

COMPETITION TRIBUNAL
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OTTAWA, ONT.

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CT-2023-003

THE COMPETITION TRIBUNAL

IN THE MATTER OF an Application by the Commissioner of Competition for an order under sections 74.01 and 74.1 of the *Competition Act*, RSC 1985, c C-34.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- and -

CINEPLEX INC.

Respondent

**BOOK OF AUTHORITIES OF THE RESPONDENT
(COSTS)**

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T-2023-18
2021 FC 186

T-2023-18
2021 CF 186

Allergan Inc. (Plaintiff)

Allergan Inc. (demanderesse)

v.

c.

Sandoz Canada Inc. (Defendant)

Sandoz Canada Inc. (défenderesse)

and

et

Kissei Pharmaceutical Co., Ltd. (Defendant/Patent Owner)

Kissei Pharmaceutical Co., Ltd. (défenderesse/ propriétaire de brevet)

- and -

- et -

Sandoz Canada Inc. (Plaintiff by Counterclaim)

Sandoz Canada Inc. (demanderesse reconventionnelle)

v.

c.

Allergan Inc. and Kissei Pharmaceutical Co., Ltd. (Defendants by Counterclaim)

Allergan Inc. et Kissei Pharmaceutical Co., Ltd. (défenderesses reconventionnelles)

INDEXED AS: ALLERGAN INC. v. SANDOZ CANADA INC.

RÉPERTORIÉ : ALLERGAN INC. c. SANDOZ CANADA INC.

Federal Court, Crampton C.J.—Ottawa, February 26, 2021.

Cour fédérale, juge en chef Crampton—Ottawa, 26 février 2021.

Practice — Costs — Reasons for order concerning costs claimed in relation to patent infringement action filed by plaintiff Allergan Inc. (Allergan) against defendant Sandoz Canada Inc. (Sandoz), Sandoz's counterclaim — Allergan, exclusive licensee of Canadian Patent No. 2507002 ('002 patent) commencing infringement action against Sandoz in underlying action — Sandoz successful on one issue, Allergan successful on two other issues — Parties invited to make submissions on costs — Issue whether to fix costs by way of lump sum — Granting lump sum award becoming increasingly common — Lump sum award furthering objective of securing just, most expeditious, least expensive determination of proceedings — Factors to consider set out in Federal Courts Rules, r. 400(3)— Successful party generally entitled to its costs, even if not entirely successful — Possible to depart from general rule in cases of truly “divided success” or “mixed results” — Line of cases holding that where prevailing defendant not succeeding with respect to all of its allegations of invalidity, this outcome not constituting “divided success” or “mixed results”, considered binding herein — Sandoz thus entitled to its costs — Assessment of appropriate lump sum award

Pratique — Frais et dépens — Motifs d'ordonnance concernant les dépens réclamés à l'égard de l'action en contrefaçon de brevet déposée par la demanderesse, Allergan Inc. (Allergan), contre la défenderesse, Sandoz Canada Inc. (Sandoz), ainsi que la demande reconventionnelle introduite par Sandoz — Dans l'action principale, Allergan, la titulaire exclusive d'une licence sur le brevet canadien n° 2507002 (le brevet '002), a intenté contre Sandoz une action en contrefaçon — Sandoz a obtenu gain de cause à l'égard d'une question et Allergan a eu gain de cause pour ce qui est des deux autres questions — Les parties ont été invitées à présenter des observations concernant les dépens — Il s'agissait de savoir s'il convenait de fixer les dépens sous forme de somme globale — Il est devenu de plus en plus courant d'adjuger une somme globale — L'adjudication d'une somme facilite l'objectif consistant à apporter une solution au litige qui soