (or service areas) for Elevators in their analyses. Both indicated that Elevators and Crushers draw the grain they purchase from areas surrounding them, creating a geographic cluster of supplier farms.

[423] Dr. Miller's review found that proximity was an important factor in the farms' choice of an Elevator for the sale of their grain. He also noted that some Crushers attract supply from greater distances than Elevators. He found, for example, that the median farm selling to the Moosomin Elevator is just five kilometers from its location and the median farm selling to the Virden Elevator is about 20 kilometers from it, whereas the median farm selling to the Yorkton Crusher is over 100 kilometers away from it. To Dr. Miller, this suggested that farms might be more willing to travel farther distances to sell to Crushers.

[424] Ms. Sanderson's draw area maps displayed the geographic area for 95% of an Elevator's purchases from farms, using the address of each farm. In these maps, the draw areas for the Moosomin and Virden Elevators could be compared to the draw areas for other Elevators and for Crushers that could be competitors for a farm's sales. In this way, Ms. Sanderson's analysis could indicate the number of farms that switch between buyers and the distance travelled to deliver their crops.

[425] Ms. Sanderson's expert report found that for the crop year 2018-2019, the Moosomin Elevator purchased canola from [redacted] farms and the Virden Elevator purchased from [redacted] farms. The Moosomin Elevator drew [redacted] of its canola from a distance as far as [redacted] kilometers while the Virden Elevator drew [redacted] of its canola from farms located as far as [redacted] kilometers. Both were based on commercial trucking travelling those distances. As for wheat, the draw area for the Moosomin Elevator included [redacted] farms, while the draw area for the Virden Elevator comprised [redacted] farms. The Moosomin Elevator drew [redacted] of its wheat from a distance as far as [redacted] kilometers while the Virden Elevator drew [redacted] of its wheat from farms located as far as [redacted] kilometers.

[426] Ms. Sanderson found that approximately two-thirds of the farms closest to the Moosomin and Virden Elevators (*i.e.*, in the "corridor of concern") sold crops to other rival Elevators and Crushers. Only four farms sold exclusively to the Moosomin and Virden Elevators in the last three crop years combined. Seven farms sold only to the Moosomin Elevator, while 17 farms sold only

to the Virden Elevator. In addition, farms in the corridor of concern sold to more distant Elevators and Crushers. Ms. Sanderson's written testimony included details for each of the 82 farms within the corridor of concern for both canola and wheat. Ms. Sanderson noted significant deliveries from those farms to Elevators and Crushers outside of Dr. Miller's proposed geographic market.

[427] Ms. Sanderson prepared heat maps by overlapping all of the draw area maps cumulatively. The heat maps showed areas in darker colours where a higher number of Elevators and Crushers buy grain. Ms. Sanderson concluded that all farm locations within the draw areas for the Moosomin and Virden Elevators had more than six Elevators/Crushers bidding for their wheat and for their canola.

[428] Dr. Miller observed in his reply expert report that Ms. Sanderson's use of overlapping draw areas did not present any evident consideration of what factors affect a farm's choice of Elevator or, most importantly, how the farms would likely respond to a price change. Dr. Miller agreed with Ms. Sanderson that some farms scattered throughout the geographic region may elect to work with a more distant Elevator. Dr. Miller observed, however, that the overlap analysis masked that the desirability of travelling to a particular Elevator will differ for farms located at different points. In Dr. Miller's view, Ms. Sanderson's draw area maps assumed that every farm customer inside the boundary of the Elevator's draw area is equally willing to choose that Elevator, which does not address the question posed by geographic market definition, *i.e.*, where those farms would likely turn in reaction to a price increase.

[429] Specifically, Ms. Sanderson submits that what she referred to as "heat maps" provide a count of farms and their locations supplying canola and wheat to Elevators within the overlapping draw areas. However, the Tribunal observes that the overlapping draw areas do not incorporate the volume density supplied, frequency, and the respective geographic locations of those volumes. Such presentation does not assist the Tribunal in visually understanding the concentration of grain supply and corresponding distance to each Elevator as provided by the transaction data.

[430] The Tribunal recognizes that overlapping draw area maps may be useful in initially identifying the possible range of geographic scope of one or more candidate competition markets. They also may identify suppliers or customers who could be affected by a proposed transaction. However, they may be of less help in more precisely defining the scope of the relevant geographic competition market, unless they are coupled with evidence about the reaction of affected suppliers or customers to a change in price or another dimension of competition.

[431] In this case, the panel agrees with Dr. Miller's concerns that the draw area maps and heat maps have less value on their own, insofar as they treat farms at different distances from an Elevator as likely to react the same way to a change in price. Draw area maps and heat maps may, together, suggest that farms have more ability to switch in the overlapping areas but must be taken as a non-definitive factor in the assessment of a geographic area for competition purposes. In this case, Ms. Sanderson's draw area maps, on their face, give equal weight to each farm having sold grain to an Elevator regardless of frequency of sales and volumes sold. In sum, the heat maps provided additional information but, on their own, they are of limited assistance because they do not account for volume and the location of the farms from which those volumes are drawn. Both must be weighed with the evidence concerning farms' behaviour, including from the farmers'

testimonies, the diversion ratio evidence, and other data and information as to preferences and switching.

[432] On this issue, the Tribunal finds Dr. Miller's observations in his reply expert report to be compelling. Dr. Miller analyzed the percentage of MT of wheat and canola sold to the Moosomin, Virden, and Fairlight Elevators by town. The analysis showed that a farm close to an Elevator is more likely to rely on that Elevator and that more distant farms are less likely to do so. He found that farms close to the centre of the area around the Moosomin, Virden, and Fairlight Elevators had a distinct preference to work with those Elevators. This analysis is consistent with the testimonies of farmers. It also provides some more nuanced insight to assist in understanding the likely behaviour of customers in response to a price change — specifically, whether they are likely to switch Elevators.

[433] The Tribunal further finds that farms, as sellers of grain to Elevators, are less likely to switch to more distant rivals if the farm is near the centre of the geographic market, and more likely to switch as the location moves away from the centre and, the Tribunal infers, away from each of the Moosomin, Virden, and Fairlight Elevators. Consistent with this conclusion and with Dr. Miller's report, the Tribunal finds that the closer farms are to the Moosomin and Virden Elevators, the more volumes they sell to those Elevators. Conversely, farms located farther away are delivering less to these two Elevators and more to other Elevators.

[434] The Tribunal has considered the "corridor of concern." Ms. Sanderson's analysis of the deliveries of wheat and canola from those farms to the Moosomin and Virden Elevators over three crop years showed that many farms sell all, or a very substantial proportion, of those crops to the Moosomin and Virden Elevators. In her report, Ms. Sanderson noted that 54 of the 82 farms in the "corridor of concern" (*i.e.*, about two-thirds) sold wheat or canola to Elevators or Crushers that compete with the Moosomin and Virden Elevators at different points in the three successive crop years used in her analysis (Ms. Sanderson Report at Figures 19–21). She also noted that farms located in proximity adopted different approaches during that period (i.e., decide to sell at least once to a rival, or not). The Tribunal finds this analysis to be highly sensitive to change — a single sale (above the minimum volume Ms. Sanderson used) of either wheat or grain to a rival over the three crop years would change the classification of a farm. Ms. Sanderson's observation also implies that a substantial number of the farms in the corridor of concern (*i.e.*, 28 of 82, or a third) did not sell to a rival and therefore sold their wheat and canola only to the Moosomin or Virden Elevators (or to both) over three successive crop years. Ms. Sanderson also noted that the Fairlight Elevator is frequently listed as a purchaser from the corridor farms.

[435] As the Commissioner observed during final argument, Ms. Sanderson's data effectively showed that 75% of the farms in the corridor of concern (*i.e.*, 60 farms out of 80[7]) sold all of their wheat exclusively to the Moosomin, Virden, and Fairlight Elevators in any given year. For canola, the corresponding percentage was 55% of the farms selling canola only to those Elevators. The Tribunal notes that for the vast majority of the farms in the corridor, the Whitewood Elevator was not a purchaser over that time period. Finally, for canola, the corridor farms taken as a group sometimes sold to Crushers (*e.g.*, to Bunge at Harrowby).

[7] In the corridor of concern, a total of 80 farms sold wheat, 77 farms sold canola, and 82 farms sold either wheat or canola.

[436] There are some examples of switching behaviour by farms in the corridor of concern, through the sale of wheat or canola to Elevators or Crushers other than the Moosomin, Virden, and Fairlight Elevators. However, the weight of the evidence is that these farms rely acutely on the Moosomin and Virden Elevators, as well as the Fairlight Elevator, for the sale of their grain, particularly wheat.

(d) Diversion ratios

[437] Both Dr. Miller and Ms. Sanderson provided diversion ratio calculations. Diversion ratios are calculated to estimate the proportion of a competitor's customers lost to one or more rivals if that competitor raises its price. Higher diversion ratios imply more substitution between two competitors. That is, in a HMT analysis, if competitor A raises its price for the supply of a product, the diversion ratios calculation shows the resulting switching (*i.e.*, diversion) of customers to the product offered by competitors B, C, and D. Diversion ratios are expressed as a percentage, namely, the proportion of customers diverted to the products of each of competitors B, C, and D, as a percentage of the overall number of diverted customers. The same type of calculation may be done for diversions caused by a monopsonist that lowers its price.

[438] Diversion ratios assist in the assessment of how close two or more competitors may be. As part of a larger model, diversion and information about profit margins may be used to understand the dollar value of diverted sales and specifically, the dollar value of customer purchases that may be recaptured by a merged entity (for example, after the merger of competitors A and B in the example above). The results assist to understand the incentive of a merged entity to raise prices and the predicted price effects of a proposed merger (2011 MEGs at para 6.15).

[439] Dr. Miller's estimated diversion ratios indicated that many farms viewed the Moosomin and Virden Elevators as substitutes. For wheat, Dr. Miller calculated the diversion ratios from the Moosomin Elevator to the Virden Elevator to be 23.8%, and 16.8% from Virden to Moosomin. In Dr. Miller's view, the diversion ratios for wheat between the Moosomin and Virden Elevators indicated that they were "relatively close competitors" (Dr. Miller Report at para 114 and Exhibit 11). For canola, the diversion ratios between the Moosomin and Virden Elevators were smaller, at 13.1% and 5.3% respectively. However, the Fairlight Elevator had large diversion ratios with both Elevators, suggesting to Dr. Miller that there was likely indirect competition between the Moosomin and Virden Elevators, through the Fairlight Elevator, for both wheat and canola.

[440] Ms. Sanderson also presented diversion ratios. Methodologically, Ms. Sanderson reran diversion ratios using the formulas in Dr. Miller's expert report based on farm data within the union of the 90% service areas for the Moosomin, Virden, and Fairlight Elevators.

[441] In that context, Ms. Sanderson did not dispute Dr. Miller's estimates of the diversion from the Moosomin Elevator to the Virden Elevator for each of wheat, canola including Crushers, and canola excluding Crushers, and the diversion from Virden to Moosomin in the same categories. Ms. Sanderson also presented diversion ratios from each of the Moosomin, Virden, and Fairlight Elevators to many other Elevators and Crushers, in several figures attached to her expert report (Ms. Sanderson Report at Figures 47, 48, 50).

[442] The Tribunal finds that Ms. Sanderson's diversion ratios indicated, generally, that the Moosomin, Virden, and Fairlight Elevators were relatively close competitors, more so for wheat than for canola. As Ms. Sanderson observed in her expert report, there were smaller diversion ratios for canola from the Virden Elevator to the Moosomin Elevator than from Virden to several other Elevators and Crushers. The same was true for the canola diversion ratios from the Moosomin Elevator to the Virden Elevator. Ms. Sanderson's diversion ratios to rival Elevators beyond the Moosomin, Virden, and Fairlight Elevators also showed, as she testified, that estimated diversions from both the Moosomin Elevator and the Virden Elevator to all other rivals (in the aggregate) were high for both wheat and canola. For wheat, the diversion ratios found by Dr. Miller were 23.8% from the Moosomin Elevator to the Virden Elevator, and 36.3% to the Fairlight Elevator, for a total of 60.1%. This means that 40% of the sales of wheat diverted from the Moosomin Elevator would go to rival Elevators other than Virden or Fairlight. Conversely, for the Virden Elevator, the diversion ratios for wheat were 16.8% to the Moosomin Elevator and 20.3% to the Fairlight Elevator, for a total of 37.1% of the sales to these two Elevators. This, observed Ms. Sanderson, means that 63% of the diverted sales of wheat from the Virden Elevator would go to Elevators other than Moosomin or Fairlight. In the case of canola, 65% of the sales diverted from the Moosomin Elevator would go to rival Elevators other than Virden or Fairlight, and 77% of the sales diverted from the Virden Elevator would be absorbed by Elevators other than Moosomin or Fairlight. In light of these figures, Ms. Sanderson opined that the diversion ratios to rival Elevators other than Moosomin, Virden, or Fairlight are significant, with many other Elevators and Crushers having diversion ratios similar or higher than those calculated for the Moosomin and Virden Elevators.

[443] In his reply to Ms. Sanderson's opinion that the geographic market should include more Elevators given their large diversion ratios, Dr Miller referred to the extract from the 2011 MEGs stating that 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 would impose and sustain a SSNIP above levels that would likely exist in the absence of the merger. Dr. Miller further explained that defining a relevant market is important because it is impractical to consider all sources of competition. Indeed, doing so would significantly increase the burden of antitrust inquiry, while shedding very little light on the competitive effects of the Transaction.

[444] The Tribunal observes that, in aggregate, 60.1% of switched volumes of wheat are diverted from Moosomin to Virden and Fairlight, and 37.1% are diverted from Virden to Moosomin and Fairlight. The Tribunal finds that the magnitude of these diversions signals a meaningful potential impact of the Acquisition on reducing alternatives for local wheat farms residing in the corridor of concern. But the diversion ratios also reflect the fact that Elevators other than Moosomin, Virden, and Fairlight represent alternatives for the purchase of wheat.

[445] The Tribunal takes less certain direction concerning the purchase of canola, as the diversion ratio data are much less convincing. The Tribunal does not agree with the position, advanced by Ms. Sanderson in her expert report, that higher comparative diversion ratios necessarily leads to the inclusion of all additional Elevators or Crushers on the periphery of the service areas for the Moosomin and Virden Elevators. However, the diversion ratios for canola suggest that it is less likely that the Moosomin and Virden Elevators, acting as a hypothetical monopsonist, would be able to exercise market power in a market defined geographically around the Moosomin, Virden,

and Fairlight Elevators. The panel notes that the diversion data suggest that the Whitewood Elevator and the Harrowby Crusher are the next closest competitors to the Moosomin, Virden, and Fairlight Elevators for the purchase of canola, and that other Crushers and Elevators offer alternatives to the farmers for their canola.

(e) Evidence related to prices and price negotiations

[446] P&H emphasized that its posted prices were set on a centralized basis, and that the vast majority of its sales were at the Cash Price offered each day based on the Basis set each morning and the fluctuating Futures Price.

[447] Dr. Miller testified that he found evidence that farms may sometimes individually negotiate prices with Elevators. Such negotiations may depend on long-standing relationships and revenue dependence, as well as subjective assessments of whether a farm could credibly purchase GHS from another, competing Elevator. Dr. Miller also found documentary evidence that farms negotiate prices that deviate from posted prices in a number of ways, including price matching by Elevators of their competitors' prices, not charging for certain services, and purchasing grain on the basis of a higher grade price with the intent to blend the grain for later sale. Dr. Miller also noted that a farm's commitment to purchase crop input products from the Elevator could also affect price.

[448] While the Tribunal agrees that uniformity of prices may be indicative of a geographic competition market, the evidence disclosed that there was a material proportion of transactions that involved a negotiated price. Specifically, P&H confirmed that approximately [redacted] of its transactions occurred at a price set as a result of a successful negotiation of a Cash Price between a farm and the company through its representatives at a particular Elevator. (There was no percentage provided in respect of unsuccessful or attempted price negotiations.)

[449] There was also some evidence that, while negotiating a price to be offered to a farm, P&H representatives were aware of the specific distance from specific farms to the company's Elevators and to competitor Elevators, and that this information affected the assessment of whether a rival Elevator's offered price would be matched or not. In determining a potential purchase price for grain, representatives of the Elevator were able to closely analyze circumstances affecting price that were material to an individual farm. Knowledge of the location of the farm, and thus the distance from the farm to each Elevator bidding for the crop, was a key factor in deciding whether to raise the price to be offered for the crop. The internal correspondence recognized that a farm located closer to a rival Elevator would find the rival more attractive as a purchaser at the same price; a higher price would be required to attract volumes of grain away from the rival in order to make up for the time and cost of transportation.

[450] This evidence is indicative of an ability by P&H to discriminate on price when departing from the Basis determined by using its Workback Algorithm. It also further demonstrates the salience of distance (and associated transportation costs) and shows the sophistication of the buy-side analysis of price.

(f) Mr. Heimbecker's testimony and P&H business records identifying competitors

[451] The Tribunal appreciates that Mr. Heimbecker identified many competitors to the Moosomin and Virden Elevators during his testimony, and that there are documents to support the view that those Elevators and Crushers are competitors in a business sense. Those competitors were principally those within the draw areas of the Elevators. Like Mr. Heimbecker's testimony, the parties' submissions both referred to documents from the files of the merging parties that identified various competitors. Those documents included reports for planning purposes, emails that identified a rival Elevator to which a farm's sale was lost, and emails for bidding or individual price negotiation purposes (*i.e.*, to obtain supply from a farm).

[452] The Tribunal has considered this documentary evidence and Mr. Heimbecker's testimony. For the purposes of a competition analysis and geographic market definition, not all business competitors are equal: different competitors may have different abilities to affect the competitive process. Some may have considerable ability to constrain a price increase by the merged entity (or otherwise discipline key dimensions of competition in a market), while others have little or no ability to do so. In this case, applying an HMT approach, the panel finds that the competitive rivals that can constrain a SSNDP by the merged entity do not correspond with competitors from a business perspective. The evidence of internal documents and from Mr. Heimbecker identifying business rivals is relevant but, overall, is a less weighty factor in the Tribunal's assessment of the geographic scope of the competition markets.

(4) Conclusion on relevant geographic market(s)

[453] Having considered all the quantitative and qualitative factors described above, the Tribunal concludes that the relevant geographic markets for the purchase of each of wheat and canola are not likely to be smaller or larger than those resulting from the HMT analyses. The Tribunal acknowledges that factors such as the price negotiations on a non-negligible proportion of grain purchases, the diversion ratios between the Moosomin, Virden, and Fairlight Elevators on wheat, the purchases of farmers in the "corridor of concern," and the evidence on distance travelled by farmers suggest a geographic market definition that would be more localized. Conversely, the Tribunal is not persuaded that the evidence flowing from heat maps or business records identifying numerous competitors is sufficient to justify an expansion of the relevant geographic markets resulting from the HMT analyses. In the end, the Tribunal finds that the evidence related to the geographic markets does not amount to clear and convincing evidence allowing the Tribunal to move away from the results coming from the HMT analyses.

[454] Therefore, on a balance of probabilities, the Tribunal is of the view that the relevant geographic market for the purchase of wheat is more likely than not to include at least the Moosomin, Virden, Fairlight, Oakner (Cargill), Whitewood (Richardson), Elva (Cargill), and Shoal Lake (Richardson) Elevators. With respect to the relevant geographic market for the purchase of canola, it includes at least the Moosomin, Virden, Fairlight, Oakner (Cargill), Whitewood (Richardson), Brandon (Richardson), Melville (G3), Souris East (Viterra), Shoal Lake (Richardson), and Elva (Cargill) Elevators, as well as the Crushers at Harrowby (Bunge), Yorkton (LDC), Velva (ADM), and Yorkton (Richardson).

C. Has the Commissioner established, on a balance of probabilities, that the Virden Acquisition lessens, or is likely to lessen, competition substantially?

[455] The Tribunal now turns to the main element of the merger provisions, namely, whether the Virden Acquisition lessens competition substantially, or is likely to have that effect.

(1) Analytical framework

(a) The statutory language

[456] Subsection 92(1) of the Act provides that the Tribunal may make a remedial order if it finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially.

[457] The anti-competitive threshold is directly linked to the concept of market power. As discussed above, market power is the ability to profitably influence the price or non-price dimensions of competition in the market for the supply or purchase of a product. The price and non-price dimensions of competition show the intensity of rivalry between or among competitors in a market (*Tervita SCC* at para 44; *Tervita CT* at paras 371–373). A merger will only be found to lessen or prevent competition substantially if it is likely to create, maintain, or enhance the ability of the merged entity to exercise market power, whether unilaterally or in coordination with other firms. The market power analysis in respect of a merger centres on the question of whether the merged entity is able, or is likely to be able, to exercise more market power than it could have exercised in the absence of the merger. When a merger is not likely to have market power effects, "it is generally not possible to demonstrate that the transaction will likely prevent or lessen competition substantially" (2011 MEGs at para 2.8). Without market power effects, section 92 will not generally be engaged (*Tervita SCC* at para 44).

[458] If there are no market power implications of a merger, there can be no anti-competitive implications. If there are market power implications of a merger, competition can be taken to be lessened or prevented to some extent (see *Facey and Brown* at p 181; *Campbell* at p 100). However, it is only where the prevention or lessening of competition is substantial that the Tribunal can intervene under section 92. There can therefore be situations where market power is created, maintained or increased without necessarily resulting in a substantial lessening or prevention of competition.

[459] Subsection 92(2) expressly provides that the Tribunal "shall not find" that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially "solely on the basis of evidence of concentration or market share." However, depending on the circumstances, post-merger market share may be a useful or reliable indicator of market power (*Hillsdown* at p 318). In sum, evidence of changes in market shares and concentration levels are relevant and often influential, but not determinative (*The Commissioner of Competition v Parkland Industries Ltd*, 2015 Comp Trib 4 at para 89; *Tervita CT* at para 360; *Canadian Waste* at para 108, 193–195, 204–205, 224; *Superior Propane I* at paras 126, 304–313).

[460] Section 93 of the Act provides a non-exhaustive list of factors that the Tribunal may consider when assessing whether a merger substantially lessens or prevents competition or is likely to do so. These factors include whether a party is a failing business, the availability of acceptable substitutes, barriers to entry into the relevant market, the extent to which effective competition remains or would remain after a merger, whether the merger would result in the removal of a vigorous and effective competitor, and the nature and extent of change and innovation in a relevant market.

[461] The Tribunal points out that none of the section 93 factors specifically refers to exports or to the pro-competitive dimension or business rationale of a merger. The Tribunal further reaffirms that the intent of the parties is irrelevant in determining whether a merger will likely reduce competition (*Canadian Waste* at para 118).

(b) The "substantial lessening" analysis

[462] As the present case solely concerns an alleged substantial lessening of competition, the Tribunal's analysis will focus on that branch of the assessment of anti-competitive effects. In *Tervita SCC*, the SCC confirmed that the language in section 92 concerning anti-competitive effects is very close to the corresponding words in paragraph 79(1)(*c*) of the Act dealing with abuse of dominance (*Tervita SCC* at para 50). The legal framework applicable to analysis of effects under the two provisions has common features, so court and Tribunal decisions under both provisions provide guidance in relation to the assessment of a substantial lessening of competition.

[463] As the Tribunal discussed in *VAA CT* at paragraphs 632–644 and in *TREB CT* at paragraphs 456–483, there are two dimensions in the Tribunal's substantial lessening of competition analysis. The first considers a forward-looking, counterfactual comparison. The second considers whether the alleged anti-competitive effects are substantial.

[464] First, the Tribunal's review under section 92 examines whether the merger will give the merged entity the ability to lessen competition, compared with the pre-merger benchmark or "but for" world. The analysis involves a forward-looking counterfactual scenario where the Tribunal compares the state of competition that exists or would likely exist in the presence of the merger with the state of competition that would have likely existed in the absence of the merger (*Tervita SCC* at paras 51, 54; *Tervita FCA* at para 108). The focus is on whether the merged entity is likely to be able to exercise materially greater market power than in the absence of the merger, through either materially higher prices or materially lower non-price aspects of competition in the market (*Tervita SCC* at paras 15, 50–51, 54, 80–81; *Tervita FCA* at para 108; *VAA CT* at paras 636, 642; *Tervita CT* at paras 123, 229(iv), 377)[8]. The Tribunal's approach thus contemplates an assessment that emphasizes the comparative and relative state of competition before and after the merger, as

[8] In a situation involving the purchase of a product and potential monopsony power, the determination to be made is whether prices are or likely would be materially lower than in the absence of the merger. In this discussion on the analytical framework, all references to "price increases" or "material price increases" are meant to relate to mergers involving the sale of a product and potential monopoly power. For mergers involving the purchase of a product and potential monopsony power, all references would be to "price decreases" or "material price decreases."

opposed to the absolute state of competition at those two points in time. In a case involving an alleged likely substantial lessening of competition, the Tribunal will assess whether the merger is likely to enable the merged entity to exercise new or enhanced market power (*Tervita SCC* at para 55, citing *Tervita CT* at para 368). That is, the Tribunal will consider whether the merger has likely created a new ability to exercise market power, or enhanced the merged entity's existing ability to exercise market power.

[465] In the second part of its analysis, the Tribunal determines whether the difference between the level of competition in the presence of the merger, and the level that would have existed "but for" the merger, is substantial. The extent of a merger'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). The issue is whether competition would likely be substantially greater, "but for" the implementation of the merger or proposed merger, through the merged entity's ability to profitably influence price, quality, service, advertising, innovation, or other dimensions of competition (*Canadian Waste* at paras 7, 108; *Di Domenico* at p 554). For a merger to be subject to a remedial order by the Tribunal, it is not enough to demonstrate that an actual or likely lessening of competition will result, or the mere creation or enhancement of market power. In a merger review, the Tribunal's assessment focuses on "whether the merged entity is likely to be able to exercise materially greater market power than in the absence of the merger" [emphasis added] (*Tervita SCC* at para 54, citing *Tervita CT* at para 367).

[466] 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). What is substantial is not defined in the Act. The Tribunal may consider evidence of market shares and concentration levels, together with the factors listed in paragraphs 93(*a*) to (*g.3*) of the Act and, under paragraph 93(*h*), "any other factor" relevant to competition in a market that is or would be affected by the merger or proposed merger. In each given case, all relevant indicators of market power need to be considered, but the relevance and weight to be assigned to each indicator will vary with the factual context. There is no precise scale by which to measure what is substantial, and this determination will be "highly contextual" (*Facey and Brown* at p 184).

[467] In conducting its assessment of substantiality, the Tribunal will look at three key components, namely, the degree, scope, and duration of the lessening of competition (*Tervita SCC* at para 45; *VAA CT* at para 640).

[468] With respect to degree, or magnitude, the Tribunal assesses whether the impugned merger is enabling or is likely to enable the merged entity respondent to exercise materially greater market power than in the absence of the merger (*Tervita SCC* at paras 50–51, 54). When assessing whether competition with respect to prices is or is likely to be lessened substantially, the test applied by the Tribunal is to determine whether prices are or likely would be materially higher than in the absence of the merger. 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 is or likely would be materially lower than in the absence of the merger (*Tervita SCC* at para 80; *TREB FCA* at paras 89–92; *Tervita CT* at paras 123–125, 376–377; *VAA CT* at para 642).

[469] In assessing whether the degree, or magnitude, of lessening of competition is sufficient to be considered "substantial," the Tribunal will consider the overall economic impact of a merger in the relevant market. Proof of a likely post-merger price increase must be assessed in relation to its materiality in the specific market at issue, the nature and extent of pre- and post-merger competition, and the rest of all the quantitative and qualitative evidence related to the affected dimensions of competition.

[470] On the price dimension of competition, the Tribunal has not found it useful to apply rigid numerical criteria in conducting this assessment. In short, there is no specific quantum of price variation implying that a merger lessens competition substantially. The Tribunal agrees with the 2011 MEGs that there is no rigid "numerical threshold" for a material price increase (2011 MEGs at para 2.14; see also *Hillsdown* at p 329). The Tribunal pauses to underline that the use of a 5% increase in price for the purposes of the HMT analysis must not be confused with the materiality of a price increase under the substantial lessening of competition analysis. The conceptual SSNIP threshold of 5% in the HMT analysis for market definition purposes is distinct from the assessment of substantiality of anti-competitive effects. It is therefore incorrect to state that the Commissioner must adduce quantitative evidence showing a 5% variation in post-merger prices in order to establish a lessening of competition that is "substantial." The required magnitude of a "substantial" price increase will instead vary from case to case and will depend on the facts of each case (*Tervita SCC* at para 46; *TREB FCA* at para 88; *Hillsdown* at pp 328–329). A substantial price variation can be less than 5%.

[471] In fact, as Chief Justice Crampton explained in his concurring opinion in *Tervita CT*, the degree of market power used in assessing whether competition is likely to be prevented or lessened substantially must be recalibrated downward when a 5% price increase is used to assess the degree of market power held by a hypothetical monopolist for the purposes of the HMT analysis and the SSNIP threshold. At paragraphs 376–377 of *Tervita CT*, he said:

> [376] […] However, given that the Tribunal has now embraced the hypothetical monopolist framework and the SSNIP test for market definition, it is necessary to revisit this definition of substantiality. This is because if the degree of market power used to define relevant markets is the same as the degree of market power used to assess competitive effects, a merger would not be found to be likely to prevent or lessen competition substantially unless the degree of new, enhanced or maintained market power of the merged entity is the same degree of market power held by as [*sic*] the hypothetical monopolist that was conceptualized for the purposes of market definition.
>
> [377] Accordingly, the degree of market power used in assessing whether competition is likely to be prevented or lessened substantially must be recalibrated downwards. That recalibrated degree of market power is a level of market power required to maintain prices *materially* higher, or to depress one or more forms of non-price competition to a level that is *materially* lower, than they likely would be in the absence of the merger. […]
>
> [Emphasis in original.]

[472] In sum, the substantiality level contemplated by the "substantial lessening of competition" analysis can be lower than the level under the HMT analysis and the SSNIP threshold.

[473] It must also be emphasized that there is no requirement for the Tribunal to find a likely increase in price; it is sufficient for the Tribunal to conclude that the merged entity has the ability to increase price or to reduce quality, service, or product choice.

[474] Turning to scope, the assessment involves determining whether the lessening of competition affects the entire relevant market or a material part of it. If the alleged anti-competitive effects do not extend throughout the totality of the relevant market, the Tribunal will assess their scope and whether they extend throughout a "material" part of the market, or in respect to a material volume of sales / business (*Tervita FCA* at para 108; *Tervita CT* at paras 375, 378).

[475] With respect to duration, the test applied by the Tribunal is whether a material increase in price or material reduction in non-price dimensions of competition resulting from a merger is likely to be maintained for approximately two years (*Tervita SCC* at para 80; *Tervita CT* at para 123).

[476] In assessing substantiality and its various components, the Tribunal considers quantitative evidence, qualitative evidence, or both, related to the price and non-price dimensions of competition (*TREB FCA* at para 16; *VAA CT* at paras 124, 639; *TREB CT* at paras 469–471). In *Tervita SCC*, the SCC held that the Commissioner was not, in law, required to quantify any anti-competitive effects under section 92 (*Tervita SCC* at paras 121–122, 166; *TREB FCA* at paras 99–100; *TREB CT* at para 469). That said, in all situations, the Commissioner must always adduce sufficiently clear and convincing evidence, and he bears the burden to demonstrate, on a balance of probabilities, that the merger lessens or is likely to lessen competition substantially, as well as the basic facts of the "but for" scenario that are required to make that demonstration (*Tervita SCC* at paras 65–66; *TREB FCA* at paras 87; *Tervita FCA* at paras 107–108; *VAA CT* at para 644).

(2) Parties' positions

(a) The Commissioner

[477] The Commissioner submits that the Virden Acquisition is likely to cause a substantial lessening of competition in the relevant markets owing to the elimination of a vigorous and effective competitor, namely, the Virden Elevator. The Commissioner claims that both the quantitative and qualitative evidence demonstrates that farmers in the relevant markets will pay materially more for GHS for wheat and canola over the next two years and will lose other impactful aspects of competition. With the control of the Virden Elevator, says the Commissioner, P&H has the ability and incentive to unilaterally exercise market power in the relevant markets. The Commissioner contends that the lessening of competition is substantial in terms of magnitude, duration, and scope: it adversely impacts competition to a degree that is material, the duration of the anti-competitive effects is substantial, and the anti-competitive effects extend to a substantial part of the relevant markets.

[478] In his final submissions, the Commissioner argued that the substantial lessening of competition is demonstrated by the following elements, which echo many of the factors listed in

section 93 of the Act: 1) the high margins at the Virden Elevator, which provide direct evidence of P&H's existing market power; 2) P&H's ability to engage in price discrimination; 3) P&H's high market shares in the relevant markets; 4) the removal of the vigorous and effective competition to the Moosomin Elevator that the Virden Elevator provided prior to the Acquisition; 5) the material impact of the Virden Acquisition on the price for GHS for wheat and canola; 6) the postponement of the planned expansion of the Moosomin Elevator that would have made P&H a more effective competitor to the Virden Elevator in the absence of the Acquisition; 7) the inability of Viterra's Fairlight Elevator to constrain an increased exercise of market power by P&H; and 8) the existence of high barriers to entry and expansion.

[479] The Commissioner further submitted that other more distant Elevators, canola Crushers, and direct purchasers of wheat or canola are unable to constrain an exercise of market power by P&H as they do not have sufficient capacity and farmers would have to incur higher transportation costs to deliver their wheat and canola to these locations. While the Commissioner's submissions mostly focused on the anti-competitive price effects of the Virden Acquisition, the Commissioner maintains that quantified price effects are only one element of the substantial lessening of competition caused by the Acquisition. According to the Commissioner, there is also significant other evidence demonstrating that the contemplated price effects are material to the farmers.

[480] The Commissioner submits that the Tribunal should adopt a framework that allows for an economic analysis that can credibly assess the impact of local competition between Elevators that was lost when P&H acquired the Virden Elevator from LDC. The Commissioner considers that such local competition is expressed through the Basis. He states that the main issue to be determined by the Tribunal can be summarized as follows: when competition effectively takes place on, and affects one component of, the overall final price of a product, as he suggests is the case here, how should the Tribunal assess and measure the magnitude of harm and the materiality required for the lessening of competition to be substantial?

[481] In support of his arguments on the substantial lessening of competition, the Commissioner relies on three pillars of evidence: the expert evidence of Dr. Miller (including his merger simulation model), the fact witnesses (notably, the farmers who testified at the hearing), and the documentary evidence.

[482] The Commissioner does not dispute that he has the burden to adduce sufficiently clear and convincing evidence to demonstrate, on a balance of probabilities, that competition is or is likely to be lessened substantially as a result of the Virden Acquisition.

(b) P&H

[483] P&H responds that the Virden Acquisition does not, and is not likely to, lessen competition substantially in any relevant market. More specifically, P&H submits that the Commissioner has failed to meet his burden to prove, on a balance of probabilities, his alleged substantial lessening of competition. According to P&H, the evidence on the record does not establish that the markets at issue would be substantially more competitive, "but for" the Virden Acquisition.

[484] In its Response, P&H denied that the Virden Acquisition creates, enhances, or maintains monopsony power in any properly defined market for the purchase of wheat or canola. P&H argued

that it will continue to face vigorous and effective competition from numerous competing Elevators and Crushers located in Manitoba and Saskatchewan. P&H further claimed that barriers to entry and expansion are low and that rival Elevators have excess capacity, allowing them to expand their purchases of wheat and canola and to constrain any attempt by P&H to exercise monopsony power. P&H also submitted that the predicted price variations determined by Dr. Miller are immaterial and unlikely.

[485] In its closing submissions, P&H elaborated by focusing on the fact that: 1) barriers to entry and expansion are low; 2) the Virden Elevator has become and will remain a vigorous and effective competitor further to the Transaction; and 3) the Transaction enhances non-price competition.

[486] In support of its arguments on the absence of any substantial lessening of competition, P&H relies on Ms. Sanderson's expert evidence, more particularly her critique of the price effects alleged by Dr. Miller and her post-Acquisition price analysis, and on the evidence provided by the farmer witnesses.

(3) Tribunal's assessment

[487] The Tribunal notes at the outset that the evidence adduced by the Commissioner on the substantial lessening of competition primarily focused on the quantification of the alleged price effects of the Virden Acquisition. As the Commissioner said in his oral submissions, his demonstration that the lessening of competition is substantial was mostly done through Dr. Miller's quantification work including evidence such as market shares and margins. As part of its assessment, the Tribunal has therefore considered whether the Cash Prices paid by P&H to the farmers for their wheat or canola are or would likely be materially lower, "but for" the Virden Acquisition. The Tribunal also assessed other evaluative factors raised by the Commissioner and covered by section 93 of the Act. These factors notably included likely entry and expansion, excess capacity, and the extent of any remaining vigorous and effective competitors.

[488] For the reasons discussed below, the Tribunal concludes that the Commissioner has not demonstrated, on a balance of probabilities, that the Virden Acquisition lessens, or is likely to lessen, competition substantially in the relevant markets. The Tribunal accepts that the joint control of the Virden and Moosomin Elevators by P&H has and will continue to have some limited adverse effects on competition in the purchase of wheat. However, on the evidence before it, the Tribunal is not persuaded that such lessening of competition reaches or is likely to reach the substantiality required by section 92 of the Act.

[489] The Tribunal also acknowledges that the materiality level to assess the substantial lessening of competition varies from case to case, and that a lower materiality level could apply in cases, such as this one, where competition between rivals takes place, at least in part, on one more specific component of the overall final price of a product. However, the Tribunal observes that, even though the Commissioner insisted that competition between Elevators and Crushers revolved around the Basis, he has not provided any compelling submissions, nor any clear and convincing evidence, supporting a particular materiality level that the Tribunal should apply in the current circumstances. Moreover, even considering that some competition between Elevators effectively takes place on one component of the overall price of grain, namely, the Basis, the Tribunal finds

that the low magnitude of harm revealed by the evidence is not enough to meet the materiality required for the lessening of competition to be substantial, whether in relation to the Basis or the Cash Price.

(a) P&H's alleged pre-existing market power

[490] The Commissioner argues that P&H already had existing market power prior to the Acquisition and now has the ability to increase this market power by virtue of its ownership of the Moosomin and Virden Elevators. He claims that two pieces of evidence demonstrate P&H's pre-existing market power: the high margins prevailing at the Virden Elevator and P&H's ability to price discriminate.

[491] In his expert report, Dr. Miller calculated that the Virden Elevator earned a 55.2% margin on GHS for wheat and a 39.3% margin on GHS for canola. In Dr. Miller's opinion and experience, those are relatively high margins "consistent with localized competition rather than significant competition from many distant competitors" (Dr. Miller Report at para 72). Dr. Miller's margins are economic margins. Ms. Sanderson did not provide any specific margin estimates of her own. Apart from Dr. Miller's estimates, no other evidence was provided to the Tribunal with respect to Elevators' margins on the purchase of grain.

[492] To calculate his margins for the Virden Elevator, Dr. Miller identified those Virden Elevator costs which are marginal or incremental, and he excluded fixed costs. Ms. Sanderson did not dispute Dr. Miller's categorization of the fixed and marginal costs, but she criticized his estimated margins on the ground that they were overstated and failed to include certain freight costs and other costs relating to export terminal operations.

[493] The Tribunal accepts Dr. Miller's estimated margins for the Virden Elevator, based on his allocation of both revenue and costs to Elevators for the purposes of estimating marginal costs. The Tribunal agrees that the marginal costs related to GHS are a satisfactory proxy for the marginal costs associated with the purchase of grain. Although Dr. Miller's allocations were based on variable costs associated with the delivery of GHS, the same operating activities are also closely associated with the purchase of grain. The Tribunal finds that the variable costs allocated by Dr. Miller are properly allocable to the purchase of grain (and respective revenue generated) at an Elevator, in contrast with freight and other costs that are properly attributable to the marginal cost for (and revenue generated by) the sale and distribution of grain downstream at export terminals and other destinations.

[494] Turning to price discrimination, the evidence from discovery is clear that P&H knows the location of its customers and has the ability to use that information to engage in price discrimination. To the extent that Elevators sometimes negotiate individual prices with farmers, a price-discrimination framework may thus be more descriptive of the grain industry. However, the evidence on the record indicates that price negotiations between farms and P&H only occur for about [redacted] of P&H's transactions with farmers, with the vast majority (*i.e.*, the remaining [redacted]) of transactions between farmers and the Elevator being done on the basis of posted prices. This [redacted] percentage is arguably conservative, as it does not include those transactions where farms attempted price negotiations but were unsuccessful. The Tribunal also points out that, while there

is some evidence of price discrimination, Dr. Miller stated that a posted price model was the appropriate framework to study how prices are set in the grain industry (Dr. Miller Report at paras 140–142). The Tribunal considers that the evidentiary record in this case demonstrates that P&H has some ability to price discriminate based on its customers' locations, and that it can exercise that ability when it is in its interest to do so. However, the evidence shows that P&H's actual use of this ability is limited.

[495] The Tribunal agrees that high margins and the ability to price discriminate can constitute direct evidence that P&H has some pre-existing market power. This was recognized by the Tribunal in *Tele-Direct* at paragraphs 286 and 297. In that case, the Tribunal looked at Tele-Direct's behaviour towards consultants and whether it had abused its dominant position. The Tribunal found that "[w]here a firm with a high degree of market power is found to have engaged in anti-competitive conduct, smaller impacts on competition resulting from that conduct will meet the test of being "substantial" than where the market situation was less uncompetitive to begin with" (*Tele-Direct* at para 758). The Tribunal points out that in that case, Tele-Direct was found to have "overwhelming" market power.

[496] Based on the evidence before it, the Tribunal is satisfied that the high margins calculated by Dr. Miller at the Virden Elevator constitute clear and convincing evidence of P&H's pre-existing market power. Similarly, while the evidence with respect to P&H's ability to price discriminate is not as compelling given that the evidence showed a practice affecting only a limited portion of P&H's purchases of wheat and canola, the Tribunal is satisfied that, on a balance of probabilities, this evidence also supports a finding of some pre-existing market power for P&H.

(b) Price effects

[497] With respect to the price effects, the Commissioner relied on the expert evidence of Dr. Miller to support his position that prices for GHS are or will likely be materially higher than they would have been in the absence of the Virden Acquisition.

[498] In his analysis, Dr. Miller found that the diversion ratios between the Moosomin and Virden Elevators ranged between 15% and 25% for wheat and between 5% and 15% for canola. More detail about these diversion ratios were provided above in the Tribunal's discussion of the geographic market definition. Dr. Miller used these diversion ratios to quantify the UPP created by the Acquisition. The UPP is a tool that is often used in merger review to approximate the incentive for the merging parties to unilaterally increase prices following a merger, and to measure such price effects. Dr. Miller computed several measures of UPP, all of which showed that prices for GHS would likely rise as a result of the Acquisition, for both wheat and canola. His results suggested that the Transaction generates impetus for price increases, with UPPs of over CAD $2.50 per MT for wheat and over CAD $0.30 per MT for canola. He estimated the gross UPP indices ("**GUPPI**") at over 9% for wheat and over 1% for canola.

[499] As explained by both Dr. Miller and Ms. Sanderson in the concurrent evidence session, the magnitudes of UPP, GUPPI, and price effects from merger simulations depend on the amount of diversion between the merging firms and on the mark-up (or margin). Holding all else equal,

greater diversion ratios between the merging firms and higher margins will increase UPP, GUPPI, and the simulated price effects.

[500] Using his diversion ratios and his estimate of the Virden Elevator's margin, Dr. Miller constructed a merger simulation model to quantify the price impact of the Virden Acquisition on farmers. A merger simulation model is a widely accepted econometric method for calculating the predicted price effects from a merger, and to quantify changes to consumer surplus, profit, and the DWL. It is not disputed that the models constructed by Dr. Miller for his farm choice and his merger simulation are standard economic models, and that Dr. Miller's analysis reflects the principles established in the economic literature. The Tribunal pauses to mention that Dr. Miller's merger simulation model was used both for market definition purposes and for measuring the anti-competitive effects of the Acquisition.

[501] The Tribunal notes that there was no disagreement between Dr. Miller and Ms. Sanderson on the calculation of the diversion ratios that went into the merger simulation model; those diversion ratios came out of the transaction-level data.

[502] For his substantial lessening of competition analysis, Dr. Miller considered a large number of competing entities, namely, 15 Elevators in the case of wheat and, for canola, 15 Elevators and five Crushers. These were Elevators and Crushers to which there are positive deliveries of canola or wheat made by farms located within Dr. Miller's Farmer Region. In sum, Dr. Miller's merger simulation model included Elevators and Crushers that come from both inside and outside the defined geographic markets resulting from his HMT analysis.

[503] There was agreement by both experts that they were able to interpret the data provided and that Dr. Miller relied on a rich and robust data set for his merger simulation model. P&H had voiced concerns about the fact that the Commissioner did not collect data from two Paterson Elevators located at Carnduff and Binscarth, nor from the Cargill Elevator at Nesbitt. All six farmers who testified at the hearing said they do not sell to any of these three Elevators and did not produce receipts showing sales to these Elevators. In addition, no reference was made by Ms. Sanderson to these Elevators as a competitor in any of the Moosomin business documents. The Tribunal is therefore satisfied that, in the end, there were no real issues with alleged missing data in Dr. Miller's model.

[504] Dr. Miller's merger simulation model provided both relative and absolute values for his predicted price effects. Dr. Miller and Ms. Sanderson agreed on the magnitude, in absolute dollar terms, of the price effects predicted by Dr. Miller's merger simulation model. They however disagreed on the percentage of the price variations, as the relative price changes varied significantly depending on the denominator being used (*i.e.*, the price of GHS or the Cash Price).

[505] In light of the foregoing, the Tribunal is satisfied that it can accept Dr. Miller's merger simulation model and its absolute results.

[506] Both Dr. Miller and Ms. Sanderson further acknowledged that, if the diversion ratios and the mark-ups are positive, a merger simulation model will always predict price increases whenever efficiencies are not directly modeled (Ms. Sanderson Report at para 78; Consolidated Transcript, Public, at pp 1525–1526, 1529; Consolidated Transcript, Confidential A, at pp 1711, 1718–1719,

1784–1785, 1871–1872). This is a reflection of economic theory, which says that, when there is competition, there will be lower prices. In other words, a merger that reduces competition in the sale of a product will raise prices to some degree. The Tribunal must, however, determine whether the predicted price increases — or, in the case of a monopsony, price decreases — are meaningful and substantial.

[507] Further to its review of the evidence, the Tribunal is not persuaded that the Virden Acquisition is decreasing or will likely decrease the Cash Prices for wheat or canola to a material degree in the relevant markets, relative to the prices that likely would have existed "but for" the Acquisition. Stated differently, the Commissioner has not demonstrated that, "but for" the Virden Acquisition, the prices received by farmers for their wheat and canola are or would likely be materially lower. This is the case for both the relative and absolute measures coming out of Dr. Miller's evidence.

(i) Relative measures

[508] The Tribunal first considers the relative price changes predicted by Dr. Miller's model, as this is typically how expected price effects are measured and assessed by the Tribunal. The relativity of predicted price changes is an important benchmark, as price effects are not measured in a vacuum, but against a certain reference or base price. Price variations will be material when they represent a meaningful proportion of the reference price.

[509] Dr. Miller's merger simulation model based on the farmers' choices of Elevator predicts that the price of GHS for wheat will increase by CAD $2.49 per MT for the Moosomin Elevator, and by CAD $2.07 per MT for the Virden Elevator (Dr. Miller Report at Exhibit 14). This corresponds to 7.1% and 7.6% price increases, respectively, relative to the reference pre-Acquisition price of GHS for wheat at each Elevator. Turning to the price of GHS for canola, Dr. Miller's projected price increases will be between CAD $0.91 per MT and CAD $1.21 per MT at the Moosomin Elevator, and between CAD $0.25 per MT and CAD $0.35 per MT at the Virden Elevator. The range reflects the different values for canola including or excluding Crushers. These observed variations amount to a 7.3%–9.7% and 1.3%–1.7% increase in the price of GHS for canola at the Moosomin and Virden Elevators, respectively.

[510] Dr. Miller's expert opinion is that the Virden Acquisition allows P&H to charge farmers 7% to 8% more to handle their wheat, and between 1% to 7% more to handle their canola (using the data for canola including Crushers) (Dr. Miller Report at para 6). According to Dr. Miller and the Commissioner, these results from Dr. Miller's merger simulation show a material increase in the price of GHS per MT, for both wheat and canola, when considered against the price farmers pay for GHS.

[511] The Tribunal notes that the highest predicted price increase of CAD $2.49 per MT for wheat represents a variation of 6.8 cents per bushel (*i.e.*, CAD $2.49 / 36.7444 bushels). The corresponding highest predicted price increase of CAD $0.91 per MT for canola (including Crushers) equates to 2.1 cents per bushel (*i.e.*, CAD $0.91 / 44.092 bushels). Both of these highest price variations were measured for the Moosomin Elevator.

[512] Ms. Sanderson further calculated that, for wheat, the average price increase predicted by Dr. Miller for the Moosomin, Virden, and Fairlight Elevators would be CAD $1.39 per MT (or 4 cents per bushel). The average price increase for canola would be CAD $0.23 per MT (or 1 cent per bushel). When expressed as a percentage of the weighted average imputed prices for GHS at the Moosomin, Virden, and Fairlight Elevators, the price effects calculated by Dr. Miller are, on average, 1.51% for canola and 4.62% for wheat (Ms. Sanderson Slides at pp 93–94).

[513] However, as Ms. Sanderson points out in her evidence, when the predicted price changes found by Dr. Miller are expressed in relation to the Cash Prices, the picture of the relative price variations is quite different.

[514] In the period of reference used by Dr. Miller, the weighted average price for wheat was CAD $229.73 per MT at the Moosomin Elevator, and CAD $239.11 per MT at the Virden Elevator. For its part, the weighted average price for canola was CAD $461.46 per MT at the Moosomin Elevator, and CAD $452.80 per MT at the Virden Elevator. Therefore, for wheat, Dr. Miller's predicted price variations of CAD $2.49 per MT for the Moosomin Elevator and CAD $2.07 per MT for the Virden Elevator represented changes of only 1.1% and 0.9%, respectively, compared to the pre-Acquisition Cash Price for wheat at each Elevator. With respect to canola including Crushers, Dr. Miller's projected price variations of CAD $0.91 per MT for the Moosomin Elevator, and CAD $0.25 per MT for the Virden Elevator amounted to relative changes of 0.2% and 0.05%, respectively, compared to the pre-Acquisition Cash Price for canola at each Elevator. When expressed as a percentage of the average Cash Prices at the Moosomin, Virden, and Fairlight Elevators, the average relative price effects calculated by Dr. Miller are 0.05% for canola and 0.60% for wheat (Ms. Sanderson Slides at p 94).

[515] The Commissioner therefore asks the Tribunal to find a substantial lessening of competition in a situation where his expert's average predicted price increases represent 1.51% of his imputed price for GHS for canola, expressed as a percentage of the average price for GHS at the Moosomin, Virden, and Fairlight Elevators, and 4.62% of his imputed price for GHS for wheat at those same Elevators. When they are expressed in relation to the product market and the appropriate reference price identified by the Tribunal — namely, the Cash Price —, Dr. Miller's predicted price changes represent between 0.05% and 0.2% of the Cash Price for canola, and between 0.60% and 1.1% of the Cash Price for wheat. The Commissioner claims that, even if the purchase of grain and Cash Prices should be the denominator, these price effects are still material when viewed against the qualitative evidence.

[516] With respect, the Tribunal disagrees. The Tribunal is of the view that price changes of this magnitude (*i.e.*, at most 1.1% of the Cash Price for wheat and at most 0.2% of the Cash Price for canola) cannot be qualified as "material." On the contrary, the Tribunal finds that predicted price variations representing such a small fraction of the pre-Acquisition price for wheat or canola at the Moosomin or Virden Elevators are immaterial, especially in light of the fact that a merger simulation model will always predict a price increase. For the purchase of canola, price variations of 0.2% or less (or between one and two cents a bushel) are *de minimis*. For the purchase of wheat, price variations reaching at most 1.1% (or a maximum of seven cents a bushel) are very minor and far from substantial in this market. Indeed, the Tribunal observes that, in his submissions at the hearing, the Commissioner admitted that such relative price changes were "small" when expressed

in terms of percentage. Hence, the Commissioner's focus on the absolute values of the predicted price changes, to which the Tribunal will turn below.

[517] The Tribunal accepts that the Basis plays a certain role in the competition between Elevators at the local level. The evidence indicates that there can be adjustments to the Basis or to the Cash Price after or in addition to changes in the Futures Price. In some cases, the Basis fluctuates for reasons other than a change in the Futures Price, such as negotiations between farms and Elevators or limited-tonne and limited-time specials offered by the Elevators. The Tribunal also accepts that the price variation threshold can certainly be lower than 5% (contrary to P&H's argument) in order to meet the substantiality level. The Tribunal is further mindful of the fact that, when a firm has high pre-existing market power, smaller impacts on competition can be enough to meet the test of substantiality (*Tele-Direct* at para 758). The Tribunal pauses to note that, while it finds that P&H had "some pre-existing market power" in this case, the facts do not support a conclusion that P&H had "high" market power and certainly not "overwhelming" market power as in *Tele-Direct*.

[518] However, the Commissioner has not presented any compelling argument nor any clear and convincing evidence regarding the materiality level (in terms of percentage) that should apply to the substantial lessening of competition analysis in this case. More specifically, the Commissioner has not made submissions regarding the relative materiality level that should apply in a case where competition allegedly takes place on one component of the final price for wheat or canola, namely, the Basis. Similarly, the Commissioner has submitted no analysis nor any evidence to demonstrate that, in the particular circumstances of this case, the acceptable materiality level for a price decrease could be as low as around 1% or less.

[519] In fact, the Tribunal is not aware of any merger cases, in Canada or in any other jurisdiction, where a court or tribunal has recognized that a predicted price effect revolving around 1% could be enough to meet the test of substantiality. Indeed, since merger simulation models predict price increases (as discussed above), the Tribunal is of the view that, absent expert evidence allowing it to conclude differently, relative price variations predicted by a merger simulation model have to be more than 1% in order to have any significance or materiality.

[520] For all the above reasons, the Tribunal agrees with P&H and Ms. Sanderson that the relative effect of the Virden Acquisition on the Cash Prices paid by P&H for wheat or canola is not material.

(ii) Absolute measures

[521] The Commissioner also takes the position that the absolute price variations observed by Dr. Miller are material. In his submissions, the Commissioner relied on the absolute magnitude of Dr. Miller's predicted price increases and what he claimed was their resulting materiality. The Commissioner argued that, in this case, the Tribunal should prefer and adopt an absolute notion of materiality with respect to the price effects and consider the impact that the Acquisition will have on farmers, in terms of changes in "cents per bushel" they will pay for GHS or receive for their grain. The Commissioner submits that the absolute amount of the effects measured by Dr. Miller is evidence of a substantial lessening of competition. The price increases projected by Dr. Miller,

says the Commissioner, are also well above 2 cents per bushel (or, equivalently, CAD $0.73 per MT for wheat and CAD $0.88 per MT for canola), and this is sufficient to demonstrate materiality.

[522] As mentioned above, Dr. Miller's highest predicted price variations are 6.8 cents per bushel for wheat and 2.1 cents per bushel for canola. Dr. Miller and Ms. Sanderson agree that these absolute effects are the same regardless of whether the product market is GHS or the purchase of grain. In sum, these price effects are not dependent upon the definition of the relevant market or on the selection of the SSNIP. The relevant market only impacts the computation of the price effects in relative terms, and the experts indeed disagree on the percentage of the price variations (in terms of the imputed price of GHS or the Cash Price).

[523] The Commissioner further claims that price increases of 2 cents to 7 cents per bushel are material when viewed against the qualitative evidence and the pre-existing market power of P&H. The Commissioner submits that the materiality of the price effects is enhanced when all of the other evidence of a substantial lessening of competition is considered, namely, P&H's pre-existing high margins, high market shares, and ability to price discriminate, the removal of the Virden Elevator as a vigorous and effective competitor, and the loss of competition between the Virden and Moosomin Elevators as a result of the Moosomin Elevator's delayed expansion.

[524] The Tribunal is not persuaded by the Commissioner's submissions and evidence. More specifically, the Tribunal is not convinced that there is evidence showing, on a balance of probabilities, that 2 cents a bushel "matter" to farmers. The evidence is only in respect of amounts much higher than that, and higher than Dr. Miller's predicted price increases. The Tribunal agrees with P&H that arguing that a 2 cents per bushel price increase, or even a 7 cents price increase, is material is inconsistent with the farmers' evidence and with the high volatility of prices in the grain industry, often vacillating by plus or minus 10 cents a bushel in a day.

[525] The Commissioner first relies heavily on the so-called "2 cents challenge." The "2 cents challenge" refers to an email sent by [redacted] to [redacted] and [redacted] in the regular course of business (Commissioner Read-In at p 643). In that email, [redacted] said that 2 cents per bushel translated into CAD $3.2 million in profitability for P&H. The Commissioner claims that this evidence is very important to assessing materiality because [redacted] posted that if P&H bought each bushel 2 cents cheaper, it would add more than CAD $3 million in profitability to P&H. Moreover, when Mr. Heimbecker was asked on discovery what CAD $3.2 million in profit meant to him, he said that such a sum of money was "not insignificant" (Commissioner Read-In at p 178).

[526] The Commissioner adds that 2 cents per bushel is a reasonable threshold for materiality as it represents 2.1% of GHS for wheat and 7.1% of canola handling prices for the Moosomin Elevator, and 2.7% of GHS for wheat and 4.4% of canola handling prices for the Virden Elevator.

[527] The Commissioner also refers to another email where [redacted] from P&H said that he does not need to be [redacted] per bushel higher than his competitors on wheat, and that the damage of such a discount to P&H's buying program would be [redacted] (Commissioner Read-In at p 800). On the basis of this evidence, the Commissioner maintains that P&H cares about pennies on the bushel.

[528] The Tribunal does not find this evidence convincing on the issue of materiality of price effects in the context of its substantial lessening of competition analysis. For the purpose of section 92 of the Act and the Tribunal's assessment of anti-competitive effects, materiality is analyzed in relation to a market situation, to the competitive behaviour of market participants as a result of a merger, and to competition in the relevant market. It is not analyzed in relation to a firm's overall profitability or bottom line. In this case, it is analyzed in relation to the situation in the relevant geographic markets for wheat and canola as a result of the Virden Acquisition. The Tribunal appreciates that 2 cents a bushel, when projected on the overall profitability of P&H, may have some significance for P&H. But the fact that 2 cents a bushel may be important to P&H's overall bottom line does not constitute clear and convincing evidence that such an amount is or would likely be "material" with respect to a lessening of competition in the purchase of wheat or canola in the relevant markets defined above.

[529] The materiality of predicted price changes, whether relative or absolute, is not to be measured in relation to the general profitability of one specific producer or supplier, or one specific customer. This is even more so when the Commissioner's Application only challenges one specific portion P&H's business, namely, the acquisition of only one Elevator out of an overall network of 29. The issue to be determined by the Tribunal is whether the adverse price effects on competition are material in relation to the market and industry at stake. The "2 cents challenge" email offers no clear and convincing evidence to support the Commissioner's position on the alleged price effects attributable to the Virden Acquisition.

[530] The Tribunal further observes that virtually any business person would say that any additional cent of profit per unit of product sold does matter and has some significance for his or her business. In the Tribunal's view, the assessment of materiality was not meant to be reduced, and cannot be reduced, to a single comment such as those made by [redacted].

[531] With respect to the email from [redacted] the Tribunal notes that the [redacted] comment was not made in reference to a specific benchmark, let alone to a 2 cents per bushel benchmark. It was generally made in reaction to sales representatives saying that "farmers are getting better prices somewhere" with no information to support such claims. Moreover, when [redacted] referred to a particular amount P&H should not contemplate, he said that P&H did not need to be [redacted] per bushel higher than its competitors. [redacted] per bushel is far higher than the 2 cents or even 7 cents a bushel measured by Dr. Miller.

[532] The Commissioner further submits that cents per bushel matter not only to P&H, but also to farmers. In that regard, the Commissioner relies on several extracts and comments made by the farmer witnesses regarding the price changes they face in their business.

[533] Again, the Tribunal is not persuaded by the Commissioner's submissions. The Tribunal has not found clear and convincing evidence allowing it to conclude, on a balance of probabilities, that a few cents a bushel matter to farmers and to their behaviour in the market. On the contrary, the evidence from farmers is in respect of amounts much higher than 2 cents a bushel and higher than the predicted price increases of Dr. Miller.

[534] It is true, as the Commissioner argues, that Mr. Lincoln (a farmer called by the Commissioner) testified in his witness statement that that he needs "every penny to be able to hit

the profitability levels" required to operate his farm (Lincoln Statement at para 16). However, immediately before he made that statement, Mr. Lincoln referred three times to an example of what a material amount meant to him: it was 10 cents a bushel. He indicated that the Moosomin Elevator would have to offer him 10 cents a bushel above the Fairlight Elevator for it to be worthwhile driving past this Elevator (Lincoln Statement at para 15). When he went on to quantify the adverse impact of a price decrease on his business, he again used the value of 10 cents per bushel (Lincoln Statement at para 16). Nothing in the Lincoln Statement supports the contention that an amount as low as 2 cents a bushel or in the range predicted by Dr. Miller would be material to him and to his competitive behaviour in the sale of his grain.

[535] The Commissioner also referred to the testimony of Mr. Hebert, one of P&H's farmer witnesses, singling out his comments and podcasts about the farmers' margins being squeezed. Further to its review of Mr. Hebert's evidence, the Tribunal finds no support in that evidence for the proposition that 2 cents or a few cents a bushel matter to Mr. Hebert. The documents mentioned by Mr. Hebert in his testimony contained comments he made about his "5% rule" in the context of the farmers' business: for Mr. Hebert, farmers should concentrate on trying to improve certain metrics of their business by 5%. The only references to cents per bushel were to an amount of 50 cents per bushel. Again, this is far above 2 cents or 7 cents per bushel.

[536] Mr. Paull, another farmer witness called by P&H, testified that he will only switch to a more distant Elevator if it means receiving more cents a bushel. Regarding the magnitude of the price differential, Mr. Paull testified that he would not leave a local Elevator for "a few pennies a bushel or a few cents a bushel," but if he could make "10 or 15, 20 cents, sometimes 30 or 40 cents by going further," he would (Consolidated Transcript, Confidential B, at p 1020). Mr. Paull added that he would not switch from a local Elevator if the difference in net price is 5 cents a bushel or lower (Consolidated Transcript, Confidential B, at p 1022). He also mentioned that he would not haul his grain 50 or 100 miles away for a few cents a bushel. More distant Elevators would need to offer higher prices than that for him to consider sending his grain farther. In fact, Mr. Paull sold all of his canola in the last four years to Bunge Altona, a Crusher located some 350 kilometers and three and a half hours away from his farm. He did it because it was profitable to do so.

[537] In sum, Mr. Paull testified that a few pennies are not material enough for him to change his selling behaviour and to switch Elevators. It starts to matter for him at 10 cents per bushel.

[538] As Mr. Duncan, Mr. Paull, and Mr. Hebert all said in their witness statements, the net price or Cash Price they receive from the Elevators is what matters to them as farmers.

[539] In his submissions, the Commissioner indicated that farmer witnesses were not meant to be a statistically representative sample and were not the way the Commissioner intended to demonstrate that the lessening of competition is substantial. He said that substantiality flows from Dr. Miller's quantification work and other evidence on market shares and margins. However, even the farmers' examples used by the Commissioner do not support his argument that 2 cents per bushel is a material price impact on the facts of this case.

[540] Dr. Miller also testified that the price effects he calculated would represent a loss of about CAD $2,000 per farm in the Elkhorn area, located between the Moosomin and Virden Elevators. However, the Commissioner did not point to any clear evidence allowing the Tribunal to determine

how such an amount could be material or not to the farmers, or whether this would change their selling or competitive behaviour in the relevant markets for wheat or canola.

[541] The Tribunal makes one other observation in relation to the "2 cents per bushel" issue. P&H pointed out that volatility in the grain industry is often in excess of 10 cents a bushel on any given day. In her expert report, Ms. Sanderson calculated the average of the within-day price variations (Ms. Sanderson Report at para 104 and Figure 30). The average within-day variation is CAD $4.32 per MT for canola and CAD $3.82 per MT for wheat. When expressed in dollars per bushel, these values translate into approximately 10 cents a bushel for each of wheat and canola. Should a farm be successful in timing its grain sale within any given day, it can therefore achieve a purchase price that is 10 cents a bushel higher by selling grain at the right hour of the day. This evidence was not contradicted.

[542] In light of this evidence, said Ms. Sanderson, a 2 cents variation that is significantly lower than the typical within-day daily fluctuations in the purchase price of wheat or canola cannot be a material price variation in the grain industry. Furthermore, Ms. Sanderson stated that, during 2018-2019, the average cash purchase price paid at the Moosomin Elevator for canola was CAD $10.47 a bushel (or CAD $461.46 per MT), making 2 cents equal to 0.19% of the Cash Price of canola. During the same period, the average cash purchase price paid at the Moosomin Elevator for wheat was CAD $6.25 CAD a bushel (or CAD $229.73 per MT), making 2 cents equal to 0.32% of the Cash Price of wheat (7 cents would be equal to 1.12%).

[543] According to Ms. Sanderson, this evidence suggests that a material change in price cannot be less than 10 cents a bushel. The Tribunal agrees. The weighted average price increases predicted by Dr. Miller's merger simulation model are only 1 cent per bushel in canola and 4 cents per bushel for wheat (in relation to the average price at the Moosomin, Virden, and Fairlight Elevators), which are both well below 10 cents per bushel.

[544] In sum, even looking at the absolute price effects measured by Dr. Miller, the Tribunal does not find evidence supporting the Commissioner's position that the projected price variations are material. They are rather of a small magnitude and immaterial, consistent with the fact that P&H faces considerable competition from several rival Elevators and Crushers to constrain material price decreases after the Transaction.

[545] The Tribunal pauses to note the following. On this whole issue of P&H's prices, the Tribunal agrees with the Commissioner that little weight should be given to Mr. Heimbecker's evidence on this front, as he was obviously not very familiar with P&H's day-to-day operations in relation to these pricing issues. However, even without taking into account Mr. Heimbecker's evidence, there is no clear and convincing evidence of a material decrease in the price for wheat or canola, in absolute or relative terms.

[546] The Tribunal concludes that the evidence of absolute pricing variations does not constitute clear and convincing evidence supporting a conclusion that, "but for" the Virden Acquisition, the prices of wheat or canola paid to farmers by P&H are or would likely be "materially" lower.

(iii) Difference-in-differences analysis

[547] As part of her expert report, Ms. Sanderson did a difference-in-differences regression analysis to verify whether, since the closing of the Transaction, P&H has effectively lowered the Cash Prices "it pays farms at Virden or Moosomin post-Acquisition in an economically significant way" (Ms. Sanderson Report at para 110). Ms. Sanderson's difference-in-differences is a retrospective merger analysis based on what actually happened to P&H's post-Acquisition posted prices since the merger.

[548] Difference-in-differences regressions can be informative to study the effect of events such as mergers if the facts are consistent with the empirical framework. These analyses are called difference-in-differences because they aim at determining whether the merger has created a difference going above and beyond the other changes that would have occurred in any event, and whether the relative difference will be the same through the review period.

[549] In this case, Ms. Sanderson used a difference-in-differences regression analysis of posted prices at the Moosomin and Virden Elevators to test if the Acquisition has effectively reduced P&H's Cash Prices at Moosomin and Virden, relative to the prices prevailing at a benchmark P&H Elevator (namely, the Dutton Elevator) that is unaffected by the Acquisition. Ms. Sanderson considered that the Dutton Elevator was an appropriate comparator Elevator as it was unaffected by the Acquisition and was outside of any acquired LDC Elevator's draw areas, it was subject to the same network dynamics as the Moosomin Elevator, and it had posted prices. The graphs provided in Ms. Sanderson's expert report show that the Dutton Elevator had closely similar behaviour and common trends compared to the Virden and Moosomin Elevators, with no evidence of materially lower purchase prices than the Virden and Moosomin Elevators.

[550] Ms. Sanderson calculated a difference-in-differences regression comparing net price changes for the Moosomin and Virden Elevators using the post-Acquisition months from December 10, 2019 to June 30, 2020 and the same months for 2016 to 2019 in the pre-Acquisition period. By using similar months every year, Ms. Sanderson removed added seasonal variations that increase modeling noise, and she chose the Dutton Elevator outside the Transaction's competitive markets to control for impact of market conditions external to the impact of the Transaction.

[551] Ms. Sanderson concluded to a minimal decline in the Cash Price of canola and to a posted Cash Price increase of 1.5% for wheat since the Acquisition (Ms. Sanderson Report at para 112 and Figure 33; Ms. Sanderson Slides at p 86). More specifically, for the Moosomin Elevator, her difference-in-differences analysis found that canola prices were 0.5% higher and that wheat prices were 0.6% lower. For the Virden Elevator, she found that canola prices were 0.6% lower and wheat prices 1.5% higher. On that basis, she concluded that her regression analysis constituted further evidence that, as far as price effects are concerned, the Virden Acquisition does not, and is not likely to, lessen competition substantially.

[552] Dr. Miller acknowledged that Ms. Sanderson's difference-in-differences methodology was "about as good as you can do" and "as good as the economic literature can get you here" (Consolidated Transcript, Confidential A, at p 1889). However, Dr. Miller considered that Ms.

Sanderson's regression framework does not fit the facts of this case, and is not a good predictor of P&H's pricing in the future.

[553] Three concerns were expressed by Dr. Miller about Ms. Sanderson's difference-in-differences analysis. First, Dr. Miller's main issue was about the usefulness of doing such an analysis while a merger review process is still on-going. In other words, he questioned the probative value of a retrospective merger analysis while the merger itself is still under review before the Tribunal, and had serious reservations about it. Second, he questioned the use of posted prices as opposed to realized transactions which could include results of negotiations (bearing in mind that, according to the evidence, [redacted] of P&H's prices for wheat and canola are negotiated). These negotiations often impact the Basis, and not only the Cash Price. Third, he was concerned about the reliability of the data in the period surrounding the Transaction, which is influenced by an international trade war and the effects of the COVID-19 pandemic. Dr. Miller also submitted that Ms. Sanderson does not have enough data post-merger to do a robust analysis, nor does she have a sufficient control set against which to reliably interpret her results, as she only had one benchmark Elevator, the Dutton Elevator, in her control group.

[554] In her presentation at the hearing, Ms. Sanderson took into account the concerns raised by Dr. Miller (Ms. Sanderson Slides at p 87). She responded that she used the Dutton Elevator to counter the impact of factors such as an international trade war or COVID-19. She is comparing the changes at the Moosomin and Virden Elevators to the changes at the Dutton Elevator. All three Elevators were impacted by these exogenous factors, and the assumption was that the broader market effects would be similar on the three Elevators.

[555] With respect to the quality of her price data, Ms. Sanderson emphasized that her regression is a difference-in-differences analysis, and that using the posted price data would be suitable for picking up whether there is a difference due to the Acquisition. Approximately [redacted] of P&H's transactions are at posted prices, and there was no evidence that the situation about negotiated prices is different at the Moosomin and Virden Elevators from what it is at other Elevators, including the Dutton Elevator. More generally, Ms. Sanderson advised that there is no indication that the Dutton Elevator was an outlier or had delivered results different from other Elevators in the P&H network. Ms. Sanderson's model results also indicate that the R-squared variable, which is an indicator measuring how well the variables in the regression predict the dependent variable, is fairly high, thus showing a good fit for her model.

[556] The Tribunal notes that Dr. Miller identified a few reasons as to why Ms. Sanderson's methodology could provide inadequate results, but no evidence was provided to show that this occurred with Ms. Sanderson's model in this case.

[557] However, the Tribunal agrees with some of Dr. Miller's concerns about Ms. Sanderson's difference-in-differences regression, in that it did not account for autocorrelation in the modeling, which leads to overstating the precision of her results. The Tribunal also notes that the post-Acquisition time period for the data used by Ms. Sanderson, being less than a year, is fairly short and that there were inventory issues at the Virden Elevator towards the end of 2019.

[558] One member of the Tribunal, Ms. Samrout, has additional methodological concerns with Ms. Sanderson's analysis. Ms. Samrout is of the view that Ms. Sanderson's regression treated the

Futures Price as a control variable that explains a portion of the variation in the observed Cash Price. Although this variable provides the average change in the Cash Price pre- and post-Transaction as the Futures Price changes, while holding all other variables constant, it is unclear whether the model fully or partially explains the magnitude of the variation in the Cash Price since the interaction between the timing of the transaction (pre- and post-Transaction) and the Futures Price was not tested. In other words, a variable should have been included to capture the difference in the magnitude of how well the Cash Price is affected by the Futures Price pre- and post-Transaction.

[559] As part of her difference-in-differences analysis, Ms. Sanderson also presented in her testimony (Ms. Sanderson Slides at pp 82–85) the line trends tracking the difference in Cash Price before and after the Acquisition in comparison with the Dutton Elevator's Cash Price, showing that there is little difference between the Moosomin and Virden pricing behaviour in Cash Price in comparison to Dutton. Ms. Samrout notes that Ms. Sanderson compared the Cash Price before and after the Acquisition without any visual linkage to the fluctuation and trending of Futures Prices and their corresponding posted Basis to arrive at the Cash Prices.

[560] In the end, the Tribunal is satisfied that Dr. Miller's critiques do not significantly alter Ms. Sanderson's conclusions and agrees that, on a balance of probabilities, it is more likely than not that P&H has not lowered its purchase prices for wheat and canola since the Acquisition. In sum, the Tribunal is of the view that Ms. Sanderson's difference-in-differences analysis is more consistent with P&H's position than the Commissioner's, and that it provides some support for the non-material nature of the price effects resulting or likely to result from the Virden Acquisition. However, the Tribunal finds the analysis to be of more limited assistance given the concerns raised by the limitation of the data and by the fact that it is looking at the behaviour of P&H while the Virden Acquisition was under review. The Tribunal thus concludes that it should be given little weight in its price effects analysis.

(iv) Conclusion on price effects

[561] In light of the foregoing, the Tribunal is left with unpersuasive and insufficient evidence regarding the alleged substantiality of the price effects of the Virden Acquisition. The measured price effects are *de minimis* for the purchase of canola. For wheat, the Tribunal finds that the Acquisition is having or is likely to have some very minor price effects on the purchase of wheat but they are far from substantial. In sum, having regard to the evidence presented, the Tribunal finds that the likely price variations due to the Virden Acquisition, whether in absolute terms or in relative terms, are immaterial and are likely to remain immaterial for both the purchase of wheat and the purchase of canola.

[562] The Tribunal underlines that, even though farmers located in the "corridor of concern" are arguably the most affected by the Virden Acquisition as a vast majority of them sell their wheat and canola exclusively to the Virden, Moosomin, and Fairlight Elevators, the Commissioner presented no quantitative evidence regarding the predicted price changes in that specific part of the relevant geographic markets for wheat and canola. There is therefore insufficient evidence allowing the Tribunal to determine the relative or absolute magnitude of the predicted price variations for the farmers located in the corridor of concern.

(c) Market concentration and market shares

[563] The Tribunal now turns to the effect of the Virden Acquisition on P&H's post-merger market shares. As discussed above, Dr. Miller and Ms. Sanderson disagree as to the number of participants in the relevant geographic markets; hence, they disagree on whether or not the merged firm will have a market share that exceeds 35%, which is considered a "safe harbour" in the Commissioner's 2011 MEGs.

[564] Relying on *Tele-Direct* at paragraph 226, the Commissioner submits that high market shares are an indirect indicator that the Virden Acquisition allows P&H to exercise increased market power: in this case, Dr. Miller's calculations indicate that P&H's post-Acquisition market shares are 59.6% for wheat and 53.9% for canola (Dr. Miller Report at Exhibit 10). These calculations are for Dr. Miller's original relevant geographic market based on the "imputed" price for GHS, which was defined by Dr. Miller as including solely the Virden, Moosomin, and Fairlight Elevators.

[565] According to Ms. Sanderson, using the geographic markets based on the Cash Prices with a 5% SSNIP threshold, P&H's post-Acquisition market shares would be much lower (Ms. Sanderson Slides at pp 74–75). It would be 31.6% in the relevant geographic market for the purchase of wheat, defined by Ms. Sanderson as including the Moosomin, Virden, Fairlight, Oakner, Whitewood, Elva, Shoal Lake, and Carnduff Elevators, using the average price at the Virden Elevator as the reference price. Based on Ms. Sanderson's figures, this percentage would increase to 34.6% if the Carnduff Elevator is left out of the market. Post-Acquisition market shares would amount to only 16.1% in the relevant geographic market for the purchase of canola, defined by Ms. Sanderson as including the Moosomin, Virden, Fairlight, Oakner, Whitewood, Brandon (Richardson), Melville, Souris East, Shoal Lake, and Elva Elevators as well as the Crushers at Harrowby (Bunge), Yorkton (LDC), Velva (ADM), and Yorkton (Richardson).

[566] Ms. Sanderson further opined that what matters for the competitive effects analysis is P&H's post-merger share of purchases, because this determines the competitive alternatives available to farms if P&H were to seek to reduce its purchase prices for wheat and canola post-Acquisition. Ms. Sanderson testified that, post-Acquisition, the Moosomin and Virden Elevators account for only 15% of total canola purchases and only 26% of total wheat purchases from farms within Dr. Miller's Farmer Region.

[567] While subsection 92(2) of the Act expressly precludes the Tribunal from making a finding of substantial lessening of competition "solely on the basis of evidence of concentration or market share," it is not disputed that evidence of changes in market shares and concentration levels are relevant and often influential in the Tribunal's assessment. The Tribunal further agrees with the Commissioner that, in its market share and concentration calculations, it should not take into account the purchases of all Elevators located both inside and outside the relevant markets; the market shares should instead be computed based on the purchases made by those participants that are part of the relevant markets, as these markets are defined by the Tribunal.

[568] In this case, based on the evidence before it and considering the geographic market definition discussed above, the Tribunal finds that the post-Acquisition market share of P&H would be at most 16.1% in the relevant geographic market for the purchase of canola. This is a

conservative measure, as the relevant geographic market for canola identified by Ms. Sanderson was based on SSNIP level well below 5% — it was 3.08% — and on the lower Virden Elevator price for canola as a reference price. This concentration level is significantly below the 35% safe harbour threshold identified in the MEGs, and cannot be considered indicative of a lessening of competition in the purchase of canola, let alone a substantial one.

[569] Turning to wheat, the Tribunal concludes that the post-Acquisition market share of P&H would likely fall within a range corresponding to the potential relevant geographic markets discussed above: these market shares would vary between 31.6% for a relevant geographic market including all Elevators retained by Ms. Sanderson in her analysis and approximately 34.6% if the market is limited to the Moosomin, Virden, Fairlight, Oakner, Whitewood, Elva, and Shoal Lake Elevators (and excludes the Carnduff Elevator). These market share figures approaching 35% provide, in the Tribunal's view, no more than weak evidence of enhanced market power in the purchase of wheat.

(d) Removal of a vigorous and effective competitor

[570] The Commissioner submits that the Virden Acquisition eliminates intense rivalry between the two main suppliers of GHS for wheat and canola in the corridor of concern. He asserts that the Moosomin and Virden Elevators competed head-to-head on price and service, and were each other's closest competitors. The removal of a vigorous and effective competitor is one of the factors specifically contemplated by section 93, at paragraph (*f*).

[571] The Tribunal agrees with the Commissioner on this point.

[572] Three sources of evidence support the Commissioner's arguments: the diversion ratios, the documentary evidence, and the farmers' testimonies.

[573] One of the factors that can be relevant when considering the likely competitive effects of a merger is the diversion ratios between the products of the merging parties. This is because such ratios can provide information regarding the closeness of competition between those products. In this case, the diversion ratios calculated by Dr. Miller demonstrate that the Virden and Moosomin Elevators are close competitors. For wheat, the diversion ratios found by Dr. Miller were 23.8% from the Moosomin Elevator to the Virden Elevator, and 36.3% to the Fairlight Elevator. Conversely, for the Virden Elevator, the diversion ratios for wheat were 16.8% to the Moosomin Elevator and 20.3% to the Fairlight Elevator. True, the highest diversion ratios from each of the two Elevators were to the Fairlight Elevator. But the diversion ratios between the Moosomin and Virden Elevators were second, reflecting the fact that the Moosomin and Virden Elevators are relatively close competitors. As will be discussed below, the Tribunal is mindful of the fact that these diversion ratios — being around 20% and far below 50% — are not objectively high, and that there is significant diversion to rival Elevators other than Moosomin, Virden, or Fairlight. However, this does not diminish the fact that, in light of these observed diversion ratios, the Acquisition removes a vigorous and effective competitor.

[574] There is also ample documentary evidence of direct, head-to-head competition between the Moosomin and Virden Elevators.

[575] Finally, the farmer witnesses who testified on behalf of the Commissioner — Mr. Lincoln, Mr. Pethick, and Mr. Wagstaff — all referred to the fact that they were using the two Elevators and complained about the loss of one competitive option further to the Virden Acquisition.

[576] Based on all this evidence, the Tribunal finds that the Acquisition eliminates a vigorous competitor —the Virden Elevator — which was a close rival to the Moosomin Elevator. The Tribunal is satisfied that, in the absence of the Acquisition, the Virden and Moosomin Elevators would have continued to vigorously compete in the relevant markets for the foreseeable future. There is no evidence to indicate that the Virden Elevator would have ceased being a vigorous and effective competitor, but for the Acquisition.

(e) Effective remaining competitors

[577] While the removal of a vigorous and effective competitor is a factor that the Tribunal may have regard to, paragraph 93(*e*) of the Act also directs the Tribunal to consider the "extent to which effective remaining competition remains or would remain" in a market affected by the merger. P&H maintains that there are several remaining Elevators and Crushers which will continue to discipline the Virden and Moosomin Elevators after the Acquisition, in the purchase of both wheat and canola, and that these rivals will be capable of constraining P&H's ability to exercise increased market power after the Acquisition.

[578] The Tribunal agrees in part with P&H. The fact that the Moosomin and Virden Elevators went toe-to-toe on several occasions does not mean that they did not also have to go toe-to-toe with other rival Elevators located farther away. At the stage of the substantial lessening of competition, the Tribunal considers whether rivals' purchase locations (including those close to the border of the relevant geographic market) provide competition and constrain the supply/purchase locations that are within the geographic market (*VAA CT* at para 305; *Hillsdown* at p 330).

[579] Dr. Miller and Ms. Sanderson agree that, for the purpose of analyzing anti-competitive effects and the substantial lessening of competition, the Tribunal needs to consider competitors located both inside and outside the defined relevant geographic markets in order to assess their constraining impact on the price and non-price dimensions of competition. In other words, the competitive constraints on a merged firm can come from rivals within and outside the relevant geographic markets (Consolidated Transcript, Public, at p 1831). Indeed, the number of competitors considered by Dr. Miller for his substantial lessening of competition analysis were not limited to those Elevators he had included in his narrow geographic market definition; they instead extended to 15 Elevators for wheat and, for canola, to these same 15 Elevators as well as five Crushers. In sum, Dr. Miller's merger simulation model included Elevators and Crushers that come from outside the defined geographic markets.

[580] In her testimony before the Tribunal, Ms. Sanderson stated that, however the geographic market is defined, what matters for anti-competitive effects is P&H's post-merger share of purchases because this determines the competitive alternatives available to farms if P&H were to seek to reduce its purchase prices post-Acquisition. Dr. Miller and Ms. Sanderson did not dispute P&H's share of purchases. As mentioned above, post-Acquisition, the Moosomin and Virden

Elevators account only for 15% of canola purchases and 26% of wheat purchases from farms within Dr. Miller's Farmer Region.

[581] P&H's evidence indicates that it competes with numerous Elevators and Crushers in the purchase of wheat and canola in Dr. Miller's Farmer Region. According to P&H, its competitors for wheat include the following Elevators and grain companies: Viterra at Fairlight, Brandon, Souris East, Grenfell, Waldron, Binscarth, and Carnduff; Paterson at Binscarth and Carnduff; Richardson at Shoal Lake, Kemnay, Langenburg, Melville, Minnedosa, Estevan, and Whitewood; Ceres at Northgate; Cargill at Oakner, Nesbitt, and Elva; and G3 at Bloom and Melville (Heimbecker Statement at paras 119, 121–124). P&H adds that its competitors for canola include the following Elevators and Crushers, and grain companies: Viterra at Fairlight, Brandon, Souris East, Grenfell, Waldron, Binscarth, and Carnduff; Paterson at Binscarth and Carnduff; Richardson at Shoal Lake, Kemnay, Langenburg, Yorkton, Melville, Minnedosa, Estevan, and Whitewood; Ceres at Northgate; Cargill at Oakner, Nesbitt ,and Elva; G3 at Bloom and Melville; LDC at Yorkton; ADM at Velva; and Bunge at Harrowby and Altona (Heimbecker Statement at paras 120–125).

[582] According to Ms. Sanderson, there are many other Elevators and Crushers buying canola and wheat from farms in Dr. Miller's Farmer Region. As indicated in Ms. Sanderson's expert report, 11 rival Elevators and Crushers are buying more canola than does the Moosomin Elevator (Ms. Sanderson Report at Figure 24; Ms. Sanderson Slides at pp 77–78). And Viterra's Fairlight Elevator and Bunge's Harrowby Crusher also purchase more canola than the Virden Elevator. For wheat, while the Virden, Moosomin, and Fairlight Elevators are the largest purchasers of wheat, six rival Elevators each have at least a 5% share of total wheat purchases (Ms. Sanderson Report at Figure 25; Ms. Sanderson Slides at pp 79–80).

[583] P&H further submits that internal business documents from both its records and LDC's records further show that each of the Moosomin and Virden Elevators compete with and track prices of many other Elevators beyond Moosomin, Virden, and Fairlight (Ms. Sanderson Report at paras 81–82). In her evidence, Ms. Sanderson referred to numerous contemporaneous business documents from P&H and LDC where they referred to competitor pricing, such as Viterra at Carnduff, or Richardson at Whitewood.

[584] Ms. Sanderson's analysis of P&H's documents and LDC's Producer Reports showed that individual price negotiations are relatively infrequent, echoing the evidence demonstrating that about [redacted] of P&H's transactions are at posted prices. In her analysis of those instances where price negotiations actually occurred, Ms. Sanderson found that 72 of the 213 reports referring to negotiations at the Virden Elevator identified farms using rival Elevator prices in a negotiation: only six of those 72 mentioned the Moosomin Elevator, and 27 mentioned Viterra's Fairlight Elevator. Other rival grain companies identified in the reports included G3 (13 times), Cargill (11 times), and Richardson (eight times). Conversely, 17 reports referring to negotiations at the Moosomin Elevator identified farms using rival Elevator prices in a negotiation: five of those mentioned Virden, and the Fairlight Elevator appeared 12 times (Ms. Sanderson Report at paras 116–117, Figures 35a–35b; Ms. Sanderson Slides at p 88). This evidence, says P&H, reflects the presence of other remaining Elevators and Crushers constraining P&H's pricing behaviour.

[585] Turning to the diversion ratios found by Dr. Miller, Ms. Sanderson advises that, for wheat, they show that 40% of the sales diverted from the Moosomin Elevator would go to rival Elevators other than Virden or Fairlight. For the Virden Elevator, 63% of the diverted sales of wheat from the Virden Elevator would go to Elevators other than Moosomin or Fairlight. In the case of canola, these percentages are higher: 65% of the sales diverted from the Moosomin Elevator would go to rival Elevators and Crushers other than the Virden or Fairlight Elevators, and 77% of the sales diverted from the Virden Elevator would be absorbed by Elevators and Crushers other than the Moosomin or Fairlight Elevators (Dr. Miller Report at Exhibit 11; Ms. Sanderson Report at Figure 50). The Tribunal agrees with Ms. Sanderson that these diversion ratios to rival Elevators other than Moosomin, Virden, or Fairlight are not insignificant, with several other Elevators and Crushers having diversion ratios for canola that are similar or higher than those calculated between the Moosomin and Virden Elevators (Ms. Sanderson Report at Figure 47). For wheat, diversion ratios from one of the Moosomin or Virden Elevators exceed 10% to the Fairlight (Viterra), Whitewood (Richardson), Souris East (Viterra), and Oakner (Cargill) Elevators (Ms. Sanderson Report at Figure 48).

[586] Distance (and hence trucking costs) between individual farms and Elevators was included in Dr. Miller's farm choice model, which found that the Virden and Moosomin Elevators would lose a significant portion of their wheat or canola sales to rival Elevators other than Moosomin, Virden, and Fairlight.

[587] According to Ms. Sanderson, the relatively small price variations predicted by Dr. Miller's merger simulation model reflect the relatively low diversion ratios between the Moosomin and Virden Elevators, compared to the diversion ratios to rival Elevators and Crushers (Ms. Sanderson Slides at p 5). P&H submits that the diversion ratios support a finding that P&H also faces competition from several rival Elevators and Crushers.

[588] The evidence from the farmer witnesses also suggests that farmers have numerous alternatives to which they sell their grain, and to which they could sell more, should P&H attempt to reduce its purchase prices for wheat or canola (Ms. Sanderson Report at paras 12–13). Any farm located within the draw areas of the Moosomin and Virden Elevators has at least six other Elevators or Crushers available to it, should it not want to sell its grain to P&H, if the price offered price at those other locations was attractive. According to P&H, the evidence establishes that all farmers in the Commissioner's relevant geographic market and in the Commissioner's corridor of concern within that geographic market, including each of the farmer witnesses, consistently sell to numerous Elevators and Crushers beyond the Virden, Moosomin, and Fairlight Elevators. P&H also argued that the evidence also establishes that the farmers could easily switch to other Elevators and Crushers without negative financial impact on them in the event that P&H were to attempt to pay them less for their wheat or canola (P&H Read-In at pp 26–27, 52–54, 61–67, 77, 551, 553–556, 558).

[589] The three farmer witnesses called by the Commissioner (*i.e.*, Mr. Lincoln, Mr. Wagstaff, and Mr. Pethick) have sold their grain to Elevators located farther away when offered an acceptable price from more distant Elevators. Farmer witnesses further confirmed in their testimony that while transportation costs are important to farmers in deciding between competing Elevators and/or Crushers, they do not preclude sales of grain to competing alternatives available to farmers at a greater distance. This is so because rival Elevators and Crushers offer posted Cash Prices that are

high enough to cover farmers' hauling costs and make it worthwhile for them to sell to those Elevators and Crushers (Exhibit P-R-14, Witness Statement of Mr. Edward Paull, at para 25; Exhibit P-R-077, Witness Statement of Mr. Kristjan Hebert, at para 26; Exhibit P-R-095, Witness Statement of Mr. Timothy Duncan, at para 21).

[590] In light of the foregoing, the Tribunal agrees that there are some effective remaining competitors able to constrain P&H's attempt to increase its market power further by the Virden Acquisition. The more difficult question is to identify how many there is and who they are. The Tribunal is not persuaded that all rival Elevators and Crushers singled out by P&H remain, and are likely to remain, effective competitors post-Acquisition. All competitors are not equal, even if they purchase some grain from the farms located in Dr. Miller's Farmer Region.

[591] In the Tribunal's view, the effective remaining competitors certainly include those Elevators and Crushers forming part of the relevant geographic markets accepted by the Tribunal. For wheat, these competitors are the following Elevators (and grain companies): Fairlight (Viterra), Oakner (Cargill), Whitewood (Richardson), Elva (Cargill), and Shoal Lake (Richardson). For canola, this effective remaining competition includes several Elevators — namely, Fairlight (Viterra), Oakner (Cargill), Whitewood (Richardson), Brandon (Richardson), Melville (G3), Souris East (Viterra), Shoal Lake (Richardson), and Elva (Cargill) — as well as four Crushers — namely, Harrowby (Bunge), Yorkton (LDC), Velva (ADM), and Yorkton (Richardson). The Tribunal observes that these competing Elevators and Crushers are all operated by major grain companies that purchase wheat and canola in competition with P&H throughout Western Canada, including Viterra and Richardson, the two largest. They also include most of the Elevators and Crushers having the higher diversion ratios discussed above, as well as all the rivals which buy more canola than the Virden or Moosomin Elevators and four out of the six Elevators having at least a 5% share of total purchases of wheat.

[592] One notable exception is the Viterra Elevator in Souris East, which is not part of the relevant geographic market for wheat despite its high diversion ratio from the Virden Elevator (*i.e.*, 12.9%) and its 5.3% share of total wheat purchases. The Tribunal is of the view that, in light of this evidence, this rival Elevator can be considered as an effective remaining competitor in wheat even though it is not part of the relevant geographic market.

[593] With respect to other competing Elevators and Crushers located outside the relevant geographic markets identified in these Reasons, the Tribunal accepts that, from time to time, they are purchasing grain from farms located in Dr. Miller's Farmer Region. However, the Tribunal does not find that, on a balance of probabilities, they can be qualified as "effective" remaining competitors able to constrain P&H post-Acquisition.

[594] In sum, the Tribunal agrees with P&H that there is and will be several remaining effective competitors in the relevant markets for the purchase of wheat and canola. On a balance of probabilities, there are competitors remaining that are able to discipline P&H's attempts to exercise market power.

(f) Fairlight Elevator

[595] The Commissioner claims that, while the Fairlight Elevator will remain as an effective competitor, it is not sufficient to constrain the exercise of market power by P&H post-Acquisition.

[596] According to the Commissioner, the simple way to demonstrate this is through Dr. Miller's quantitative evidence. There is also qualitative evidence to support this quantitative evidence: the Virden and Moosomin Elevators are both on the Trans-Canada Highway, while the Fairlight Elevator is located approximately 35 kilometers away down a secondary road. This secondary road is subject to weight restrictions in the spring. Mr. Wagstaff testified that, contrary to the Trans-Canada Highway where one can drive at an average speed, going up highway 41 or down road no. 8 to get to the Fairlight Elevator is more difficult, as the road conditions are worse, and it takes longer to haul the grain.

[597] The Tribunal accepts that, in and of itself, the presence of the Fairlight Elevator may not be enough to constrain the exercise of increased market power by P&H post-Acquisition. However, the Tribunal nonetheless observes that the Fairlight Elevator is a very important competitive constraint that will remain after the merger given its market shares and the evidence of diversion ratios. In the geographic market for wheat, the Fairlight Elevator would have the highest market share after the Moosomin-Virden combination. In the geographic market for canola, it would have the second highest market share after the Crusher in Harrowby and Moosomin-Virden. Moreover, the Fairlight Elevator's diversion ratios (at 20.3% and 36.3%) are respectively higher than the Moosomin Elevator (16.8%) and Virden Elevator (23.8%) for diversion of wheat from the Virden Elevator and the Moosomin Elevator. It is also true for canola: the Fairlight Elevator's diversion ratios (at 17.2% and 22.2%) are respectively higher than those of the Moosomin Elevator (5.3%) and the Virden Elevator (13.1%) for diversion of wheat from the Virden Elevator and the Moosomin Elevator.

[598] For those reasons, the Tribunal is of the view that the Fairlight Elevator is a significant competitor that, on the evidence, cannot be qualified as being less effective than other remaining Elevators and Crushers.

(g) Moosomin expansion

[599] The Commissioner contends that P&H's decision not to expand the Moosomin Elevator's rail capacity is another reflection of the anti-competitive effects caused by the Virden Acquisition. Prior to the Acquisition, P&H had planned to expand railcar access at the Moosomin Elevator, allowing it to load up 112 railcars at once, instead of its current limit of 56. This expansion would have allowed the Moosomin Elevator to access lower bulk rates on its freight, and to be more competitive.

[600] Considering the evidence provided by Mr. Heimbecker on the reasons for the delayed expansion at the Moosomin Elevator, the Tribunal is not persuaded by the Commissioner's arguments. In sum, there is no clear and convincing evidence supporting the Commissioner's assertion that the delay in expansion is or could likely be the result of the Virden Acquisition.

[601] The evidence before the Tribunal shows that in July 2019, P&H made the decision not to expand rail capacity at the Moosomin Elevator as initially planned before LDC solicited P&H to buy its 10 Elevators, including the Virden Elevator. Mr. Heimbecker further testified that later in 2019, P&H decided to postpone all capital expenditures, including the Moosomin Elevator expansion, for a period of one year, as a matter of prudent financial management, in light of the fact that P&H would be spending more than [redacted] to purchase the LDC Elevators (Heimbecker Statement at para 138, Exhibit 34). Mr. Heimbecker further confirmed in his testimony that, subject to the outcome of this Application (as a result of which P&H could potentially be ordered to divest the Moosomin Elevator), the P&H Board is expected to approve the 112-car spot expansion at the Moosomin Elevator.

[602] The Tribunal accepts Mr. Heimbecker's evidence on that point, which has not been contradicted. The Tribunal does not dispute that if the Moosomin Elevator's rail capacity had been expanded, the Moosomin Elevator would have been a more vigorous competitor. But the evidence before the Tribunal does not allow it to conclude that the delayed Moosomin expansion can be attributed to the Virden Acquisition.

[603] This is therefore not a factor supporting the Commissioner's claim of a substantial lessening of competition caused by the Virden Acquisition.

(h) Barriers to entry and expansion

[604] In assessing whether competition is or is likely to be substantially lessened by a merger, an important factor to consider is whether entry or expansion into the relevant market likely is or likely would be substantially faster, more frequent, or more significant "but for" the merger (*TREB CT* at para 505). This factor is specifically mentioned at paragraph 93(*d*) of the Act. As previously noted by the Tribunal, "[t]he conditions of entry into a relevant market can be a decisive factor in the Tribunal's assessment of whether a merger is likely to prevent or lessen competition substantially" (*Tervita CT* at para 216).

[605] In assessing whether new entry into, or expansion within, a relevant market can be relied upon to conclude that a substantial lessening of competition is likely to occur, the Tribunal will consider whether such entry or expansion will be timely, likely, and sufficient (*Tervita CT* at para 217). For a new entry to be timely, the assessment is not limited to the actual construction time. The period starts when firms begin considering sites and go through the regulatory approval process.

[606] According to the Commissioner, entry or expansion by competitors into the relevant markets is unlikely to occur in a timely and sufficient way because barriers to entry and expansion are high in the grain industry. They include capital costs of CAD $40-50 million to construct an Elevator, as well as having to find a location where there is sufficient demand and a suitable site permitting adequate rail and road access. A potential entrant would further take more than two years to build an Elevator, says the Commissioner.

[607] P&H responds that, in terms of entry, there is evidence that at least 20 new high throughput Elevators have been built in Western Canada since 2015, including 10 Elevators by G3, two

Elevators by P&H, one by Ceres, and four by GrainsConnect. P&H adds that G3 also has three additional Elevators currently under construction.

[608] For the reasons detailed below, the Tribunal finds that the Commissioner has provided credible and persuasive evidence confirming that barriers to entry and expansion are high. This evidence came from G3 and from P&H itself.

[609] Mr. Malkoske of G3 testified that, based on his experience with G3's Vermillion site, the total costs to build a new Elevator are approximately [redacted] (Exhibits P-A-047 and CB-A-048, Witness Statement of Mr. Brett Malkoske, at para 8). He also stated that it typically takes between [redacted] months from deciding to construct an Elevator to commencing operations.

[610] The evidence of G3 was corroborated by P&H's own evidence.

[611] When building a new Elevator in Dugald, Manitoba, P&H considered sites in June 2018 and, going through the permit process, regulatory approvals, and construction, it expected the Elevator to be completed in [redacted], approximately [redacted] months after its initial consideration. P&H further estimated the cost of building a new Elevator to be in the range of [redacted] to [redacted].

[612] The Tribunal notes P&H's evidence on its experience that a motivated competitor wishing to construct greenfield Elevators could build a new Elevator in the Virden/Moosomin area in approximately 18 months. However, the Tribunal is not convinced by the general statement of Mr. Heimbecker on this point, in light of the other specific evidence on the record, referring to actual experiences by both G3 and P&H itself in building new Elevators over a much longer timeframe.

[613] As a result, the Tribunal is satisfied that there is clear and convincing evidence to support the conclusion that entry or expansion is not likely to occur on a sufficient scale or scope within the next two years and that new entrants are not sufficient to have a material impact on the price and non-price dimensions of competition in the purchase of wheat and canola. Having regard to the foregoing evidence, the Tribunal finds that there are significant barriers to entry into the purchase of wheat and canola. Entry and expansion within the relevant markets is not likely to be sufficient to ensure that the Virden Acquisition does not and will not likely lessen competition substantially, and to prevent P&H from imposing and sustaining decreased prices for its purchase of wheat and canola.

(i) Excess capacity

[614] At the Elevator level, the general issue of entry and expansion entails considering the potential of adding capacity through new entry, the possibility of expanding existing capacity, and the existence of excess capacity that already lies dormant in the industry.

[615] In his submissions, the Commissioner addresses the first two elements — namely, entry and expansion — but not the last one, excess capacity.

[616] P&H claims that the presence of significant excess capacity is and will remain a constraining factor on P&H after the Virden Acquisition. In paragraphs 141 to 147 and 152 of his witness statement, Mr. Heimbecker discussed the maximum observed throughput and actual throughput at P&H and other Elevators in the grain industry. Using publicly available CGC data (Heimbecker Statement at Exhibit 35), Mr. Heimbecker prepared a table setting out the average amount of grain purchased and shipped annually by each of P&H's rival Elevators over a five-year period between the 2014-2015 and 2018-2019 crop years. The table also provided information on each of the Elevators' maximum annual throughput in that five-year period and their average and best turn rates (Heimbecker Statement at paras 143–145).

[617] Summing their individual maximum annual throughputs, Mr. Heimbecker testified that the aggregate maximum "capacity" of competing Elevators (*i.e.*, Elevators other than Moosomin and Virden) is at least 4,562,400 MT. In comparison, the five-year average of total throughput of these Elevators was 3,570,700 MT (Heimbecker Statement at para 146). A comparison of these two figures led Mr. Heimbecker to conclude that these rival Elevators are capable of handling at least 991,700 MT more than their average throughput over the five-year period. In his witness statement, Mr. Heimbecker also addressed the rail shipping capacity, at paragraphs 148 to 151, and concluded that the unused car spot capacity added up to 4,765,200 MT.

[618] In a preliminary motion objecting to some paragraphs of the Heimbecker Statement, the Commissioner submitted that Mr. Heimbecker cannot opine as to what rival Elevators can do and took exception with Mr. Heimbecker's statements that rival Elevators "could easily increase their purchases of wheat and canola from farms in the Virden/Moosomin area" or "add significant grain purchasing capacity," made at paragraphs 141 and 152 of the Heimbecker Statement.

[619] In a decision issued in December 2020, the Tribunal agreed with P&H that those paragraphs on average throughput and capacity generally described Mr. Heimbecker's observations and perceptions from data published by the CGC showing the volume of grain that P&H and rival Elevators purchased and shipped (i.e., their effective and maximum throughput) in the five-year period between the 2014-2015 and 2018-2019 crop years (*Parrish & Heimbecker* at paras 25–30). The Tribunal was satisfied that the statements on the actual measures of capacity and throughput generally reflected Mr. Heimbecker's own observation of data and amounted to simple arithmetical calculations required to establish averages, totals, and differences regarding maximum throughput at Elevators within a five year span. Given his long experience in the grain industry, the Tribunal noted that Mr. Heimbecker was well positioned to assist the Tribunal in this regard. However, the Tribunal held that Mr. Heimbecker was not qualified to form conclusions as to what the rival Elevators would do with their alleged excess capacity. Extrapolating from the throughput data to what rival Elevators could do in their businesses and to their future conduct in terms of purchases of wheat and canola are inferences or conclusions that could be done by experts or argued by counsel, and which will ultimately be for the Tribunal to determine. The Tribunal therefore struck certain passages of the Heimbecker Statement as inadmissible lay opinion evidence.

[620] Mr. Heimbecker's evidence on throughput and excess capacity calculations was not contradicted. The Tribunal, however, observes that no evidence has been provided regarding what other Elevators not owned by P&H could or would do with their excess throughput capacity or

railcar capacity, and how it could or would translate in terms of their purchases of wheat and canola.

[621] In their testimonies, Mr. McQueen from Viterra and Mr. Wildeman from Ceres confirmed the nature of the data and information reported to the CGC regarding Elevators' throughput, which was used by Mr. Heimbecker for his calculations.

[622] The Commissioner did not adduce (or obtain) any evidence as to excess capacity nor did he challenge the evidence put forward by P&H in this regard.

[623] The Tribunal is not satisfied that the arithmetic calculation presented by Mr. Heimbecker can qualify as a true measurement of excess capacity. Mr. Heimbecker's calculations provide no reference to grain volumes produced during each crop year corresponding to the grain purchased and shipped for that year, as well as to the grain companies' ability to ship and sell those volumes. Nor do they provide a clear understanding of the supply chain capacity and fluidity impacting Elevators' throughput with respect to ships availability, and the capacities of export terminals, Elevators, ports, and rail networks.

[624] In previous decisions, the Tribunal has considered excess capacity in its substantial lessening of competition analysis and when considering market power at the market definition stage (see, for example, *Hillsdown*, at pp 318–321). In *Hillsdown*, the Tribunal noted that if rival firms in a market have excess capacity, they "can respond to a supra-competitive price rise by flooding the market at a lower price level" (*Hillsdown* at p 318). As a result, "the best question to ask when assessing market power, in some circumstances, is whether the respondents' [merging parties'] current competitors have capacity available to service what otherwise would be the merged firm's customers" (*Hillsdown* at p 318).

[625] The Tribunal in *Hillsdown* considered evidence about the excess capacity of several specific rivals and the merged firm's own excess capacity. At page 320, the Tribunal concluded that in the industry, it was fairly easy for renderers to increase their capacity or, in the case of multi-plant firms, to shift renderable material among different plants to open up capacity at a given plant when it was needed. The Tribunal also found that there appeared to be significant excess capacity in the industry generally, and that the merged firm was not capacity-constrained. The excess capacity of firms both inside and outside the relevant market would provide a degree of competitive pressure on the merged firm and restrain to a considerable degree its ability to raise prices (*Hillsdown* at p 321).

[626] In the present case, the Tribunal accepts that, at an industry level, the Elevators are likely able to move more grain as suggested by Mr. Heimbecker's evidence and to transport it by rail to ports. However, the Tribunal cannot place much weight on this general finding in its substantial lessening of competition assessment. An assessment of excess capacity in the grain industry would have had to consider many additional factors and evidence that is not before the Tribunal. For instance, in the Tribunal's view, there is insufficient evidence about the excess capacity of specific rival Elevators close to the Moosomin and Virden Elevators — namely, how the owners of those rival Elevators could adjust their local grain inventories and rail capacities at different points in the crop year to respond to lower grain purchase prices offered to farmers at those two P&H Elevators. In the absence of additional factual evidence (*e.g.*, from rival Elevator owners) or expert

evidence about the industry that assessed capacity issues in more detail, the Tribunal can reach no firm conclusion on the impact of any excess throughput capacity on the intensity of rivalry after the Transaction, or on the ability of P&H to decrease prices for wheat and canola.

(j) Other factors

[627] Paragraph 93(*h*) of the Act also allows the Tribunal to take any other relevant factor in consideration in its assessment of the substantial lessening of competition. The Tribunal is aware that, following the most recent amendments to the Act entered into force after the hearing of this Application, the Act specifically recognizes, at paragraph 93(*g.3*), that the Tribunal may have regard to any effect of a merger on "price and non-price competition, including quality, choice or consumer privacy."

[628] In this case, the non-price effects alleged by the Commissioner are very limited. More specifically, there is no issue of change and innovation being affected by the Virden Acquisition (see paragraph 93(*g*)).

[629] In his final submissions, the Commissioner argued that the evidence also supports the existence of non-price competition. He referred to evidence from Mr. Pethick stating that the ability of an Elevator to accept grain during harvest is important to him (Pethick Statement at para 13). He also mentioned that the ability of an Elevator to quickly and efficiently receive grain, and its capacity to do so, is an aspect of non-price competition that the Tribunal should consider. The Commissioner however added that, while these aspects of competition are not necessarily reflected in the Elevator's posted price, they "ultimately all are reflected in the price paid to the farmers by the Elevator" (Commissioner's Closing Submissions at para 44).

[630] The non-price effects alleged by the Commissioner thus appear to be reflected in the transaction data and in the Cash Prices ultimately charged to the farmers by P&H and other Elevators for their wheat and canola. They are part of the price effects on which the Commissioner has focused in his submissions and in the evidence he presented.

[631] The Tribunal therefore determines that there is no clear and convincing evidence of separate non-price factors demonstrating, in and of themselves, a lessening of competition, let alone a substantial one.

(k) Magnitude, duration, and scope of the anti-competitive effects

[632] Having regard to all of the foregoing, the Tribunal concludes that, "but for" the Virden Acquisition, there are and will likely be some fairly limited adverse effects on competition in the purchase of wheat in the relevant markets, and virtually no proven effects in the purchase of canola. More specifically, there is not, and would likely not be, any new entry or expansion; there is, or likely would be, some very minor price decreases in the amount paid to farmers for their wheat; the Acquisition removes a close competitor to P&H's Moosomin Elevator, as the Virden Elevator provided vigorous and effective competition; and there is also evidence of some pre-existing market power held by P&H. However, those anti-competitive effects are far less than what the Commissioner alleged.

[633] The Tribunal finds that the price effects, whether they are measured in relative or absolute terms, are minimal and immaterial in the circumstances, for both wheat and canola. Moreover, there will be several remaining effective rival Elevators and Crushers to compete with the Virden and Moosomin Elevators, and this situation is unlikely to change for the foreseeable future. In addition, the post-merger market shares of P&H would be far below the safe harbour threshold in the 2011 MEGs for purchases of canola; for wheat, the market shares are more likely than not to be slightly lower than the 35% safe harbour. Finally, the postponement of the Moosomin expansion cannot be attributed to the Virden Acquisition, and there appears to be some varying capacity at rival Elevators though the evidence does not allow the Tribunal to assess its constraining impact on P&H.

[634] The Tribunal must now determine whether the limited anti-competitive effects attributable to the Virden Acquisition and identified above, taken together, rise to the level of substantiality required by section 92. Further to its assessment of all the evidence before it, and notably the immaterial price effects resulting from the Virden Acquisition, the Tribunal finds that this is not the case. In particular, the Tribunal puts significant weight on the evidence showing an absence of any material price effects resulting from the Virden Acquisition, in the purchase of both wheat and canola, and the continuing presence of several effective remaining competitors in the markets. In brief, the aggregate impact of the limited anti-competitive effects that have been demonstrated to result from the Virden Acquisition does not constitute an actual or likely substantial lessening of competition in the relevant markets.

[635] Stated differently, the Tribunal is not persuaded that the evidence regarding the absence of likelihood of additional entry and expansion, the minimal predicted price variations, and the loss of the Virden Elevator as a competitor are sufficient, cumulatively, to enable the Commissioner to discharge his burden under section 92, even in a context where P&H has some pre-existing market power. Without a link between, on the one hand, such evidence and, on the other hand, some material impact on the price or non-price dimensions of competition in a material part of the relevant markets (*Tervita FCA* at para 108), the Commissioner's evidence falls short of the mark. In this regard, when measured against factors such as the immaterial price variations, the effective competitors remaining, and the post-merger market shares below the 35% safe harbour threshold, the Tribunal agrees with P&H that the Commissioner's evidence does not provide clear and compelling evidence that there is, or would likely be, materially lower price or non-price competition "but for" the Acquisition.

[636] Regarding scope, the Tribunal typically considers whether the merged entity would likely have the ability to impose the anti-competitive effects in a material part of the relevant market, or in respect of a material volume of sales. The evidence relied on by the Commissioner does not establish that it does**.**

[637] The Tribunal looked more specifically at the evidence regarding farmers located in the corridor of concern, arguably the most affected by the Virden Acquisition as a vast majority of them sell their wheat and canola exclusively to the Virden, Moosomin, and Fairlight Elevators. However, as mentioned above, there was an absence of quantitative and qualitative evidence regarding the predicted price changes in that specific part of the relevant geographic markets for the purchase of wheat and canola. Similarly, the Commissioner has not presented compelling evidence regarding the particular effects that the removal of the Virden Elevator as a vigorous and

effective competitor would have in the corridor of concern. There is therefore insufficient quantitative and qualitative evidence to allow the Tribunal to determine the degree to which the price and non-price effects resulting from the Virden Acquisition would be different for the farmers located in the corridor of concern.

(4) Conclusion on substantial lessening of competition

[638] In light of all of the foregoing, the Tribunal is not satisfied that the anti-competitive effects that could be attributable to the Virden Acquisition are, individually or in the aggregate, "substantial" as required by section 92 of the Act. The evidence does not allow the Tribunal to conclude that the Virden Acquisition has adversely affected or is adversely affecting price or non-price competition in the relevant markets, to a degree that is material, or that it is likely to do so in the future. True, the Virden Acquisition allows and is likely to allow P&H to increase its market power in the purchase of wheat; but the evidence does not support a finding that, on a balance of probabilities, it allows P&H to be able to exercise materially greater market power than in the absence of the merger. The Tribunal therefore concludes that the Commissioner has not demonstrated, on a balance of probabilities and with clear and convincing evidence, that the requirements of section 92 are met and that "but for" the Virden Acquisition, purchase prices paid by P&H for wheat and canola are or would likely be materially lower in the relevant markets, or that there are or would likely be materially greater non-price competition in those markets.

D. If the Commissioner has established that the Virden Acquisition lessens, or is likely to lessen, competition substantially, what is the remedy to be ordered?

[639] Given the Tribunal's conclusion that the Virden Acquisition does not lessen, and is not likely to lessen, competition substantially in any relevant market, there is no remedy to be ordered.

E. Has P&H established, on a balance of probabilities, that the gains in efficiency will be greater than, and will likely offset, the effects of any lessening of competition pursuant to section 96 of the Act?

[640] In light of the Tribunal's findings on the substantial lessening of competition, and since there will be no remedial order under section 92 of the Act, the Tribunal does not need to determine the issue of efficiencies claimed by P&H under section 96. However, considering the extensive submissions made by the parties on the issue of efficiencies and the nature of the issues raised, the Tribunal will address the matter.

(1) Analytical framework

[641] The section 96 efficiencies defence is an exception to the application of section 92. It "prohibits the Tribunal from making an order precluding a merger when it finds that the merger is likely to bring about gains in efficiency that would be greater than and would offset the anti-competitive effects of the merger" (*Tervita SCC* at para 17).

(a) The statutory language

[642] In the current case, P&H relies on both the general language of section 96 and the more specific provisions of subsection 96(2) to support its efficiency claims. Each will be discussed in turn.

(i) Section 96

[643] Section 96 of the Act is reproduced in Schedule "A" to these Reasons. Subsection 96(1) provides in relevant part that the Tribunal shall not make an order under section 92 if it finds that the merger in respect of which the application is made has "brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any […] lessening of competition that will result or is likely to result from the merger […] and that the gains in efficiency would not likely be attained if the order were made." Subsection 96(3) further instructs the Tribunal not to find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency "by reason only of a redistribution of income between two or more persons."

[644] The analysis mandated by subsection 96(1) has three components: 1) an assessment of the anti-competitive effects of any lessening or prevention of competition resulting or likely to result from the merger; 2) an assessment of the gains in efficiency brought about or likely to be brought about by the merger, and that would not likely be attained if the contemplated remedial order is made by the Tribunal; and 3) a trade-off analysis (or balancing test) to determine whether the assessed gains in efficiency will be greater than, and will offset, the assessed anti-competitive effects. The analyses of anti-competitive effects and efficiencies analyses are both forward-looking estimations and are therefore associated with varying degrees of uncertainty.

[645] In *Tervita SCC* and *Tervita CT*, the SCC and the Tribunal provided important guidance on the three elements of section 96.

- Anti-competitive effects

[646] For the purpose of the efficiencies defence and section 96, the anti-competitive effects include all effects of "any" lessening of competition, as long they result or are likely to result from the merger in respect of which the application is made.

[647] Anti-competitive effects include the likelihood of price increases, but they are not confined to such resource allocation effects, as the exercise of market power can manifest itself in ways other than an increase in price. Under both sections 92 and 96 of the Act, the anti-competitive effects encompass all relevant price and non-price effects that are likely to arise from a merger, including the following: negative effects on allocative, productive, and dynamic efficiency; redistributive effects; and effects on service, quality, and product choice (2011 MEGs at paras 12.21–12.22).

[648] The main anti-competitive effect considered under section 96 is the DWL associated with a likely increase in price. The DWL represents the loss of allocative efficiency and reflects the reduction in total consumer and producer surplus within Canada resulting from a merger. As the SCC stated in *Tervita SCC*, the "total surplus standard involves quantifying the DWL which will result from a merger — 'the amount by which total surplus is reduced under certain market conditions that reduce the quantity of a good that is supplied' (*Facey and Brown* at pp 256–57)" (*Tervita SCC* at para 94). The DWL "results from the fall in demand for the merged entities' products following a post-merger increase in price, and the inefficient allocation of resources that occurs when, as prices rise, consumers purchase a less suitable substitute" (*Canada (Commissioner of Competition) v Superior Propane Inc*, 2003 FCA 53 ("***Superior Propane IV***") at para 13). Estimates of the elasticity of demand (*i.e.*, the degree to which demand for a product varies with its price) are necessary to calculate the DWL (*Tervita CT* at para 244). Put differently, a price increase or decrease is not enough to determine the extent of the DWL, if there is no evidence on the price elasticity of demand (*Tervita SCC* at paras 132–133; *Tervita FCA* at para 124).

[649] The focus of this DWL approach is on the magnitude of the total surplus. The degree to which total surplus is allocated between producers and consumers is not considered. In other words, the total surplus standard measures the total benefit flowing to the economy and is not concerned with whom the benefits flow to (*Tervita SCC* at para 95; *Superior Propane IV* at para 16).

[650] A lessening or prevention of competition resulting from a merger can also lead to non-price effects in the form of a reduction in service, quality, product choice, incentives to innovate, or other dimensions of competition that customers value. While some indicators of quality may be translatable into dollar terms by making use of available statistical or survey data, others may not be expressible in that way. As such, it is not always possible to translate anti-competitive effects related to non-price factors into consumer or producer welfare terms, as can be more easily done with price effects.

[651] Anti-competitive effects covered by both sections 92 and 96 are therefore not strictly limited to reductions in price and to the quantified or quantifiable DWL. They may also include unquantifiable non-price effects such as: reduction in service, quality, and product choice; loss of productive efficiency; and loss of dynamic efficiency (2011 MEGs at paras 12.29–12.31). If a non-price anti-competitive effect is not reasonably measurable, it may be assessed using qualitative evidence. The SCC recognized it in *Tervita SCC*, when it noted that "qualitative elements of a merger, including in some cases such things as better or worse service or lower or higher quality, may not be measurable as they are dependent on individual preferences in the market" (*Tervita SCC* at para 100, citing *Superior Propane I* at paras 459–460).

[652] This qualitative assessment of anti-competitive effects may only be resorted to where such effects are not quantifiable: "[q]ualitative anti-competitive effects, including lessening of service or quality reduction, are only assessed on a subjective basis because this analysis involves a weighing of considerations that cannot be quantified because they have no common unit of measure (that is, they are "incommensurable")" (*Tervita SCC* at para 125). However, quantifiable effects which the Commissioner failed to quantify cannot be resurrected as qualitative effects (*Tervita SCC* at para 100). Anti-competitive effects should be quantified wherever reasonably

possible, and the weight given to unquantifiable qualitative effects must be reasonable (*Tervita FCA* at para 148).

[653] In some circumstances, the anti-competitive effects to be assessed under section 96 may further include redistributive effects, namely, wealth transfers from buyers to sellers which amount to a social loss. These are commonly referred to as a "socially adverse wealth transfer."

[654] It may happen that the Tribunal finds a substantial lessening of competition under section 92, but no anti-competitive effects under section 96, as was the case in the *Tervita* matter, a situation characterized by Justice Rothstein as a "paradoxical" result (*Tervita SCC* at para 166). Depending on the evidence available, the statutory scheme under sections 92 and 96 does not bar a finding of likely substantial lessening or prevention of competition where there has been a failure to quantify the DWL. But the test under section 96 does require that quantifiable anti-competitive effects be quantified in order to be considered under the efficiencies defence. In *Tervita SCC*, the SCC determined that the failure to quantify the DWL barred consideration, under section 96, of the quantifiable effects that supported a finding of likely substantial prevention of competition under section 92.

- Cognizable efficiencies

[655] With respect to efficiencies, section 96 provides that, to be recognized and be qualified as "cognizable," efficiencies must meet three different requirements. First, the gains in efficiency must be brought, or be likely to be brought, by "the merger or proposed merger in respect of which the application is made" (subsection 96(1)). Second, the gains in efficiency would not likely be attained if the order contemplated by the Tribunal to remedy the substantial lessening or prevention of competition were made. Third, the gains in efficiency must not result "by reason only of a redistribution of income between two or more persons" (subsection 96(3)).

[656] As is the case for anti-competitive effects, cognizable efficiencies include both efficiencies that can reasonably be quantified as well as those that cannot reasonably be quantified and are therefore qualitative. Since it must be "likely" that the claimed gains in efficiency are achieved because of the merger, there must be evidence of the claimed savings and of the implementation process leading to the materialization of the claimed efficiencies (*Superior Propane I* at paras 347–348). As stated in the 2011 MEGs, "the parties must be able to validate efficiency claims to allow the Bureau to ascertain the nature, magnitude, likelihood and timeliness of the asserted gains, and to credit (or not) the basis on which the claims are being made" (2011 MEGs at para 12.3).

[657] In *Tervita CT*, the Tribunal adopted five screens to standardize the methodology used to eliminate efficiencies that are not cognizable under subsections 96(1) and 96(3) (*Tervita CT* at paras 261–264). Those screens may be summarized as follows:

1. The claimed gains in efficiency must involve a type of productive or dynamic efficiency or be likely to result in an increase in allocative efficiency (*Tervita SCC* at para 102; *Tervita CT* at para 262).

2. The claimed gains in efficiency must likely be brought about by the merger (*Tervita SCC* at para 113; *Tervita CT* at para 262).

3. The claimed gains in efficiency must not be brought about by reason only of a redistribution of income, or amount to a simple wealth transfer between organizations in Canada. This screen serves to discard savings that result solely from a reduction in output, service, quality or product choice, reductions in taxes, and savings from increased bargaining leverage (*Tervita CT* at para 262).

4. The claimed gains in efficiency must not be achieved outside Canada and must instead flow back to Canadian shareholders. Under this fourth screen, savings from operations in Canada that would flow through to foreign shareholders are eliminated (*Tervita CT* at para 262).

5. The claimed gains in efficiency must not (a) be attainable through alternative means even if the Tribunal were to make an order to eliminate the substantial prevention or lessening of competition, or (b) be achievable through the merger even if the remedial order were made (*Tervita CT* at para 264). In sum, the gains in efficiency are evaluated in light of the order contemplated by the Tribunal (*Commissioner of Competition v Superior Propane Inc*, 2002 Comp Trib 16 ("***Superior Propane III***") at para 149), and gains that would have occurred irrespective of the merger are not cognizable (*Hillsdown* at p 83).

[658] Implicit in these five screens is that, in order to be cognizable under section 96, the claimed gains in efficiency must accrue to the benefit of society — that is, to the Canadian economy (*Tervita SCC* at para 102; *Tervita CT* at para 262; *Superior Propane III* at para 196; *Superior Propane I* at paras 412–413, 429–430).

- Trade-off analysis or balancing test

[659] Turning to the trade-off analysis, the SCC held that the requirement in section 96 according to which the efficiency gains must be "greater than" and "offset" the anti-competitive effects imports a weighing and balancing of both quantitative and qualitative aspects of the merger. The term "greater than" suggests a numerical comparison of the magnitude of the efficiencies versus the extent of the anti-competitive effects. The term "offset" implies a more subjective analysis related to qualitative considerations — i.e., things that cannot be quantitatively compared because they have no common measure (*Tervita SCC* at paras 144–145; *Superior Propane II* at para 95).

[660] In *Tervita SCC*, the SCC also directed the Tribunal to use an analysis that is as objective as possible. As such, the SCC held that in most cases, the qualitative effects of a merger will be of "lesser importance." In addition, the SCC stated that "the statutory requirement that efficiencies be greater than *and* offset the anti-competitive effects would in most cases require a showing that the quantitative efficiencies exceed the quantitative anti-competitive effects as a necessary element of the defence" [emphasis in original] (*Tervita SCC* at para 146).

[661] *Tervita SCC* adopted a two-step inquiry for the balancing test in subsection 96(1). First, the quantitative efficiencies of the merger at issue are compared against the quantitative anti-

competitive effects to determine whether the quantitative efficiencies are "greater than" the quantitative anti-competitive effects. If the quantitative anti-competitive effects outweigh the quantitative efficiencies, this step will be dispositive in most cases, and the section 96 defence will not apply. Second, the qualitative efficiencies are balanced against the qualitative anti-competitive effects. The Tribunal then makes a final determination as to whether the total efficiencies "offset" the total anti-competitive effects of the merger at issue (*Tervita SCC* at para 147).

[662] The SCC further held that the Tribunal should consider "all available quantitative and qualitative evidence" (*Tervita SCC* at para 100, citing *Superior Propane I* at para 461; *Superior Propane III* at para 335). For the Tribunal to give weight to qualitative elements in its analysis, they must be supported by the evidence, and the reasoning for the reliance on the qualitative aspects must be clearly articulated (*Tervita SCC* at para 147).

(ii) Interpretation of subsection 96(2)

[663] In this matter, P&H also made specific submissions on the interpretation of subsection 96(2) and relied heavily on this provision in its consideration of the efficiency gains allegedly brought about by the Transaction. This subsection provides in part that in considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection 96(1), the Tribunal shall consider whether such gains will result in "(*a*) a significant increase in the real value of exports."

[664] P&H argued that the purpose and effect of the Transaction were to increase export sales by P&H and that increased throughput at export terminals was the "uncontroverted objective" of the Transaction. P&H further submitted that increased throughput at an export facility is a "more efficient utilization of an asset in the purest sense," and that the Transaction as a whole clearly leads to a significant increase in the real value of exports of grain under subsection 96(2).

[665] P&H maintained that there were three possible interpretations of subsection 96(2):

- The consideration of efficiencies related to exports is subsumed under the subsection 96(1) analysis, so that all of the tests applied under subsection 96(1) would be applied to exports;

- The consideration of exports under subsection 96(2) is a separate consideration that is not confined to the efficiencies arising in the local or domestic markets. Any efficiencies arising either domestically or in an export market that lead to a significant increase in exports must be separately considered. In this interpretation, the efficiency gains that lead to significant increases in the real value of exports would not be subsumed in the subsection 96(1) analysis including the offset test and the counterfactual but-for test; and

- Subsection 96(2) only deals with efficiency gains that lead to increases in the real value of exports, and exports *per se* should be considered under the broader analysis under sections 92 and 93 of the Act.

[666] P&H took the position that the second and third interpretations described above are the correct ones to follow.

[667] P&H submitted that the interpretation of subsection 96(2) must accord with Parliamentary intent, as seen in comments made in 1986 by the Parliamentary Secretary to the Minister of Agriculture, the Honourable Pierre Blais, during the House of Commons debates on Bill C-91 (which enacted the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp) ("**CTA**") and the Act). P&H argued that mergers should be assessed, in Mr. Blais' words, "in such a way as to encourage competition between Canadian businesses at home in Canada, without putting them at a disadvantage when carrying out business dealings in international markets." P&H also referred to the objectives in section 1.1 of the Act, including its references to the expansion of opportunities for Canadian participation in world markets and the promotion of the efficiency of the Canadian economy. In addition, P&H submitted (again citing Mr. Blais) that "when a merger would greatly improve efficiency, thereby increasing exports or substitutions to imports, the Tribunal will have to authorize it." P&H argued that this reflected a focus on efficiencies that lead to increased exports.

[668] The Commissioner made no written submissions on subsection 96(2). The Commissioner noted in oral argument that P&H made no reference to any reliance on that provision in its Response filed on February 3, 2020. The Commissioner submitted that P&H had acquired the grain volume at the Virden Elevator which LDC would have exported. In other words, these grain volumes were headed to the port at Vancouver for export, regardless of the Transaction. Therefore, P&H had not demonstrated any substantial increase in the real value of exports under paragraph 96(2)(*a*). The Commissioner also submitted that P&H had not analyzed why keeping the Virden Elevator in its possession (*i.e.*, if the Tribunal makes no order) would lead to a substantial increase in the real value of exports.

[669] This is the first time that the Tribunal has been directly asked to interpret or apply paragraph 96(2)(*a*) of the Act.

[670] Under modern principles of statutory interpretation, the words of paragraph 96(2)(*a*) must be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and the object of the Act, and the intention of Parliament (*Pioneer Corp v Godfrey*, 2019 SCC 42 at para 42; *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 ("***Canada Trustco***") at para 10; *Bell ExpressVu* at para 26; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21; *VAA CT* at para 257; *The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 10 at paras 101, 118; *Rakuten Kobo Inc v The Commissioner of Competition,* 2016 Comp Trib 11 at para 108). In *Canada Trustco*, the SCC also held that if the words of a provision are precise and unequivocal, their ordinary meaning plays a dominant role in the interpretive process. If the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. However, in all cases, the Tribunal must seek to read the provisions of the Act as a harmonious whole (*Canada Trustco* at para 10; *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 at para 60).

[671] When the legislation that would become the Act was introduced in December 1985, the accompanying guide made the following observations:

> The existing merger provision is considered to be unsuitable for the Canadian economy, which is small and open. Canadian firms often have to compete with larger foreign rivals both at home and abroad. In these circumstances, they should

not be prevented from obtaining economies of scale which improve their competitive position. An effective merger law for Canada must weight [*sic*] the advantages of economic efficiency against the disadvantages of a lessening of competition.

[…]

The new merger law will also provide a defence in situations where the gains in efficiency that would result from the merger would more than offset the costs due to the lessening of competition. It is important for the performance of the economy that significant cost savings brought about by mergers, for example, through scale economies or other efficiencies, be allowed. Moreover, the Tribunal will be invited to consider whether the gains in efficiency resulted in increased exports or increased import substitution.

Minister of Consumer and Corporate Affairs, *Competition Law Amendments: A Guide*, (1985) at pp 16–17.

[672] In *Tervita SCC*, Justice Rothstein, speaking for a majority of the court, observed the following at paras 87 and 167:

[87] A stand-alone statutory efficiencies defence was considered "particularly appropriate for Canada because a small domestic market often precludes more than a few firms from operating at efficient levels of production and because Canadian firms need to be able to exploit scale economies to remain competitive internationally" (Campbell, [citation below] at p. 152; see also *House of Commons Debates*, vol. VIII, 1st Sess., 33rd Parl., April 7, 1986, at p. 11962; Minister of Consumer and Corporate Affairs, *Competition Law Amendments: A Guide* (1985), at p. 4). In the context of the relatively small Canadian economy, to which international trade is important, the efficiencies defence is Parliamentary recognition that, in some cases, consolidation is more beneficial than competition (*ibid*., at pp. 15-17).

[…]

[167] While the efficiencies defence applies in this case under the terms of s. 96 as written, this case does not appear to me to reflect the policy considerations that Parliament likely had in mind in creating an exception to the general ban on anti-competitive mergers. As discussed above at para. 84 [*sic*: 87] in the historical examination of s. 96, the evidence suggests that the efficiencies defence was created in recognition of the size of Canada's domestic market and with an eye toward supporting operation at efficient levels of production and the realization of economies of scale, particularly with reference to international competition. […]

[Emphasis added.]

[673] In section 1.1 of the Act, Parliament set out the overall purpose of the statute: "to maintain and encourage competition in Canada." Section 1.1 contains four objectives or benefits of maintaining and encouraging competition in Canada (*Superior Propane I* at paras 407–408, 410), which are listed in the provision:

Purpose of Act	**Objet**
1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.	**1.1** La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

[674] The FCA has held that section 96 as a whole gives primacy to the statutory objective of economic efficiency, because it provides that if efficiency gains exceed and offset the effects of an anti-competitive merger, the merger must be permitted to proceed even though it would otherwise be prohibited by section 92 (*Superior Propane II* at para 90).

[675] The commentary on the proper interpretation of the language in subsection 96(2) has not been extensive, despite its presence in the Act since 1986.

[676] The Competition Bureau's 1991 MEGs stated that the words "described in subsection (1)":

> make it clear that section 96(2) does not operate to expand the class of efficiency gains that may be considered in the trade-off analysis. Accordingly, this provision is simply considered to draw attention to the fact that, in calculating the merged entity's total output for the purpose of arriving at the sum of unit and other savings brought about by the merger, the output that will likely displace imports, and any increased output that is sold abroad, must be taken into account.

[677] The principal drafter of the 1991 MEGs, now a judicial member of the Tribunal, set out the same point in a 1991 article, adding that, "[a]pparently, there was never any intention on the part of the drafters of subsection 96(2) that this section has any significant role in the trade-off assessment" (*Crampton 1991* at pp 967–968).

[678] A book by the same author further explained:

> If an increase in the real value of exports […] cannot be shown to lead to one or more of the types of "gains in efficiency" [in subsection (1)], there is nothing that can be found in subsection 96(2) that will change this fact. In short, this provision simply requires the Tribunal to assess whether any significant increase in the real value of exports […] *that is attributable to the attainment of efficiencies, will give rise to further efficiency gains*.
>
> *Crampton 1990* at p 548 [Emphasis in original.]

[679] On this view, the increased exports are a source of efficiencies that must be taken into account under subsection 96(1) and Parliament enacted subsection 96(2) to fulfil a "guidance function" (*Crampton 1990* at p 549).

[680] While this approach would not give efficiencies that meet the requirements of subsection 96(2) an independent role, the *Crampton 1990* text offered additional analysis. It noted that there is a reasonable argument that Parliament intended subsection 96(2) to provide more than a guidance function, and that export-related efficiencies merit, and were intended to receive, additional qualitative weighting, that should be decisive only if the trade-off analysis under subsection 96(1) "yields an inclusive result." The text listed four possible reasons. The significant increase in the real value of exports may: 1) give rise to other important but unquantifiable benefits to the economy; 2) promote the adaptability of the Canadian economy; 3) expand the opportunities for Canadian participation in world markets; and 4) have been considered to be of such particular importance as to merit specific mention in the legislation. In a footnote, the author referred to remarks by the then-Director of Investigation and Research ("**Director**"), who noted in a speech that information provided by merging parties about efficiency gains that allow the firm to significantly increase the real value of exports would be given "additional weight" in favour of the merging parties under subsection 96(1) (*Crampton 1990* at pp 549–550).

[681] At least one commentary has taken a more robust view of subsection 96(2). While recognizing the positions taken in the 1991 MEGs and by the Director, Dr. Neil Campbell remarked that in enacting the provision, Parliament appeared to be creating an "independent category of efficiencies" (*Campbell* at pp 155–156, citing a discussion of "national champions" in A.N. Campbell and J.W. Rowley, *Industrial Policy, Efficiencies and the Public Interest – the Prospects for International Merger Rules*, (Center for Trade Policy and Law, 8th Annual Conference on Trade, Investment and Competition, Ottawa, May 1993)).

[682] The Competition Bureau's 2004 MEGs and 2011 MEGs both advised merging parties to provide the Bureau with information that "establishes that the merger will lead them to increase output owing to greater exports," noting in a footnote that "increased output in this context is

generally only possible with an associated decrease in price" (see 2011 MEGs at para 12.12; 2004 MEGs at para 8.10).

[683] The text of subsection 96(2) is situated within section 96. The chapeau language of subsection 96(2) provides that in considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal "shall" consider whether "such" gains "will result in" a significant increase in the real value of exports and a significant substitution of domestic products for imported products.

[684] With respect to the language in subsections 96(1) and (2), the Tribunal notes that:

- In *Tervita SCC*, Justice Rothstein observed that subsection 96(2) is "logically subservient to" subsection 96(1) (*Tervita SCC* at para 152);

- The analysis of any claimed efficiencies that meet the requirements of paragraphs 96(2)(*a*) and (*b*) occurs during the Tribunal's consideration of whether the merger is likely to bring about the gains in efficiency described in subsection 96(1);

- The word "shall" is mandatory or directory, not permissive. The Tribunal is required to consider subsection 96(2) if the evidence supports its relevance in a proceeding;

- The words "such gains" [emphasis added] in subsection 96(2) refer to the gains in efficiency in subsection (1); and

- The words "will result in" suggest that the Tribunal consider the causal relationship between the gains in efficiency in subsection (1) and the existence of the two factors in paragraphs 96(2)(*a*) and (*b*). Parliament also chose to use "will result in" [emphasis added], which implies proof with greater certainty than, for example, "may result in."

[685] Paragraph 96(2)(*a*) contemplates that the Tribunal consider the gains in efficiency in subsection (1) that will result in a significant increase in the "real value" of exports, which suggests that evidence must be adduced as to the quantum, in dollars, of the increase. To engage the provision, the increase must be shown to be "significant," not small, trivial or inconsequential.

[686] In light of the foregoing, the Tribunal considers that the proper interpretation of subsection 96(2) should:

- Adhere to the language of subsection 96(2), read in tandem with subsection 96(1);

- Seek to implement the overall purpose and the objectives of the Act, as set out in section 1.1;

- Be compatible with the approach to the trade-off analysis established in *Tervita SCC*, including the two-step quantitative and qualitative assessments described by Justice Rothstein at paragraph 147; and

- Be compatible with the five screens established by the Tribunal in *Tervita CT* to implement the trade-off analysis in subsections 96(1) and (3).

[687] The Tribunal further observes that, by creating the efficiency exception enabling parties to avoid the application of section 92 when the elements of section 96 are satisfied, Parliament has in fact "withdrawn efficiency consideration, or at the very least, consideration relating to efficiency *enhancement*, from eligibility in the determination of whether competition has been prevented or substantially lessened" [emphasis in original] (*Crampton 1990* at p 257). Gains in efficiency are thus excluded from the assessment of anti-competitive effects under section 92.

[688] In view of the language in subsection 96(2) and the discussion in the various legal sources above, the Tribunal adopts the following framework for the interpretation and application of subsection 96(2):

1. The Tribunal recognizes that a merger may make a firm more competitive in international markets through proven efficiencies realized in Canada (*i.e.*, efficiencies that accrue to the Canadian economy).

2. Such proven efficiencies may be claimed and included in the Tribunal's trade-off analysis, as established in *Tervita SCC* and *Tervita CT*.

3. Efficiencies that are claimed to result in a significant increase in the real value of exports should be analyzed within the established trade-off analysis under subsection 96(1).

4. The language of subsection 96(2) does not alter or expand the types of gains in efficiency under subsection 96(1) that may be considered in the trade-off analysis.

5. If a respondent raises a claim that efficiencies will result in a significant increase in the real value of exports, that respondent has the same burden to prove such efficiencies as with any other claimed efficiencies.

6. Specifically, if such claimed efficiencies are quantifiable, they must be quantified or, at a minimum, estimated, as contemplated by *Tervita SCC*.

7. If proven and quantified, such efficiencies will then be assessed along with other proven quantitative efficiencies in the first step of the trade-off analysis.

8. If such efficiencies are proven but cannot be quantified or estimated, they may be considered and given weight by the Tribunal at step two of the trade-off analysis, as qualitative efficiencies.

[689] Not resolved in this framework are the questions of whether and how the Tribunal should provide any additional recognition to efficiencies that result in a significant increase in the real value of exports under paragraph 96(2)(*a*).

[690] The Tribunal does not have the benefit of recent legal, economic, or business commentary on the role that subsection 96(2) should play in the efficiencies trade-off analysis established by *Tervita SCC*. The Tribunal also believes that, since the Act came into force in June 1986, there

have been material developments affecting the Canadian industrial policy and international trade policies, as well as significant changes in some sectors of the Canadian economy, that could affect the proper approach to paragraphs 96(2)(*a*) and (*b*).

[691] Given the Tribunal's conclusions elsewhere in these Reasons under section 92 and subsection 96(1), it is not necessary to resolve all questions related to paragraph 96(2)(*a*) in this proceeding. The Tribunal nonetheless considers that, without limiting other possible options, the following approach to paragraphs 96(2)(*a*) and (*b*) could be contemplated.

[692] As noted above, the Tribunal is of the view that the language of subsection 96(2) does not alter or expand the types of gains in efficiency under subsection 96(1) that may be considered in the trade-off analysis. However, in order to implement the objectives set out in section 1.1 of the Act and other indications of Parliamentary intent and objectives, the Tribunal could provide additional qualitative recognition to some claimed efficiencies in the trade-off analysis if a firm is able to demonstrate, with clear and cogent evidence, that the specified efficiencies achieved in Canada also meet the requirements of paragraphs 96(2)(*a*) or (*b*). Such proven efficiencies could achieve one or more of the objectives listed in section 1.1, in addition to the promotion of the efficiency of the Canadian economy inherent in any proven efficiencies under subsection 96(1).

[693] For example, a merger could be proven to result in efficiencies that accrue to the Canadian economy which will also result in a significant increase in the real value of exports and expand the opportunities for Canadian participation in world markets. A merger might, for example, enable a firm to enter a new overseas market due to the lower costs of production in Canada that result from the merger. In that type of scenario, the Tribunal could give the proven efficiencies that achieve the requirements of paragraph 96(2)(*a*) some additional, qualitative weight at stage two of the trade-off analysis under subsection 96(1). Specifically, at stage two, the Tribunal could give some qualitative weight to proven and quantified efficiencies that will result in a significant increase in the real value of exports; or the Tribunal could give additional qualitative weight at stage two to proven qualitative efficiencies. The weight could vary, for example, with the strength of the efficiencies' proven ability to achieve at least one of the objectives of the Act as set out in section 1.1 (other than promoting the efficiency of the Canadian economy). Regardless of how the Tribunal decides to proceed in a future case, the Tribunal will determine how such efficiencies may be weighed at stage two based on the evidence and the applicable law, including *Tervita SCC* and *Tervita CT*.

(b) Evidentiary burden on efficiencies

[694] As discussed above, the Commissioner has an initial burden under section 96 to prove the anti-competitive effects, including both quantitative and qualitative effects (*Tervita SCC* at para 122, citing *Superior Propane I* at paras 399, 403, *Superior Propane II* at para 154 and *Superior Propane IV* at para 64; *Tervita CT* at para 232).

[695] The SCC in *Tervita SCC* instructed that, to discharge his burden, the Commissioner must quantify any quantifiable anti-competitive effects, at least by estimate (*Tervita SCC* at paras 125, 126, 137, 165; *Tervita FCA* at para 127; *Tervita CT* at para 243). To meet that burden, the Commissioner must ground the calculations or estimates in evidence that can be challenged and

weighed (*Tervita SCC* at para 125). If effects are realistically measurable, failure to at least estimate the quantification of those effects will not result in the effects being assessed on a qualitative basis (*Tervita SCC* at para 100, citing *Superior Propane III* at para 233 and *Superior Propane IV* at para 35). Instead, quantifiable effects that are not quantified are considered to be equal to zero and have no weight (*Tervita SCC* at paras 128–129, 137, 140, 142, 151, 157, 159, 165).

[696] While the Commissioner has the burden to prove the anti-competitive effects, the merging parties bear the onus of proving the remaining elements of the defence under section 96 (*Tervita SCC* at paras 136, 165; *Superior Propane II* at paras 154, 157; *Tervita CT* at para 233). The merging parties' onus is to prove the extent of the efficiency gains and that those efficiency gains from the merger will be greater than and will offset the effects of any prevention or lessening of competition resulting from the merger (*Tervita SCC* at paras 89, 122; *Superior Propane I* at para 403).

[697] In the Tribunal's view, the same requirements imposed on the Commissioner for proof of anti-competitive effects under section 96 should also be imposed on the merging parties (in this case, P&H) to discharge their onus to prove the remaining elements under section 96. Thus, if a claimed efficiency is quantifiable, it must be quantified or at least estimated. That quantification or estimate must be grounded in evidence that can be challenged and weighed. If the claimed efficiency is quantifiable but is not quantified or estimated, then it will be treated as a zero and given no weight. An unquantified claimed efficiency that could have been quantified, but was not, will not be considered as a qualitative efficiency (*Tervita SCC* at para 124; *Superior Propane IV* at para 35). Claimed qualitative efficiencies, if any, must also be supported by evidence that can be challenged and weighed.

(2) Tribunal's assessment

[698] In the Tribunal's view, and for the following reasons, P&H has not met its burden of demonstrating, on a balance of probabilities, that the Virden Acquisition is likely to bring about cognizable gains in efficiency. As a result, such gains would not be greater than, and would not offset, the anti-competitive effects of any lessening of competition resulting from the Virden Acquisition.

(a) The anti-competitive effects of any lessening of competition

[699] In light of the Tribunal's conclusions on efficiencies, there is no need to deal extensively with the anti-competitive effects of any lessening of competition resulting from the Virden Acquisition.

[700] Suffice it to say that there is no fundamental dispute between Dr. Miller and Ms. Sanderson on the magnitude of the consumer surplus loss, suggested to be CAD $540,000 per crop year in wheat and less in canola according to Dr. Miller's model. This estimate is conditional on accepting the diversion ratios and mark-up used by Dr. Miller.

[701] Ms. Sanderson only takes issue with Dr. Miller's producer surplus calculations. She claims that it should include profits captured by Elevators and Crushers falling outside the relevant geographic markets. Even accepting Ms. Sanderson's critique, when profits associated with all transfers to rival Elevators and Crushers are included, there is still some DWL in wheat, but not in canola. Taking into account the producer surplus transferred to rival Elevators and Crushers which do not belong to Dr. Miller's geographic market, Dr. Miller's DWL for wheat decreases to some CAD $30,000, while the DWL in respect of canola is eliminated.

[702] In sum, no matter how it is defined or calculated, the DWL is certainly greater than zero for wheat.

(b) The gains in efficiencies

(i) P&H's claimed efficiencies

[703] At the outset of this proceeding, P&H's Response claimed the following efficiencies from the Acquisition: improved FGT scale efficiencies and cost savings; elimination of the margin that LDC formerly paid to use the Vancouver export terminal owned by Kinder Morgan; output expansion and improved scale economies at the former LDC Elevators; and administrative efficiencies.

[704] P&H did not elaborate on its claimed efficiencies during the discovery process.

[705] Mr. Heimbecker's initial witness statement identified four areas of claimed efficiencies that became the focus of the parties' submissions at the hearing. They were as follows: 1) increased throughput at the Virden Elevator; 2) network logistics efficiencies arising from optimizing the shipment of grain to "freight-logical" terminals; 3) efficiencies at the Vancouver terminals, particularly the FGT; and 4) efficiencies related to the conversion of local Elevators to include the retail sale of crop inputs.

[706] At the hearing, the Commissioner did not cross-examine Mr. Heimbecker on his evidence about these proposed efficiencies. Mr. Heimbecker was not qualified to provide expert evidence on efficiencies and acknowledged that he is not such an expert. He provided P&H's factual foundation for its efficiency claims. As discussed above, on a pre-hearing motion, some of his evidence was struck out (*Parrish & Heimbecker* at paras 72–73). Ultimately, P&H did not file an expert report to support or quantify its position on efficiencies, either initially or in reply to Mr. Harington's expert report. P&H solely relied on the initial and reply witness statements of Mr. Heimbecker.

- <u>Increased throughput at the Virden Elevator</u>

[707] Regarding the increased throughput at the Virden Elevator, P&H offered Mr. Heimbecker's evidence comparing the throughput at the Virden Elevator in 2019 when it was operated by LDC with Virden's 2020 throughput when operated by P&H. Mr. Heimbecker also explained that P&H's Elevators had a higher "turn rate" than LDC's former Elevators. An Elevator's "turn rate" is calculated as the purchases of grain by an Elevator in a given period

divided by the storage capacity. According to Mr. Heimbecker, P&H also forecast a higher turn rate for each of the former LDC Elevators during 2020. He attributed the higher turn rate to four factors: P&H's superior port access (particularly its access to the Superior terminal in Thunder Bay, Ontario, which LDC did not use); port storage and ship loading speed in Vancouver; its larger network of Elevators from which it could source grain; and the fact that P&H purchased a larger variety of grain than LDC did.

[708] In his initial witness statement, to which Mr. Harington responded, Mr. Heimbecker compared the Virden Elevator's 2019 results with its actual results from January to July 2020 and P&H's forecast for the balance of 2020. He then applied P&H's grain margins for wheat and canola to the increased volumes to find an annual "efficiency," in dollars, for each of wheat and canola.

[709] In his reply witness statement, Mr. Heimbecker reiterated his evidence about P&H's Elevator turn rates, its better port access at both Vancouver and Thunder Bay terminals, and its larger network of Elevators, all compared with LDC. He also updated his initial Virden throughput evidence with actual 2020 results up to October 31, 2020.

[710] Mr. Heimbecker also addressed the overall increase in grain production from 2019 to 2020 raised by Mr. Harington in his expert report. He concluded that, even adjusting for the increased production, the Virden Elevator showed increased throughput for wheat and canola when comparing the period from January 1 to October 31, 2019 with the period from January 1 to October 31, 2020. Using the same wheat and canola margins from his initial evidence, Mr. Heimbecker then re-determined the "additional value" created, in dollars, from the increased Virden throughput through to October 31, 2020, adjusting LDC's 2019 numbers for grain industry developments.

- Network logistics efficiencies

[711] Turning to network logistics efficiencies, Mr. Heimbecker explained in his initial witness statement that Elevators have a natural, "freight logical" terminal. Elevators operated by P&H fall into catchment areas depending on their physical location. Those catchment areas are for terminals in either Vancouver or Thunder Bay. The catchment area determines rail freight costs from an Elevator to a terminal. The Virden Elevator is in the Thunder Bay catchment area. As a result, the wheat and canola purchased from farms and delivered to the Virden Elevator will generally be shipped to P&H's Superior terminal in Thunder Bay for sale to its eastern grain customers.

[712] Mr. Heimbecker testified that P&H decided that four of the Elevators it purchased in the Transaction could shift their grain from delivery to West Coast terminals in favour of delivery to the Superior terminal in the east. At the same time, some grain movement from Elevators already owned by P&H could be switched to delivery westward to Vancouver at P&H's two most efficient terminals, namely, AGT and FGT. According to Mr. Heimbecker, the additional eastbound throughput from the addition of the four new Elevators "will now allow P&H to increase the efficiency of its network." In particular, Mr. Heimbecker stated that P&H acquired the Virden and Rathwell Elevators in the Transaction and would shift their grain eastward, enabling additional tonnage to be shipped westward to Vancouver from other Elevators in the P&H network.

[713] Mr. Heimbecker advised in his reply witness statement that the addition of the Virden Elevator and its additional volume was a "necessary addition to P&H's elevator network to achieve these logistics benefits" (Exhibits CA-R-121 and P-A-122, Reply Witness Statement of Mr. John Heimbecker ("**Heimbecker Reply Statement**"), at para 43).

- Efficiencies at West Coast terminals

[714] Mr. Heimbecker also identified efficiencies at the West Coast terminals. He testified that the amount of grain that would be processed through P&H's terminals in Vancouver would increase as a result of the Transaction. In his reply witness statement, Mr. Heimbecker further noted that the FGT's location on Vancouver's South Shore bypasses the congested rail corridors to the West Coast, which move grain from the Prairies to the West Coast terminals. As a result of its location, FGT would provide significant rail cycle time of 50% which many other grain purchasers would not enjoy. Mr. Heimbecker did not provide any evidence supporting his claim in improved rail car cycle time, nor did he provide any explanation or operating plans from the railways that attest to those savings.

- Crop inputs efficiencies

[715] With respect to crop inputs efficiencies, Mr. Heimbecker testified that the Transaction allows P&H to compete more effectively with rival grain companies by converting the Elevators acquired in the Transaction into dual-purpose facilities. Previously, they were purely grain facilities, whereas P&H would now create a "one-stop shop" location that would include both the delivery of grain for sale and also enable farmers to purchase crop inputs. The sales of crop inputs at the newly acquired Elevators would provide P&H with increased margins. Mr. Heimbecker provided evidence of the cost per Elevator to convert a location into a combined grain/crop inputs facility and, based on his past business experience, he estimated the increased margins at [redacted]. Mr. Heimbecker acknowledged that some of the crop inputs sales to be made at the Virden Elevator would come from sales made by other grain companies and crop input retailers. Mr. Heimbecker also advised that the expansion of crop inputs would not only benefit P&H through increased sales and margin but would also increase overall grain production.

(ii) The Commissioner's response

[716] The Commissioner's Reply filed on February 17, 2020 stated that the Transaction would not generate cognizable gains in efficiencies to the extent claimed by P&H. The Commissioner reminded that his Application to the Tribunal sought the divestiture of just one Elevator, leaving nine others acquired by P&H as part of the Transaction. The contemplated orders requested would therefore not impact P&H's ability to achieve the alleged efficiencies. The Commissioner further denied that any cognizable efficiencies would be greater than or offset the anti-competitive effects of the Virden Acquisition.

[717] As already noted, the Commissioner filed Mr. Harington's expert report, which addressed each of the efficiencies claimed in Mr. Heimbecker's initial witness statement. Mr. Harington's

report provided his analysis of how the five screens identified in *Tervita CT* applied to each of P&H's claimed efficiencies.

- Increased throughput at the Virden Elevator

[718] The Commissioner submitted that this claimed efficiency was caught by four of the five *Tervita CT* screens, namely, screens 1, 2, 3, and 5, summarized above in these Reasons. On *Tervita CT* screens 1 and 2, the Commissioner submitted that the increased volumes at the Virden Elevator would have occurred irrespective of the Acquisition, given the overall upward trend in grain production (measured by delivery volumes to Elevators) from 2019 to 2020. The Commissioner also noted that at the end of 2019, inventory levels at the Virden Elevator were low and had to be replenished by P&H after it acquired that Elevator. According to the Commissioner, those additional purchase volumes could partially explain the increase in delivered volume to Virden.

[719] The Commissioner further submitted that P&H had failed to demonstrate that the increased volumes at the Virden Elevator were not a redistribution of income between two persons under subsection 96(3) (*Tervita CT* screen 3). He argued that any increases in volume not attributable to the overall industry increase in grain production were merely a wealth transfer from other Elevators and did not represent a cognizable efficiency under section 96. According to the Commissioner, P&H also had not shown that its per unit variable operating costs of the Virden Elevator for the 10 months of 2020 were lower than LDC's operating costs at this Elevator the previous year.

[720] The Commissioner further submitted that P&H had not shown that any increase in volume at the Virden Elevator could not have been achieved by an alternative purchaser of that Elevator (*Tervita CT* screen 5).

[721] Mr. Harington's expert report concluded that increased throughput at the Virden Elevator was not a cognizable efficiency. In his view, any increase in throughput in P&H's Virden Elevator and terminal network would have to arise from increased Canadian grain production and not be a pecuniary redistribution of throughput between P&H's facilities and other facilities. To be a cognizable efficiency, any increased throughput would have to result from an increase in grain production brought about by the Virden Acquisition that was not "cannibalized" volume from other entities, and would not likely occur in the event of an order under section 92. Mr. Harington concluded that the claimed efficiencies based on an increase in throughput at the Virden Elevator did not qualify as a cognizable efficiency under these criteria.

- Network logistics efficiencies

[722] Regarding the claimed logistics efficiencies, Mr. Harington noted in his report that P&H did not quantify the cost savings arising from shipping volumes to a more "freight logical" terminal and did not demonstrate that any of the savings would be lost in the event of a remedial order by the Tribunal. In addition, P&H did not show what proportion of any cost savings was attributable to the purchase of the Virden Elevator as opposed to the Rathwell facility.

- Efficiencies at West Coast terminals

[723] Turning to the claimed efficiencies at the West Coast terminals, Mr. Harington's expert report found that increased volumes at more efficient Vancouver area terminals were not a cognizable efficiency that would be lost in the event of an order of the Tribunal, because the same volume was still going through the less efficient Superior terminal in Thunder Bay; that is, the "only difference is the Elevators from which these volumes to Thunder Bay are coming." Mr. Harington also noted that P&H did not offer any proof of increased volume of grain production due to the Acquisition and did not provide a comparison of operating costs at the Vancouver terminals with similar costs at another terminal through which the grain previously travelled.

- Crop inputs efficiencies

[724] On crop input efficiencies, Mr. Harington's expert report opined that the benefit of increased crop inputs sales would be a redistribution of income rather than a real resource saving. Any margin on crop inputs sales earned by P&H by the conversion of facilities was, in his view, a "pecuniary redistribution of income between P&H and farmers," even if some portion of those sales were new sales rather than sales that would otherwise be made by rival retail suppliers.

[725] Mr. Harington noted the absence of any evidence (apart from Mr. Heimbecker's opinion) that an additional crop inputs retail location would increase crop inputs sales in the area of the Virden Elevator rather than redistribute sales within the area, or would lead to more use of crop inputs by farmers and increase grain production as a result.

(iii) The gains in efficiency under subsection 96(1)

[726] For the following reasons, the Tribunal concludes that P&H has not proven cognizable efficiencies under section 96.

- Increased throughput at the Virden Elevator

[727] P&H advanced the position that the Acquisition had caused an increase in throughput at the Virden Elevator, by an increase in volume of grain delivered to and processed by that Elevator between 2019 and 2020.

[728] Mr. Heimbecker's evidence about Elevators' turn rates was not contradicted, nor did the Commissioner cross-examine him on it. Mr. Heimbecker testified that P&H had access to port terminals both in the Vancouver area and in Thunder Bay, compared with LDC which had no access to Thunder Bay and did not export from the Superior terminal. He also testified that the Virden Elevator is in P&H's catchment area for Thunder Bay and that grain from Virden will generally be shipped east by P&H to its Superior terminal for sale to its eastern grain export customers. He testified that P&H's most efficient port terminals are the AGT and the FGT.

[729] The Tribunal accepts that there are likely some time and transportation (*i.e.*, rail) cost savings to move the Virden Elevator grain to the Superior terminal in Thunder Bay rather than to

a Vancouver port terminal, which would presumably contribute to a higher turn rate at Virden for P&H than what existed when LDC sent its grain to Vancouver. However, P&H did not adduce evidence of any transportation cost savings. Having said that, Mr. Heimbecker's evidence was also that P&H's Superior terminal is not as efficient as the AGT or FGT in Vancouver. In light of that evidence, the Tribunal is unable to measure any benefits to the Canadian economy that would allegedly result from the change of the Virden Elevator grain being shipped west to the Vancouver port by LDC before the Transaction, to it being shipped east to the Superior terminal in Thunder Bay by P&H afterwards.

[730] Mr. Heimbecker provided a forecast that P&H would increase the Virden Elevator's turn rate from historical rates of [redacted] in 2017 and [redacted] in 2018 while LDC operated Virden, to a turn rate of [redacted] in P&H's fiscal year 2021. Mr. Heimbecker did not present turn rates (actual or forecast) for the years 2019 or 2020, as the Virden Elevator was emptied by LDC following the agreement on the Transaction, and P&H needed to replenish it. The Virden Elevator's forecast increase of [redacted] from 2018 to 2021 ranks just [redacted] of the 10 former LDC Elevators' forecast increases, and is relatively small compared with some increases at other Elevators (which went up by as much as [redacted]). The Tribunal further observes that the Virden Elevator's turn rate of [redacted] in fiscal year 2021 will be the lowest of any of the former LDC Elevators. The Tribunal does not find this evidence about increased turn rates at the Virden Elevator to be particularly compelling or persuasive.

[731] The evidence about the relative inventory numbers between 2019 and 2020 must be assessed carefully. Mr. Harington testified that the abnormally lower inventory due to lower purchases by LDC in 2019, as well as the abnormally higher purchases by P&H in 2020 to make up the needed volume for inventory, would essentially have a "two-times" effect on the Tribunal's ability to compare the two years. To compare them, each year would have to be adjusted (2019 upward and 2020 downward).

[732] In the Tribunal's view, there are several additional uncertainties and anomalies associated with P&H's evidence that undermine the reliability of any comparison of the change in throughput over these two years. These concerns prevent a sufficiently accurate quantification of any change in throughput following the Transaction and raise considerable doubt about the existence of any increase in throughput brought about by the Virden Acquisition.

[733] First, there is uncertainty about the baseline volumes in 2019. Mr. Heimbecker testified that LDC diminished the inventory levels at its Elevators, including at the Virden Elevator, prior to the closing of the Transaction on December 10, 2019. P&H did not provide the Tribunal with the Virden Elevator's inventory level information as of that date. There was no evidence from LDC as to when it began to lessen its grain purchases (or if it simply stopped sometime before the closing), or about how much less grain it acquired at the Virden Elevator or decided not to store. The evidence also does not contain inventory levels or grain delivery volumes to the Virden Elevator in any prior years (*e.g.*, 2018, 2017, or 2016) for historical comparison to 2019.

[734] Second, there is uncertainty about which product's inventory decreased in 2019. In his initial witness statement, Mr. Heimbecker testified that there was little or no canola inventory at most of the LDC locations, including at the Virden Elevator. He testified that, by summer of 2020, P&H had "significantly increased canola purchases at Virden over the levels purchased there previously by LDC." In his reply witness statement, Mr. Heimbecker explained that one reason

why P&H missed its three-month throughput forecast for May to July 2020 was "low level of inventory left by LDC. LDC did not have grain in the pipeline when P&H purchased the assets which prevented P&H from selling grain in the beginning of the year" [emphases added] (Heimbecker Statement at para 51; Heimbecker Reply Statement at para 24).

[735] At the hearing, Ms. Sanderson testified, having looked at the Virden Elevator's purchase data, that she did not see any sort of change on the canola side in December 2019 or January 2020 compared to the year prior. She attributed the running down of inventories just to wheat.

[736] Third, there were anomalous monthly deliveries of both canola and wheat that make 2019 and 2020 harder to compare. Mr. Heimbecker provided monthly MT deliveries of canola to the Virden Elevator from January 1 to October 31, 2020. Of the approximately [redacted] in those ten months, [redacted] was delivered in September 2020. That month saw deliveries of [redacted] in 2019, implying an increase of over [redacted] comparing September 2019 with September 2020.

[737] There was also an anomalous month in the data for wheat. Ms. Sanderson testified that November 2019 wheat purchases by LDC were more than twice larger than October 2019 and were "by far and away the largest" quantity purchased in any month from January 2019 to July 2020 (the period of available actual data when she prepared her report) (Consolidated Transcript, Confidential A, at p 1895). Ms. Sanderson's review of volumes from September to December 2019 allowed her to conclude that LDC increased purchases in November and may have run down inventories in December. As noted, the Transaction closed on December 10, 2019, and the parties did not provide the Tribunal with inventory level information at the Virden Elevator as of that date.

[738] Fourth, in order to compare the 2019 and 2020 deliveries to the Virden Elevator, both parties agreed that the 2020 deliveries had to be adjusted for an overall industry increase in grain production over 2019. Mr. Heimbecker used the overall grain production increase in Canada of 13.1% for the crop years ending July 31, 2019 compared with July 31, 2020 to make adjustments. However, Mr. Harington's presentation of the industry evidence on increased deliveries indicated that the increases in both all-wheat production and all-grain production in Saskatchewan and Manitoba were each different from the 13.1% used in the calculations: higher for Saskatchewan (+15.8% and +17.9%, respectively) and noticeably lower for Manitoba (+6.8% and +7.0%, respectively). The Virden Elevator's purchases come from those two provinces.

[739] Mr. Heimbecker's revised calculations in his reply witness statement continued to use the 13.1% Canada all-grain increase, referring to the Manitoba increases in all-wheat production and all-grain production and tendering his calculations as a "conservative" approach. However, Mr. Heimbecker acknowledged in cross-examination that overall canola deliveries in Manitoba increased by 18%, comparing January to October 2019 with January to October 2020. At the same time, Mr. Heimbecker was also careful to distinguish between grain or canola production and delivery.

[740] The Tribunal finds that an adjustment of 13.1% to account for increased grain production in Canada does not account accurately for grain delivery increases to the Virden Elevator from farms in Saskatchewan and Manitoba from 2019 to 2020, and negatively affects the Tribunal's ability to quantify any increase in throughput at the Virden Elevator over the period.

[741] In light of all this evidence, the Tribunal finds that there is considerable uncertainty about the existence and quantum of any actual increase in throughput at the Virden Elevator following the Acquisition. The Tribunal cannot conclude that any specific amount of increased throughput volume of wheat, or canola, or grain, has been demonstrated or satisfactorily quantified for 2020 after the Transaction.

[742] The Tribunal is also unable to conclude that any increase or any quantifiable increase in throughput was brought about by the Virden Acquisition for the purposes of *Tervita CT* screen 2. P&H offered no expert assistance to assist the Tribunal in identifying and quantifying throughput increases brought about by the Virden Acquisition (if any) and to distinguish it from higher throughput caused by rising overall grain deliveries to replenish inventory (the quantum of which was itself debated, as discussed above).

[743] In addition, while the monthly trend comparing 2019 to 2020 for canola was generally rising from March to September 2020, the spike in canola deliveries in September 2020 (comprising nearly half of the delivered volume for the calendar year) is inconsistent with P&H's position that there are sustainable, ongoing efficiencies in throughput at the Virden Elevator. As Mr. Harington testified, one month does not make a trend.

[744] The Tribunal concludes that P&H has not demonstrated, with clear and convincing evidence, any section 96 efficiencies with respect to increased throughput at the Virden Elevator.

- Network logistics efficiencies

[745] With respect to network logistic efficiencies, the Tribunal agrees with the Commissioner that P&H has not quantified its alleged efficiencies arising from the optimization of shipments to "freight logical" terminals in Vancouver. The evidence does not establish how much additional or incremental grain has been or will be diverted to the grain terminals in Vancouver (from other western terminals or from Thunder Bay), nor any of the cost savings that resulted from processing grain at the Vancouver terminals compared with the Superior terminal, nor any cost savings associated with processing and transporting grain a shorter distance from an Elevator to a terminal. While the possibility of a synergy or an efficiency arising from better network logistics has some intuitive attraction, the evidence does not support the existence or any quantification of such an efficiency for the purposes of section 96.

[746] Applying the principles articulated in *Tervita SCC*, this proposed efficiency must be considered a zero.

- Efficiencies at West Coast terminals

[747] The Tribunal also concludes that the evidence does not support any proven efficiencies arising from any additional grain flowing through the terminals in Vancouver used by P&H. Again, P&H did not offer any quantification of the incremental volumes of grain from the Virden Acquisition, or any cost savings as a result of processing such grain, in the Vancouver terminals or by a shift in volumes from other grain terminals to its terminals. Moreover, Mr. Heimbecker did not provide any evidence supporting his claim of improved rail car cycle time nor did he provide

any explanation or operating plans from the railways that attest to those savings. Applying the principles set out in *Tervita SCC*, this proposed efficiency must also be considered a zero.

- Crop inputs efficiencies

[748] Turning finally to the claimed crop inputs efficiencies, the Tribunal concludes that P&H has not proven any section 96 efficiencies related to crop inputs. An increase in margins accruing to P&H is not a benefit to the Canadian economy for the purposes of an efficiency under section 96. In addition, P&H has not measured, quantified, or even estimated any increase in output as alleged (*i.e.*, any increase in the sale of crop inputs in the area around the Virden Elevator, nor any increase in local grain production). Needless to say, such claims in efficiencies were, by their nature, clearly quantifiable.

[749] The Tribunal therefore concludes that P&H has not demonstrated any cognizable efficiencies, whether quantitative or qualitative, under subsection 96(1) of the Act. Since P&H failed to meet its burden, the efficiencies are assigned a weight of zero.

(iv) The impact of subsection 96(2)

[750] P&H submitted that the Tribunal should also apply subsection 96(2), since its objective in entering the Transaction was to increase its competitiveness in domestic and international export markets and to maximize the profitability of its export business. P&H emphasized that the Transaction served to enhance the return on its investment in the FGT through the expansion of its network, by acquiring access to increased throughput of grain sourced from the acquired LDC Elevators. P&H emphasized that it had no anti-competitive intention. Its intention was not to exercise monopsony power in local input markets, but rather to increase output in export markets.

[751] P&H pointed to its focus — and the focus of the industry as a whole — on exporting canola and wheat. It noted that its pricing mechanism (*i.e.*, the Workback Algorithm) tied local prices in the input market to prices in the export market. The acquisition of the grain volumes represented by the LDC Elevators, including the Virden Elevator, enabled large increases in the volume processed by the FGT without displacing any planned volumes from pre-Transaction P&H Elevators. Those increased throughput volumes would be achieved quickly, rather than waiting for [redacted] years as P&H originally anticipated and planned for the FGT.

[752] P&H referred to Mr. Brooks' evidence and to a report from the Saskatchewan Wheat Development Commissioner (found in Exhibits CA-R-240 and P-R-241, Compilation of Miscelleaneous Documents) to support a submission that grain producers' (*i.e.*, farmers') interests in increased production were aligned with grain companies' interests in increasing export capacity.

[753] P&H submitted that the Elevators acquired in the Transaction:

> […] will be capable at full utilization to fill the [redacted] metric tonnes of capacity at the FGT. This capacity utilization represents a 9% increase in export sales capacity at the West Coast and approximately 6.5% of total Canadian export capacity. The contribution of the LDC Elevators to export sales pre-acquisition was

[redacted] MT. At full capacity, within the P&H network, these elevators will add MT of export throughput to FGT for a net increase of [redacted]. Hence the transaction as a whole clearly leads to a significant increase in the real [value] exports of grain within the meaning of section 96(2).

[Emphasis added.]

[754] The Commissioner responded that there was no evidence to indicate that the Transaction had actually led to a real increase in the value of exports under subsection 96(2). The Commissioner contended that P&H had acquired the grain volume that LDC was exporting through Vancouver terminals, so that P&H could export the same grain volume through its terminals in Vancouver. The grain was all headed for export, regardless of the Transaction. In addition, no analysis had been done to demonstrate that allowing P&H to keep one Elevator (*i.e.*, the Virden Elevator) would lead to a significant increase in the real value of exports.

[755] The Tribunal disagrees with P&H's submission that the increase in the real value of exports from the Transaction "as a whole" may be considered under subsection 96(2). That provision refers to the gains in efficiency mentioned in subsection 96(1), which in turn refers to the efficiencies brought about by the merger or proposed merger "in respect of which the application is made." Consideration of a substantial increase in the real value of exports under paragraph 96(2)(*a*) must therefore focus on the specific merger being challenged by the Commissioner in the proceeding. In this case, the Commissioner's Application is solely made in respect of P&H's Acquisition of the Virden Elevator, not in respect of the Transaction as a whole.

[756] During oral argument, the Tribunal asked whether there was anything in the evidence that parsed out the impact of the Virden Elevator on exports. P&H's answer was no. It advised that it would need access to third party information and data about grain volumes from other grain companies at the port and their efficiencies there, as well as those companies' variable operating costs to reach the port facilities, in order to measure such impact.

[757] During argument, the Tribunal requested that P&H specifically refer to the evidence on the additional (incremental) volume attributable to the Virden Elevator that would be exported through the FGT. P&H did not provide a satisfactory answer in substance, pointing to its evidence of increased throughput at the Virden Elevator. However, as noted above, this evidence does not support the quantification of any volume of increased throughput at the Virden Elevator. The Tribunal also notes that volumes of grain from the Virden Elevator were delivered to Thunder Bay (not Vancouver) and that the Superior terminal in Thunder Bay closed during the winter. Because P&H redirected the Virden Elevator grain eastward to Thunder Bay, any increased volume to the FGT that could (in theory) be attributable to the Virden Elevator would have to be sourced from another Elevator(s). P&H did not provide an analysis to support such an attribution.

[758] Reduced to its essence, P&H's submission was that more of the FGT's capacity would be used, and sooner, as a result of the Transaction as a whole. The evidence of how much additional capacity would be used (or the value of that grain in dollars), and when, is insufficient to show a significant increase in the real value of exports resulting from the Virden Acquisition. The Tribunal agrees with the Commissioner that it is likely that most of the additional volumes anticipated to be processed at the FGT post-Transaction are volumes that would otherwise have been processed at

other terminals but will now be diverted to the FGT because P&H now owns all of the source Elevators. Further, P&H confirmed during argument that the additional volumes are for all types of grains, not just wheat and canola. Lastly, the Tribunal appreciates the logic of Mr. Heimbecker's evidence concerning congested rail lines. Even accounting for that evidence and the general claim that the FGT would be a more efficient terminal (it was scheduled to become fully operational shortly after the hearing), the Tribunal is not satisfied that the evidence demonstrates a significant increase in the real value of exports for the purposes of paragraph 96(2)(*a*).

[759] The Tribunal pauses to again note that P&H's intention or objectives in entering the Transaction are not relevant, or material, to the Tribunal's analysis.

[760] Given the analysis above with respect to subsection 96(1), the Tribunal finds that P&H has not shown a causal connection between any proven efficiencies under subsection 96(1) and an increase in the real value of any exports. The Tribunal therefore concludes that the requirements of subsection 96(2) have not been met.

(c) The trade-off analysis

[761] In light of the Tribunal' conclusions on efficiencies, there is no need to deal with the trade-off analysis in this case.

(3) Conclusion on efficiencies and section 96

[762] For the reasons detailed above, the Tribunal concludes that P&H has not demonstrated, with clear and convincing evidence, its claimed efficiencies and that it would not have met its burden of demonstrating, on a balance of probabilities, that its claimed gains in efficiency would be greater than, and would offset, the anti-competitive effects of any lessening of competition resulting from the Acquisition.

VIII. CONCLUSION

[763] For the above detailed reasons, the Commissioner's Application is dismissed. In light of this conclusion, no remedial action will be ordered.

IX. COSTS

[764] The parties were unable to come to an agreement as to costs.

[765] The Commissioner submits that he should be awarded a lump sum amount of CAD $2 million inclusive of counsel fees and disbursements if he is successful. If the Application is dismissed, then the Commissioner argues that P&H should be awarded CAD $2 million inclusive of counsel fees and disbursements. However, if the Application is dismissed and the Tribunal finds that P&H's section 96 efficiencies defence would not have been successful, then the Tribunal should, in the Commissioner's view, deduct CAD $500,000 from the lump sum cost award, in recognition of the costs the Commissioner incurred in order to respond to that defence. While the

Commissioner recognizes that P&H was entitled to rely on the efficiencies defence, he argues that if a respondent pleads the defence but does not adduce sufficient evidence to make it out, then the Tribunal should use a costs award to recognize the significant costs incurred by the Commissioner (and ultimately, Canadian taxpayers) to respond. If there is no financial deterrent associated with an unsuccessful efficiencies defence, the Commissioner submits that in the future, respondents will claim efficiencies as a matter of course, causing significant financial burden on the Commissioner regardless of whether raising the efficiencies defence was justified.

[766] P&H, in turn, seeks costs payable as a lump sum in the amount of CAD $2,206,958.18, inclusive of fees, disbursements and taxes, if the Commissioner's Application is dismissed. This sum represents approximately CAD $209,000 for legal fees and approximately CAD $1,998,000 for disbursements (both inclusive of taxes). Should the Application be allowed, P&H indicates that it takes no position with respect to the Bill of Costs submitted by the Commissioner, save for one item — *i.e.*, the preparation and filing of the Commissioner's motion materials dealing with confidentiality designations — which P&H maintains is an ineligible cost in view of the Tribunal's order dismissing the Commissioner's confidentiality motion without costs. As for the matter of costs relating to the efficiencies defence, P&H submits that the merits of the efficiencies defence becomes moot if a substantial lessening of competition is not found under section 92, and that the result of the case must drive costs, not *obiter dicta*. According to P&H, this is not a case of divided success (citing *Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 at paras 31, 43).

[767] Both parties submitted bills of costs and affidavits in support.

A. Legal principles applicable to costs

[768] In *VAA CT*, the Tribunal noted that section 8.1 of the CTA grants jurisdiction to the Tribunal to award costs of proceedings before it in accordance with the provisions governing costs in the FC Rules (*VAA CT* at para 817). Under subsection 400(1) of the FC Rules, 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 subsection 400(3).

[769] Costs ordinarily follow the outcome of the proceeding, in that the successful party is usually awarded costs (see, for example, *Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 at para 182; *MacFarlane v Day & Ross Inc*, 2014 FCA 199 at para 6; *VAA CT* at para 816; FC Rule 400(3)(a)).

[770] The costs regime does not indemnify the successful party for all of its legal fees and disbursements, absent very unusual circumstances. Costs are only partial compensation for the actual costs incurred in litigation. As noted in *VAA CT*, an award of costs represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party (*VAA CT* at para 817, citing *Apotex Inc v Wellcome Foundation Ltd* (1998), 159 FTR 233 (FCTD), 84 CPR (3d) 303, aff'd (2001), 199 FTR 320 (FCA)).

[771] The objectives of a costs award include having the unsuccessful party make a "reasonable contribution" to the successful party's costs of litigation, having regard to the Tariff in the FC Rules (*NOVA Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 ("***NOVA***

Chemicals") at paras 13, 21). Although the Tariff amounts may be inadequate in complex litigation, nevertheless, an increased costs award cannot be justified solely on the basis that a successful party's actual fees are significantly higher than the Tariff amounts. The burden is on the party seeking increased costs to demonstrate why their particular circumstances warrant an increased award (*NOVA Chemicals* at para 13, citing *Wihksne v Canada (Attorney General)*, 2002 FCA 356 at para 11).

[772] The approximation of lump sum costs is a matter of judgment rather than an accounting exercise (*Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc*, 2002 FCA 417 at para 8). While the costs awarded should have a fair relationship to the actual costs of litigation, the question for the Tribunal is 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).

[773] Disbursements must be reasonable, necessary, and justified (*NOVA Chemicals* at para 26; *VAA CT* at para 821). Expert-related costs are not automatically recovered in their entirety and can be adjusted by the Tribunal if they do not appear reasonable (*VAA CT* at para 822).

[774] In *VAA CT*, the Tribunal took into account that success on the issues in dispute, particularly the legal issues in dispute, was divided; although the respondent was successful overall, the Commissioner prevailed on certain issues (*VAA CT* at paras 819, 827). The Tribunal reduced the costs award to the respondent to reflect the time spent on issues on which the Commissioner prevailed but the respondent persisted in spending time, and based on the reasonableness and necessity of the disbursements.

[775] As paragraph 400(3)(a) of the FC Rules contemplates, success overall in the proceeding remains a principal factor, subject to additional considerations relevant to the circumstances and claims made. The Tribunal may consider the factors in paragraphs 400(3)(b) to (n.1) of the FC Rules and any other matter it considers relevant under subsection 400(3)(o).

[776] The Tribunal favours lump sum costs awards (*VAA CT* at para 825).

B. Tribunal's assessment

[777] As the successful party, P&H is entitled to an award of costs. The Tribunal will fix the costs payable by the Commissioner in this proceeding.

(1) Legal fees

[778] With respect to legal fees, P&H claimed approximately CAD $209,000 in respect of legal fees, calculated based on Tariff B, Column IV. Its claims included time spent for preparation of pleadings, affidavits of documents, preparing for and attending oral examinations for discovery, preparing for and attending case management conferences, preparation of witness statements, and the attendance of two counsel at the hearing. The Commissioner submitted that, if P&H is successful, its quantum of costs should be determined on the usual basis of the middle of column III, and should also be less than the amount fixed by the Tribunal in *VAA CT* (which was CAD $70,000) because the matter occupied fewer hearing days.

[779] As noted, both parties took positions to increase or decrease an award of costs by large amounts beyond the Tariff. P&H increased its requested award based on its actual legal fees and the complexity of this proceeding. P&H advised that it believed that an award for legal fees in the amount of CAD $900,000 would be appropriate (its actual legal fees were approximately CAD $3.6 million), but only claimed CAD $209,000 under Tariff B, Column IV. For his part, the Commissioner sought to decrease an award to P&H if it did not succeed on section 96 issues. The Commissioner submitted that P&H's costs award should be reduced by CAD $500,000, which the Commissioner argued represented the amount he paid to respond to P&H's position under section 96 by having to quantify the anti-competitive effects (through Dr. Miller) and file Mr. Harington's expert report on efficiencies under section 96.

[780] The parties also argued several novel points — i.e., issues that had not been argued to the Tribunal in previous litigated proceedings. The Commissioner's position on product market raised new issues for the Tribunal's consideration, while P&H raised issues under section 96 that had not been considered previously.

[781] The most important overall factor in arriving at a costs award is which party succeeded. Here, the Tribunal dismissed the Commissioner's Application. In addition to the overall result, the Tribunal recognizes that this proceeding involves a public official with a statutory mandate to administer and enforce the Act; both parties are highly sophisticated with very experienced counsel; and the legislative setting contemplates significant pre-litigation disclosure through the merger review process and pre-hearing disclosure, as well as well known elements and burdens of proof under sections 92 and 96 of the Act. The Tribunal also finds that proceedings under section 92 involve complex legal and factual matters that support higher costs awards under the Tariff B, Column IV in the FC Rules (as claimed by P&H).

[782] Although the Commissioner succeeded on several preliminary issues, the Tribunal does not find that those arguments diminish P&H's entitlement to an award of costs in this case.

[783] The Tribunal does not agree with the Commissioner's position that the costs award to P&H should be reduced by an overall lump sum amount of CAD $500,000 because P&H would not have succeeded on its section 96 defence. Although the cost of Mr. Harington's services are known (*i.e.*, CAD $259,000), the balance to arrive at the claimed amount of CAD $500,000 is merely an assumption or guess without a sufficient evidentiary basis.

[784] That said, however, the Tribunal finds it appropriate under FC Rule 400(3)(o) (and by analogy to other paragraphs in FC Rule 400(3)) to take into account the specific circumstances of this proceeding related to the section 96 evidence and arguments in its overall assessment of legal fees, as follows:

- The overall burden of proof under section 96 was on P&H;
- P&H raised efficiencies in its pleading. The Tribunal notes that P&H did not provide details of its position on efficiencies at examinations for discovery and did not file an expert report for the hearing — even though it advised it would do so during the discovery process. It only filed Mr. Heimbecker's fact evidence (which included some efficiencies arguments that P&H did not initially plead);

- The Commissioner did not waste time on section 96 issues during the fact portion of the hearing; he did not cross-examine Mr. Heimbecker on his evidence related to alleged efficiencies;

- The Commissioner prevailed on section 96 issues. Even if the Tribunal's conclusions on section 96 were, strictly speaking, unnecessary for the Tribunal to decide given the outcome of its analysis under section 92, the Commissioner had no practical alternative but to respond to the section 96 efficiencies defence raised by P&H and to do so with an expert report;

- The Commissioner had to prepare for and conduct discovery on section 96 issues, quantify the anti-competitive effects in accordance with the principles established in *Tervita SCC*, file an expert report, address section 96 issues at the hearing, and respond to issues related to the proper interpretation of subsection 96(2), all of which affected the time spent by legal counsel;

- The Tribunal considers that P&H's approach to the section 96 issues in this proceeding tended to unnecessarily increase the Commissioner's costs and increase the time spent on the proceeding. A considerable part of the Commissioner's legal costs in relation to section 96 and its disbursement for Mr. Harington's report could have been avoided.

[785] Exercising its discretion, the Tribunal concludes that the appropriate costs award to P&H for legal fees in this matter should be fixed at CAD $157,000, which represents approximately 75% of P&H's legal fees as claimed under Tariff B, Column IV.

(2) Disbursements

[786] The Tribunal has considered the positions of both parties with respect to each of the claims made by P&H for the disbursements it incurred in this litigation.

[787] P&H claims expert fees in the amount of approximately CAD $1.61 million. Having regard to the Tribunal's positive treatment of Ms. Sanderson's evidence, but also to the overall reasonableness of the quantum claimed by P&H to be reimbursed by the Commissioner, the Tribunal finds CAD $1.2 million to be a reasonable sum in respect of expert fees.

[788] The Tribunal recognizes that this hearing was conducted not only electronically (as is standard at the Tribunal) but entirely virtually, and in very unusual circumstances owing to the COVID-19 pandemic. P&H decided that its counsel would travel to Winnipeg, at or close to its witnesses (particularly Mr. Heimbecker), and presumably close to P&H's offices. For the hearing, P&H set up an operations centre at a hotel, necessitating the rental of a large room (to maintain physical distancing and set up the appropriate equipment for a virtual hearing with all the required computers and technical support).

[789] P&H claims a disbursement of approximately CAD $126,000 for hotel conference rooms and audio visual display equipment used during examinations for discovery and, later, during the facts portion of the hearing. The Commissioner submitted that these amounts were excessive,

noting his own claim for just CAD $2,200. The Tribunal does not accept the Commissioner's comparison of P&H's costs for four witnesses to testify in Manitoba, versus the 10 witnesses called by the Commissioner. Having decided that counsel would travel to Winnipeg (which the Tribunal does not find appropriate to question in this case), the Tribunal finds that the rental of space and equipment was reasonable given the COVID-19 restrictions in Manitoba at the time. Although some charges on the invoices related to food and package deliveries and the amounts charged for space and equipment appear quite high on a daily basis, the Tribunal finds it appropriate that the Commissioner make a reasonable contribution to this expense in the amount of CAD $50,000.

[790] P&H claimed payments made for case law searches in third party legal databases in the amount of approximately CAD $32,000. The evidence reveals more than 300 searches, done mostly in the two months leading up to the hearing. It is unclear whether those searches related to two motions argued and decided during the same period, or to the legal issues arising in the hearing itself. (On one motion, costs were awarded in the cause whereas no costs were awarded in the other.) The Tribunal recognizes that most legal research is done online and at the time, the law firm personnel were likely working from home and without a law library. It is also clear that some of the legal issues raised by the Commissioner's position and by P&H (for example, preliminary issues and the interpretation of subsection 92(2)) required legal research. Although the Commissioner did not object in his submissions, the Tribunal finds that the high number of searches and absence of details as to what the searches concerned (motions as opposed to hearing; issues raised by each party) support a reasonable claim for CAD $8,000.

[791] P&H sought reimbursement for air travel to and from Winnipeg in the amount of CAD $31,500. Its claim was based on 50% of the actual cost of a private jet for two counsel to travel to Winnipeg and back for discovery, and later for the fact portion of the hearing. Reviewing the invoices, it appears that at both the discovery and hearing stages, the aircraft flew from Winnipeg to Toronto (without passengers on board other than flight crew) to pick up P&H's counsel and returned the same day. The aircraft made a trip to return counsel to Toronto upon completion of both the discoveries or portion of the hearing, and then flew back to Winnipeg without passengers on board other than flight crew. The invoices reflect charges for round-trips even though counsel were on board one way only. The Tribunal will allow a claim for CAD $4,500, which (on the evidence) approximates a full fare economy air ticket for two counsel to fly between Toronto and Winnipeg for discovery and for the fact portion of the hearing.

[792] P&H claims approximately CAD $31,600 for transcripts of the examinations for discovery and the hearing and approximately CAD $10,600 for data hosting, which was necessary for the virtual hearing at the Tribunal. The Tribunal allows these claims in their entirety.

[793] The Tribunal allows claims for photocopies and printing in the amount of CAD $800 and for hotels and meals during examinations for discovery and at the hearing in the aggregate of the amount of CAD $8,000 (based on a contribution to the cost of hotel rooms for two counsel and a reasonable *per diem* for meals).

[794] P&H claimed approximately CAD $6,000 in courier costs attributable, for example, to counsel working from home during the pandemic and materials sent by counsel to the panel members and the Tribunal Registry during the hearing. The Tribunal notes that most (approximately CAD $4,200) of P&H's claim in that regard relates to a single package sent from

Winnipeg to Toronto to return materials and equipment after the fact portion of the hearing ended. The Tribunal considers CAD $2,000 as a reasonable contribution towards courier costs.

[795] P&H claimed meals in the amount of approximately CAD $1,350 in addition to those claimed by hearing counsel, which the Tribunal notes was not an appropriate claim for costs purposes.

[796] A claim for conference calls in the amount of CAD $127 is *de minimis* in this context. The Tribunal notes that certain calls occurred before the litigation began.

C. Conclusion on costs

[797] In light of the foregoing, the Tribunal awards costs for legal fees in the lump sum amount of CAD $157,000, inclusive of applicable taxes. The total of all disbursements allowed is CAD $1,315,500, inclusive of applicable taxes.

[798] The Tribunal therefore concludes that the Commissioner shall pay an all-inclusive aggregate lump sum amount of CAD $1,472,500 to P&H in respect of costs of this proceeding.

X. ORDER

[799] The Application brought by the Commissioner is dismissed.

[800] Within 30 days from the date of this Order, the Commissioner shall pay to P&H an amount of CAD $1,472,500.

[801] These Reasons are confidential. In order to enable the Tribunal to issue a public version of the Reasons, 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 Registry by no later than the close of business on November 14, 2022, setting out their agreement and any areas of disagreement concerning the redaction of the confidential version of the Reasons. 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 with the Tribunal Registry by the close of business on November 14, 2022.

DATED at Ottawa, this 31st day of October, 2022

SIGNED on behalf of the Tribunal by the Panel Members.

(s) Denis Gascon J. (Presiding Member)
(s) Andrew D. Little J.
(s) Ramaz Samrout

COUNSEL OF RECORD:

For the applicant:

Commissioner of Competition

Jonathan Hood
Ellé Nekiar

For the respondent:

Parrish & Heimbecker, Limited

Robert S. Russell
Davit Akman
Denes Rothschild
Moshe Grunfeld
Joshua Abaki
Carolyn Wong

Schedule "A" – Relevant provisions of the Act

Mergers	Fusionnements
[…]	[…]
Order	**Ordonnance en cas de diminution de la concurrence**
92 (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially	**92 (1)** Dans les cas où, à la suite d'une demande du commissaire, le Tribunal conclut qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet :
(a) in a trade, industry or profession,	**a)** dans un commerce, une industrie ou une profession;
(b) among the sources from which a trade, industry or profession obtains a product,	**b)** entre les sources d'approvisionnement auprès desquelles un commerce, une industrie ou une profession se procure un produit;
(c) among the outlets through which a trade, industry or profession disposes of a product, or	**c)** entre les débouchés par l'intermédiaire desquels un commerce, une industrie ou une profession écoule un produit;
(d) otherwise than as described in paragraphs (a) to (c),	**d)** autrement que selon ce qui est prévu aux alinéas a) à c),
the Tribunal may, subject to sections 94 to 96,	le Tribunal peut, sous réserve des articles 94 à 96 :
(e) in the case of a completed merger, order any party to the merger or any other person	**e)** dans le cas d'un fusionnement réalisé, rendre une ordonnance enjoignant à toute personne, que celle-ci

soit partie au fusionnement ou non :

(i) to dissolve the merger in such manner as the Tribunal directs,

(i) de le dissoudre, conformément à ses directives,

(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or

(ii) de se départir, selon les modalités qu'il indique, des éléments d'actif et des actions qu'il indique,

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

(iii) en sus ou au lieu des mesures prévues au sous-alinéa (i) ou (ii), de prendre toute autre mesure, à condition que la personne contre qui l'ordonnance est rendue et le commissaire souscrivent à cette mesure;

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

f) dans le cas d'un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant :

(i) ordering the person against whom the order is directed not to proceed with the merger,

(i) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder au fusionnement,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(ii) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder à une partie du fusionnement,

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(iii) en sus ou au lieu de l'ordonnance prévue au sous-alinéa (ii), cumulativement ou non :

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the

(A) à la personne qui fait l'objet de l'ordonnance, de s'abstenir, si le fusionnement était éventuellement complété en tout ou en partie, de faire

prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

quoi que ce soit dont l'interdiction est, selon ce que conclut le Tribunal, nécessaire pour que le fusionnement, même partiel, n'empêche ni ne diminue sensiblement la concurrence,

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

(B) à la personne qui fait l'objet de l'ordonnance de prendre toute autre mesure à condition que le commissaire et cette personne y souscrivent.

Evidence

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

Preuve

(2) Pour l'application du présent article, le Tribunal ne conclut pas qu'un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou qu'il aura vraisemblablement cet effet, en raison seulement de la concentration ou de la part du marché.

Factors to be considered regarding prevention or lessening of competition

93 In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:

Éléments à considérer

93 Lorsqu'il détermine, pour l'application de l'article 92, si un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou s'il aura vraisemblablement cet effet, le Tribunal peut tenir compte des facteurs suivants :

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses

a) la mesure dans laquelle des produits ou des concurrents étrangers assurent ou assureront vraisemblablement une concurrence réelle aux

of the parties to the merger or proposed merger;

entreprises des parties au fusionnement réalisé ou proposé;

(b) whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail;

b) la déconfiture, ou la déconfiture vraisemblable de l'entreprise ou d'une partie de l'entreprise d'une partie au fusionnement réalisé ou proposé;

(c) the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or are likely to be available;

c) la mesure dans laquelle sont ou seront vraisemblablement disponibles des produits pouvant servir de substituts acceptables à ceux fournis par les parties au fusionnement réalisé ou proposé;

(d) any barriers to entry into a market, including

d) les entraves à l'accès à un marché, notamment :

(i) tariff and non-tariff barriers to international trade,

(i) les barrières tarifaires et non tarifaires au commerce international,

(ii) interprovincial barriers to trade, and

(ii) les barrières interprovinciales au commerce,

(iii) regulatory control over entry,

(iii) la réglementation de cet accès,

and any effect of the merger or proposed merger on such barriers;

et tous les effets du fusionnement, réalisé ou proposé, sur ces entraves;

(e) the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger;

e) la mesure dans laquelle il y a ou il y aurait encore de la concurrence réelle dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé;

(f) any likelihood that the merger or proposed merger will or would result in the

f) la possibilité que le fusionnement réalisé ou proposé entraîne ou puisse entraîner la disparition d'un

removal of a vigorous and effective competitor;

(g) the nature and extent of change and innovation in a relevant market;

(g.1) network effects within the market;

(g.2) whether the merger or proposed merger would contribute to the entrenchment of the market position of leading incumbents;

(g.3) any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy; and

(h) any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.

[…]

Exception where gains in efficiency

96 (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result

concurrent dynamique et efficace;

g) la nature et la portée des changements et des innovations sur un marché pertinent;

g.1) les effets de réseau dans le marché;

g.2) le fait que le fusionnement réalisé ou propose contribuerait au renforcement de la position sur le marché des principales entreprises en place;

g.3) tout effet du fusionnement réalisé ou proposé sur la concurrence hors prix ou par les prix, notamment la qualité, le choix ou la vie privée des consommateurs;

h) tout autre facteur pertinent à la concurrence dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé.

[…]

Exception dans les cas de gains en efficience

96 (1) Le Tribunal ne rend pas l'ordonnance prévue à l'article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la

from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.

Factors to be considered

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

Facteurs pris en considération

(2) Dans l'étude de la question de savoir si un fusionnement, réalisé ou proposé, entraînera vraisemblablement les gains en efficience visés au paragraphe (1), le Tribunal évalue si ces gains se traduiront :

(a) a significant increase in the real value of exports; or

a) soit en une augmentation relativement importante de la valeur réelle des exportations;

(b) a significant substitution of domestic products for imported products.

b) soit en une substitution relativement importante de produits nationaux à des produits étrangers.

Restriction

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

Restriction

(3) Pour l'application du présent article, le Tribunal ne conclut pas, en raison seulement d'une redistribution de revenu entre plusieurs personnes, qu'un fusionnement réalisé ou proposé a entraîné ou entraînera vraisemblablement des gains en efficience.

Schedule "B" – List of Exhibits

Exhibit No.	Description
P-A-001	Witness Statement of Mr. Alistair Pethick
CA-R-002	Purchase Receipts from Pethick Farms (Confidential – Level A)
P-R-003	Purchase Receipts from Pethick Farms
CA-R-004	2018 Purchase Receipts from Pethick Farms (Confidential – Level A)
P-R-005	2018 Purchase Receipts from Pethick Farms
CA-R-006	Excel Table Summarizing Purchases of Grain by Pethick Farms (Confidential – Level A)
P-R-007	Excel Table Summarizing Purchases of Grain by Pethick Farms
CA-R-008	2019 Purchase Receipts from Pethick Farms (Confidential – Level A)
P-R-009	2019 Purchase Receipts from Pethick Farms
CA-R-010	Purchase Contracts from Pethick Farms (Confidential – Level A)
P-R-011	Purchase Contracts from Pethick Farms
CA-R-012	Grain Purchase Order Agreement of Mr. Pethick (Confidential – Level A)
P-R-013	Grain Purchase Order Agreement of Mr. Pethick
P-A-014	Witness Statement of Mr. Harvey Brooks
P-R-015	PDQ Update Notice from Alberta Wheat Commission
P-R-016	"Where's My Region?" Map from PDQ
P-R-017	Rosetown "Where's My Region?" Map from PDQ
P-R-018	Virden "Where's My Region?" Map from PDQ
P-R-019	Moosomin "Where's My Region?" Map from PDQ
P-R-020	Fairlight "Where's My Region?" Map from PDQ
P-R-021	Wheat Market Outlook and Price Webpages from Sask Wheat

P-R-022	FOB Wheat Prices and Export Basis Prices Calculation pdf from Sask Wheat
P-R-023	Sask Wheat Strategic Plan 2018-2020
P-R-024	Sask Wheat Port Capacity Article
CB-A-025	Witness Statement of Mr. Chris Lincoln (Confidential – Level B)
P-A-026	Witness Statement of Mr. Chris Lincoln
CA-R-027	Chris Lincoln Deliveries 2016-2019 (Confidential – Level A)
P-R-028	Chris Lincoln Deliveries 2016-2019
CA-R-029	Chris Lincoln Grain Purchase Agreements (Confidential – Level A)
P-R-030	Chris Lincoln Grain Purchase Agreements
CA-R-031	Balance Sheet for CKB Lincoln Farms for Wawota and Maryfield (Confidential – Level A)
P-R-032	Balance Sheet for CKB Lincoln Farms for Wawota and Maryfield
P-A-033	Witness Statement of Mr. Ian Wagstaff
CA-R-034	Ian Wagstaff Deliveries 2016-2019 (Confidential – Level A)
P-R-035	Ian Wagstaff Deliveries 2016-2019
P-A-036	Witness Statement of Mr. Dean McQueen
CA-A-037	Witness Statement of Mr. Dean McQueen (Confidential – Level A)
CB-A-038	Witness Statement of Mr. Dean McQueen (Confidential – Level B)
CB-R-039	Competition Bureau RFIs (Confidential – Level B)
P-R-040	Competition Bureau RFIs
CA-R-041	Viterra's Response to the Competition Bureau RFI (Confidential – Level A)
P-R-042	Viterra's Response to the Competition Bureau RFI
P-R-043	Canadian Grain Commission Statistics Webpage
P-R-044	Canadian Grain Commission Grain Deliveries at Prairie Points Webpage
P-A-045	Witness Statement of Mr. Ray Elliott

P-A-046	Bunge Limited General Terms and Conditions
P-A-047	Witness Statement of Mr. Brett Malkoske
CB-A-048	Witness Statement of Mr. Brett Malkoske (Confidential – Level B)
P-A-049	Reply Witness Statement of Mr. Brett Malkoske
CB-A-050	Reply Witness Statement of Mr. Brett Malkoske (Confidential – Level B)
CA-A-051	G3 Purchase Contract Terms and Conditions (Confidential – Level A)
P-A-052	G3 Purchase Contract Terms and Conditions
CA-R-053	G3's Response to the Competition Bureau RFI (Confidential – Level A)
P-R-054	G3's Response to the Competition Bureau RFI
P-A-055	Witness Statement of Ms. Darcy Jordan
CA-R-056	Cargill's Response to the Competition Bureau RFI (Confidential – Level A)
P-R-057	Cargill's Response to the Competition Bureau RFI
P-A-058	Witness Statement of Ms. Kara Hawryluk
CA-R-059	LDC's Response to the Competition Bureau RFI (Confidential – Level A)
P-R-060	LDC's Response to the Competition Bureau RFI
P-A-061	Witness Statement of Mr. Jeff Wildeman
P-A-062	Ceres Standard Terms and Conditions
CA-R-063	Ceres' Response to the Competition Bureau RFI (Confidential – Level A)
P-R-064	Ceres' Response to the Competition Bureau RFI
P-A-065	Witness Statement of Mr. Michael Irons
CA-R-066	ADM's Response to the Competition Bureau RFI (Confidential – Level A)
P-R-067	ADM's Response to the Competition Bureau RFI
P-A-068	Witness Statement of Mr. Bryce Geddes
P-A-069	Richardson Terms and Conditions for 2015-2016 Purchase Contracts

P-A-070	Richardson Terms and Conditions for 2016-2017 Purchase Contracts
P-A-071	Richardson Terms and Conditions for 2017-2018 Purchase Contracts
P-A-072	Richardson Terms and Conditions for 2018-2019 Purchase Contracts
CA-R-073	Richardson Yorkton's Response to the Competition Bureau RFI (Confidential – Level A)
P-R-074	Richardson Yorkton's Response to the Competition Bureau RFI
CA-R-075	Richardson Grain Elevators' Response to the Competition Bureau RFI (Confidential – Level A)
P-R-076	Richardson Grain Elevators' Response to the Competition Bureau RFI
P-R-077	Witness Statement of Mr. Kristjan Hebert
P-A-078	Print off from the HGV Website
P-A-079	Article "Stop Leaving Money in the Field. Learn the 5% Rule"
P-A-080	Extracts from Mr. Hebert 5% Rule Presentation
P-A-081	Transcripts from "Lessons Learned in Marketing" - Phoenix Group Podcast, dated January 15, 2018
CA-A-082	Email from Mr. Hebert, dated March 21, 2018 (Confidential – Level A)
CB-A-083	Email from Jeremy Krainik, dated October 24, 2018 (Confidential – Level B)
CA-A-084	P&H Contracts and GPOs with HGV (Confidential – Level A)
CA-A-085	HGV Transactions from the 2016 to 2021 Crop Years (Confidential – Level A)
CA-A-086	Settlement Receipts of HGV with Other Grain Elevators (Confidential – Level A)
CA-A-087	Email from Jeremy Krainik, dated November 29, 2019 (Confidential – Level A)
CA-A-088	Spreadsheet Containing HGV Transactions Collected from Third Party Data (Confidential – Level A)
P-A-089	Email from Jeremy Krainik, dated October 24, 2018

P-A-090	P&H Contracts and GPOs with HGV
P-A-091	HGV Transactions from the 2016 to 2021 Crop Years
P-A-092	Settlement Receipts of HGV with other Grain Elevators
P-A-093	Email from Jeremy Krainik, dated November 29, 2019
P-A-094	Spreadsheet Containing HGV Transactions Collected from Third Party Data
P-R-095	Witness Statement of Mr. Timothy Duncan
CB-A-096	Tim Duncan GPO, dated January 6, 2020 (Confidential – Level B)
P-A-097	Tim Duncan GPO, dated January 6, 2020
CB-A-098	Tim Duncan Fixed Price Contract, dated January 9, 2020 (Confidential – Level B)
P-A-099	Tim Duncan Fixed Price Contract, dated January 9, 2020
CA-A-100	Spreadsheet Containing Tim Duncan Transactions Collected from Third Party Data (Confidential – Level A)
P-A-101	Spreadsheet Containing Tim Duncan Transactions Collected from Third Party Data
CA-A-102	Tim Duncan Settlement Receipts for 2016 to 2020 (Confidential – Level A)
P-A-103	Tim Duncan Settlement Receipts for 2016 to 2020
P-R-104	Witness Statement of Mr. Edward Paull
CB-A-105	Ed Paull's P&H GPOs and Contracts (Confidential – Level B)
P-A-106	Ed Paull's P&H GPOs and Contracts
CA-A-107	Ed Paull's Spreadsheet Containing Deliveries from 2016-2019 (Confidential – Level A)
P-A-108	Ed Paull's Spreadsheet Containing Deliveries from 2016-2019
CA-A-109	Ed Paull's Receipts and Tickets with Third-Party Grain Companies (Confidential – Level A)
P-A-110	Ed Paull's Receipts and Tickets with Third-Party Grain Companies

CB-A-111	Text Exchange between Mr. Paull and Mr. Klippenstein, dated April 2, 2018 (Confidential – Level B)
P-A-112	Text Exchange between Mr. Paull and Mr. Klippenstein, dated April 2, 2018
CA-A-113	Transaction Level Data for Mr. Paull Collected from Third-Party Companies (Confidential – Level A)
P-A-114	Transaction Level Data for Mr. Paull Collected from Third-Party Companies
CA-R-115	Witness Statement of Mr. John Heimbecker (Confidential – Level A)
P-R-116	Witness Statement of Mr. John Heimbecker
CA-R-117	P&H Protein Spreads up to October 6, 2020 (Confidential – Level A)
P-R-118	P&H Protein Spreads up to October 6, 2020
CA-R-119	Updated Table of Sales by Commissioner's Farmer Witnesses to Virden and Moosomin Elevators to December 16, 2020 (Confidential – Level A)
P-R-120	Updated Table of Sales by Commissioner's Farmer Witnesses to Virden and Moosomin Elevators to December 16, 2020
CA-R-121	Reply Witness Statement of Mr. John Heimbecker (Confidential – Level A)
P-R-122	Reply Witness Statement of Mr. John Heimbecker
P-A-123	Screenshot from the P&H Direct App Taken October 22, 2020
CB-A-124	P&H PDQ Spot Pricing Information for Virden, January 2020 (Confidential – level B)
P-A-125	P&H PDQ Spot Pricing Information for Virden, January 2020
CB-A-126	P&H PDQ Deferred Pricing Information for Moosomin, April 2020 (Confidential – Level B)
P-A-127	P&H PDQ Deferred Pricing Information for Moosomin, April 2020
CB-A-128	P&H Contract with Tim Duncan (Confidential – Level B)
P-A-129	P&H Contract with Tim Duncan
CB-A-130	P&H Contract with Arrowdale Farms, dated April 18, 2018 (Confidential – Level B)

P-A-131	P&H Contract with Arrowdale Farms, dated April 18, 2018
CB-A-132	P&H PDQ Deferred Pricing Information (Confidential – Level B)
P-A-133	P&H PDQ Deferred Pricing Information
CB-A-134	Read-in Brief of the Commissioner of Competition (Confidential – Level B)
P-A-135	Read-in Brief of the Commissioner of Competition
CB-A-136	P&H Email Subject: Canola Basis, dated May 5, 2017 (Confidential – Level B)
P-A-137	P&H Email Subject: Canola Basis, dated May 5, 2017
CB-A-138	P&H Email with Alberta Wheat and Barley Subject: Bid Price, dated October 17, 2019 (Confidential – Level B)
P-A-139	P&H Email with Alberta Wheat and Barley Subject: Bid Price, dated October 17, 2019
P-A-140	Email from Mr. Hebert, dated March 21, 2018
P-A-141	Canola Data from Exhibit 1 to Mr. Heimbecker's Reply Witness Statement
CB-A-142	P&H Email Subject: Canola Price Comp, dated January 5, 2018 at 12:10 pm (Confidential – Level B)
P-A-143	P&H Email Subject: Canola Price Comp, dated January 5, 2018 at 12:10 pm
CB-A-144	P&H Email Subject: Canola Price Comp, dated January 5, 2018 at 12:19 pm (Confidential – Level B)
P-A-145	P&H Email Subject: Canola Price Comp, dated January 5, 2018 at 12:19 pm
CB-A-146	Moosomin Purchases for January 5, 2018 (Confidential – Level B)
P-A-147	Moosomin Purchases for January 5, 2018
P-A-148	P&H Email Subject: Gain From Your Grain, dated December 13, 2018
CB-A-149	P&H Email Subject: Gain From Your Grain, dated February 16, 2017 (Confidential – Level B)
P-A-150	P&H Email Subject: Gain From Your Grain, dated February 16, 2017

CB-A-151	P&H Email Subject: CWRS Protein Spreads, dated August 29, 2017 (Confidential – Level B)
P-A-152	P&H Email Subject: CWRS Protein Spreads, dated August 29, 2017
CB-A-153	P&H Email Subject: Competitors Protein Spreads, dated January 5, 2018 (Confidential – Level B)
P-A-154	P&H Email Subject: Competitors Protein Spreads, dated January 5, 2018
CB-A-155	Competitors Protein Spreads (Confidential – Level B)
P-A-156	Competitors Protein Spreads
CB-A-157	Notifiable Transaction Filing of P&H (Confidential – Level B)
P-A-158	Notifiable Transaction Filing of P&H
CB-A-159	P&H Basis Contract no. 157710 dated January 5, 2018 (Confidential – Level B)
P-A-160	P&H Basis Contract no. 157710 dated January 5, 2018
CB-A-161	P&H Fixed Price Contract no.157710-1 (Confidential – Level B)
P-A-162	P&H Fixed Price Contract no.157710-1
CB-A-163	P&H Basis Contract no. 157688 dated January 5, 2018 (Confidential – Level B)
P-A-164	P&H Basis Contract no. 157688 dated January 5, 2018
CB-A-165	P&H Fixed Price Contract no.157688-1 (Confidential – Level B)
P-A-166	P&H Fixed Price Contract no.157688-1
CB-R-167	P&H Shipped Tonnage Budget Fiscal 2021 (Confidential – Level B)
P-R-168	P&H Shipped Tonnage Budget Fiscal 2021
P-A-169	Expert report of Dr. Nathan Miller
CA-A-170	Expert report of Dr. Nathan Miller (Confidential – Level A)
CB-A-171	Expert report of Dr. Nathan Miller (Confidential – Level B)
P-A-172	Reply expert report of Dr. Nathan Miller

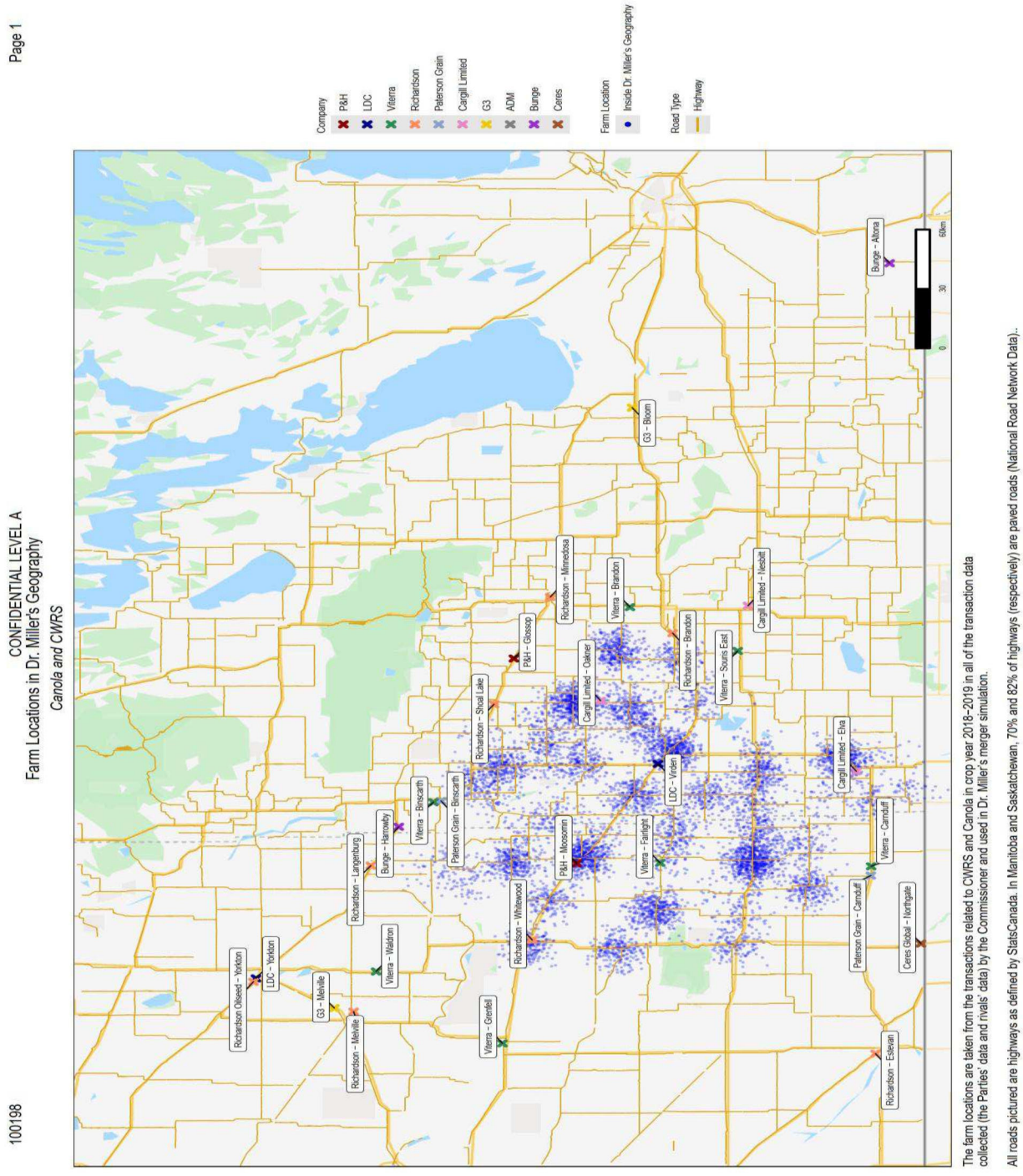
CA-A-173	Reply expert report of Dr. Nathan Miller (Confidential – Level A)
CB-A-174	Reply expert report of Dr. Nathan Miller (Confidential – Level B)
P-A-175	Qualifications of Dr. Nathan Miller
P-A-176	Demonstrative of Dr. Nathan Miller
CA-A-177	Demonstrative of Dr. Nathan Miller (Confidential – Level A)
P-R-178	Joint List of Issues for the Concurrent Expert Session
CA-R-179	Joint List of Issues for the Concurrent Expert Session (Confidential – Level A)
P-R-180	Expert report of Ms. Margaret Sanderson
CA-R-181	Expert report of Ms. Margaret Sanderson (Confidential – Level A)
P-R-182	Slides of Ms. Margaret Sanderson
CA-R-183	Slides of Ms. Margaret Sanderson (Confidential – Level A)
CB-R-184	Slides of Ms. Margaret Sanderson (Confidential – Level B)
P-R-185	Qualifications of Ms. Margaret Sanderson
CA-A-186	USB Key Containing the Back-up Documents to the Expert Reports of Dr. Nathan Miller (Confidential – Level A)
CA-R-187	USB Key Containing the Back-up Documents to the Expert Report of Ms. Margaret Sanderson (Confidential – Level A)
CA-A-188	Moosomin Business Plan for Fiscal Year 2020 (Confidential – Level A)
P-A-189	Moosomin Business Plan for Fiscal Year 2020
CA-A-190	Moosomin 2017 Business Plan (Confidential – Level A)
P-A-191	Moosomin 2017 Business Plan
CA-A-192	Relevant Results from Ms. Sanderson's HMT Calculations (Confidential – Level A)
P-A-193	Relevant Results from Ms. Sanderson's HMT Calculations
P-R-194	By-Laws and Rules of the Minneapolis Grain Exchange

P-A-195	Expert report of Mr. Andrew Harington
CA-A-196	Expert report of Mr. Andrew Harington (Confidential – Level A)
CB-A-197	Expert report of Mr. Andrew Harington (Confidential – Level B)
CA-A-198	USB Key Containing the Back-up Documents to the Expert Report of Mr. Andrew Harington (Confidential – Level A)
CA-A-199	Alistair Pethick Compendium (Confidential – Level A)
P-A-200	Alistair Pethick Compendium
CA-A-201	Ian Wagstaff Compendium (Confidential – Level A)
P-A-202	Ian Wagstaff Compendium
CA-A-203	Chris Lincoln Compendium (Confidential – Level A)
P-A-204	Chris Lincoln Compendium
CA-A-205	Ceres Compendium (Confidential – Level A)
P-A-206	Ceres Compendium
CA-A-207	Bunge Compendium (Confidential – Level A)
P-A-208	Bunge Compendium
CA-A-209	G3 Compendium (Confidential – Level A)
P-A-210	G3 Compendium
CA-A-211	Cargill Compendium (Confidential – Level A)
P-A-212	Cargill Compendium
CA-A-213	LDC Compendium (Confidential – Level A)
P-A-214	LDC Compendium
CA-A-215	Richardson Compendium (Confidential – Level A)
P-A-216	Richardson Compendium
CA-A-217	Viterra Compendium (Confidential – Level A)
P-A-218	Viterra Compendium

CA-A-219	Dr. Miller Compendium (Confidential – Level A)
P-A-220	Dr. Miller Compendium
P-A-221	Dr. Miller Public Documents Compendium
CA-A-222	Additional Documents to Be Relied upon Compendium (Confidential – Level A)
P-A-223	Additional Documents to Be Relied upon Compendium
CA-A-224	ADM Purchase Contract (Confidential – Level A)
P-A-225	ADM Purchase Contract
CA-R-226	Compilation of Documents re Alistair Pethick (Confidential – Level A)
P-R-227	Compilation of Documents re Alistair Pethick
CA-R-228	Compilation of Documents re [redacted] (Confidential – Level A)
P-R-229	Compilation of Documents re [redacted]
CA-R-230	Compilation of Documents re Chris Lincoln (Confidential – Level A)
P-R-231	Compilation of Documents re Chris Lincoln
CA-R-232	Compilation of Documents re [redacted] (Confidential – Level A)
P-R-233	Compilation of Documents re [redacted]
CA-R-234	Compilation of Documents re Tim Duncan (Confidential – Level A)
P-R-235	Compilation of Documents re Tim Duncan
CA-R-236	Compilation of Documents re Ian Wagstaff (Confidential – Level A)
P-R-237	Compilation of Documents re Ian Wagstaff
CA-R-238	Compilation of Documents Listed in Exhibit B to Ms. Sanderson's Expert Report (Confidential – Level A)
P-R-239	Compilation of Documents Listed in Exhibit B to Ms. Sanderson's Expert Report
CA-R-240	Compilation of Miscellaneous Documents (Confidential – Level A)
P-R-241	Compilation of Miscellaneous Documents

CA-R-242	Compilation of Additional Documents Added to Agreed Book (Confidential – Level A)
P-R-243	Compilation of Additional Documents Added to Agreed Book
CA-A-244	Agreed Statement of Facts (Confidential – Level A)
P-A-245	Agreed Statement of Facts
CB-A-246	Agreed Statement of Facts Related to Two Farmers (Confidential – Level B)
P-A-247	Agreed Statement of Facts Related to Two Farmers
P-R-248	Map with All Farm Locations
P-R-249	Map with Farmer Witnesses, Elevators and Crushers and Canadian Rail Lines
P-R-250	Map with Farm Locations in Dr. Miller's Geography
P-R-251	Map with Farmer Witnesses and Elevators and Crushers
P-R-252	Interactive Elevators and Crushers Map
P-A-253	List of Elevators

Schedule "C" – Map representing farm locations as well as Elevators and Crushers in Dr. Miller's geography



CANADA

CONSOLIDATION

CODIFICATION

Competition Tribunal Act

Loi sur le Tribunal de la concurrence

R.S.C. 1985, c. 19 (2nd Supp.)

S.R.C. 1985, ch. 19 (2e suppl.)

NOTE

[*1986, c. 26, assented to 17th June, 1986*]

NOTE

[*1986, ch. 26, sanctionné le 17 juin 1986*]

Current to January 25, 2023

Last amended on November 1, 2014

À jour au 25 janvier 2023

Dernière modification le 1 novembre 2014

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

Jurisdiction and Powers of the Tribunal

Jurisdiction

8 (1) The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII of the *Competition Act* and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under subsection 124.2(2) of that Act.

Powers

(2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

Power to penalize

(3) No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances.

R.S., 1985, c. 19 (2nd Supp.), s. 8; 1999, c. 2, s. 41; 2002, c. 16, s. 16.1.

Costs

8.1 (1) The Tribunal may award costs of proceedings before it in respect of reviewable matters under Parts VII.1 and VIII of the *Competition Act* on a final or interim basis, in accordance with the provisions governing costs in the *Federal Court Rules, 1998*.

Payment

(2) The Tribunal may direct by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

Award against the Crown

(3) The Tribunal may award costs against Her Majesty in right of Canada.

Costs adjudged to Her Majesty in right of Canada

(4) Costs adjudged to Her Majesty in right of Canada shall not be disallowed or reduced on taxation by reason only that counsel who earned the costs, or in respect of whose services the costs are charged, was a salaried officer of Her Majesty in right of Canada performing those services in the discharge of that counsel's duty and remunerated for those services by salary, or for that or any other reason was not entitled to recover any costs from

Compétence et pouvoirs du Tribunal

Compétence

8 (1) Les demandes prévues aux parties VII.1 ou VIII de la *Loi sur la concurrence*, de même que toute question s'y rattachant ou toute question qui relève de la partie IX de cette loi et qui fait l'objet d'un renvoi en vertu du paragraphe 124.2(2) de cette loi, sont présentées au Tribunal pour audition et décision.

Pouvoirs

(2) Le Tribunal a, pour la comparution, la prestation de serment et l'interrogatoire des témoins, ainsi que pour la production et l'examen des pièces, l'exécution de ses ordonnances et toutes autres questions relevant de sa compétence, les attributions d'une cour supérieure d'archives.

Outrage au Tribunal

(3) Personne ne peut être puni pour outrage au Tribunal à moins qu'un juge ne soit d'avis que la conclusion qu'il y a eu outrage et la peine sont justifiées dans les circonstances.

L.R. (1985), ch. 19 (2e suppl.), art. 8; 1999, ch. 2, art. 41; 2002, ch. 16, art. 16.1.

Frais

8.1 (1) Le Tribunal, saisi d'une demande prévue aux parties VII.1 ou VIII de la *Loi sur la concurrence*, peut, à son appréciation, déterminer, en conformité avec les *Règles de la Cour fédérale (1998)* applicables à la détermination des frais, les frais — même provisionnels — relatifs aux procédures dont il est saisi.

Détermination

(2) Le Tribunal peut désigner les créanciers et les débiteurs des frais, ainsi que les responsables de leur taxation ou autorisation.

Couronne

(3) Le Tribunal peut ordonner à Sa Majesté du chef du Canada de payer des frais.

Frais adjugés à Sa Majesté du chef du Canada

(4) Les frais qui sont adjugés à Sa Majesté du chef du Canada ne peuvent être refusés ni réduits lors de la taxation au seul motif que l'avocat pour les services duquel les frais sont justifiés ou réclamés était un fonctionnaire salarié de Sa Majesté du chef du Canada et, à ce titre, rémunéré pour les services qu'il fournissait dans le cadre de ses fonctions, ou bien n'était pas, de par son statut ou

Her Majesty in right of Canada in respect of the services so rendered.

Amounts to Receiver General

(5) Any money or costs awarded to Her Majesty in right of Canada in a proceeding in respect of which this section applies shall be paid to the Receiver General.

2002, c. 16, s. 17.

pour toute autre raison, admis à recouvrer de Sa Majesté du chef du Canada les frais pour les services ainsi rendus.

Versement au receveur général

(5) Les sommes d'argent ou frais accordés à Sa Majesté du chef du Canada sont versés au receveur général.

2002, ch. 16, art. 17.

Court of record

9 (1) The Tribunal is a court of record and shall have an official seal which shall be judicially noticed.

Cour d'archives

9 (1) Le Tribunal est une cour d'archives et il a un sceau officiel dont l'authenticité est admise d'office.

Proceedings

(2) All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

Procédures

(2) Dans la mesure où les circonstances et l'équité le permettent, il appartient au Tribunal d'agir sans formalisme, en procédure expéditive.

Interventions by persons affected

(3) Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the *Competition Act*, to make representations relevant to those proceedings in respect of any matter that affects that person.

Intervention des personnes touchées

(3) Toute personne peut, avec l'autorisation du Tribunal, intervenir dans les procédures se déroulant devant celui-ci, sauf celles intentées en vertu de la partie VII.1 de la *Loi sur la concurrence*, afin de présenter toutes observations la concernant à l'égard de ces procédures.

Summary dispositions

(4) On a motion from a party to an application made under Part VII.1 or VIII of the *Competition Act*, a judicial member may hear and determine the application in a summary way, in accordance with any rules on summary dispositions.

Procédure sommaire

(4) Sur requête d'une partie à une demande présentée en vertu des parties VII.1 ou VIII de la *Loi sur la concurrence* et en conformité avec les règles sur la procédure sommaire, un juge peut entendre la demande et rendre une décision à son égard selon cette procédure.

Decision

(5) The judicial member may dismiss the application in whole or in part if the member finds that there is no genuine basis for it. The member may allow the application in whole or in part if satisfied that there is no genuine basis for the response to it.

R.S., 1985, c. 19 (2nd Supp.), s. 9; 1999, c. 2, s. 42; 2002, c. 16, s. 18.

Pouvoirs du juge

(5) Le juge saisi de la requête peut rejeter ou accueillir, en totalité ou en partie, la demande s'il est convaincu que, soit la demande, soit la réponse, n'est pas véritablement fondée.

L.R. (1985), ch. 19 (2e suppl.), art. 9; 1999, ch. 2, art. 42; 2002, ch. 16, art. 18.

Organization of Work

Sittings of Tribunal

10 (1) Subject to section 11, every application to the Tribunal shall be heard before not less than three or more than five members sitting together, at least one of whom is a judicial member and at least one of whom is a lay member.

Judicial member to preside at hearings

(2) The Chairman shall designate a judicial member to preside at any hearing or, if the Chairman is present at a hearing, may preside himself.

Organisation du Tribunal

Séances du Tribunal

10 (1) Sous réserve de l'article 11, toute demande présentée au Tribunal est entendue par au moins trois mais au plus cinq membres siégeant ensemble et, parmi lesquels il doit y avoir au moins un juge et un autre membre.

Président de séance

(2) Le président désigne, pour chaque séance du Tribunal, un juge à titre de président, mais s'il est présent, il peut lui-même la présider.

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

Current to January 25, 2023

Last amended on January 13, 2022

À jour au 25 janvier 2023

Dernière modification le 13 janvier 2022

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

if the party against whom the order is made discloses a *prima facie* case why the order should not have been made.

Setting aside or variance

(2) On motion, the Court may set aside or vary an order

(a) by reason of a matter that arose or was discovered subsequent to the making of the order; or

(b) where the order was obtained by fraud.

Effect of order

(3) Unless the Court orders otherwise, the setting aside or variance of an order under subsection (1) or (2) does not affect the validity or character of anything done or not done before the order was set aside or varied.

ou d'une erreur ou à cause d'un avis insuffisant de l'instance.

Annulation

(2) La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :

a) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;

b) l'ordonnance a été obtenue par fraude.

Effet de l'ordonnance

(3) Sauf ordonnance contraire de la Cour, l'annulation ou la modification d'une ordonnance en vertu des paragraphes (1) ou (2) ne porte pas atteinte à la validité ou à la nature des actes ou omissions antérieurs à cette annulation ou modification.

PART 11

Costs

Awarding of Costs Between Parties

Discretionary powers of Court

400 (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

Crown

(2) Costs may be awarded to or against the Crown.

Factors in awarding costs

(3) In exercising its discretion under subsection (1), the Court may consider

(a) the result of the proceeding;

(b) the amounts claimed and the amounts recovered;

(c) the importance and complexity of the issues;

(d) the apportionment of liability;

(e) any written offer to settle;

(f) any offer to contribute made under rule 421;

(g) the amount of work;

PARTIE 11

Dépens

Adjudication des dépens entre parties

Pouvoir discrétionnaire de la Cour

400 (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

La Couronne

(2) Les dépens peuvent être adjugés à la Couronne ou contre elle.

Facteurs à prendre en compte

(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :

a) le résultat de l'instance;

b) les sommes réclamées et les sommes recouvrées;

c) l'importance et la complexité des questions en litige;

d) le partage de la responsabilité;

e) toute offre écrite de règlement;

f) toute offre de contribution faite en vertu de la règle 421;

(h) whether the public interest in having the proceeding litigated justifies a particular award of costs;

(i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;

(j) the failure by a party to admit anything that should have been admitted or to serve a request to admit;

(k) whether any step in the proceeding was

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(l) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;

(m) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;

(n) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299;

(n.1) whether the expense required to have an expert witness give evidence was justified given

(i) the nature of the litigation, its public significance and any need to clarify the law,

(ii) the number, complexity or technical nature of the issues in dispute, or

(iii) the amount in dispute in the proceeding; and

(o) any other matter that it considers relevant.

g) la charge de travail;

h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;

i) la conduite d'une partie qui a eu pour effet d'abréger ou de prolonger inutilement la durée de l'instance;

j) le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;

k) la question de savoir si une mesure prise au cours de l'instance, selon le cas :

(i) était inappropriée, vexatoire ou inutile,

(ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;

l) la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;

m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;

n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;

n.1) la question de savoir si les dépenses engagées pour la déposition d'un témoin expert étaient justifiées compte tenu de l'un ou l'autre des facteurs suivants :

(i) la nature du litige, son importance pour le public et la nécessité de clarifier le droit,

(ii) le nombre, la complexité ou la nature technique des questions en litige,

(iii) la somme en litige;

o) toute autre question qu'elle juge pertinente.

Tariff B

(4) The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs.

Tarif B

(4) La Cour peut fixer tout ou partie des dépens en se reportant au tarif B et adjuger une somme globale au lieu ou en sus des dépens taxés.

Court File No. CT-2021-002

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF the acquisition by Secure Energy Services Inc. of all of the issued and outstanding shares of Tervita Corportation;

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

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

SECURE ENERGY SERVICES INC.

Respondent

BOOK OF AUTHORITIES

DEPARTMENT OF JUSTICE CANADA
Attorney General of Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau QC K1A 0C9

Jonathan Hood
Paul Klippenstein
Ellé Nekiar

Tel: 647-625-6782
Fax: 819-953-9267

Counsel to the Commissioner of Competition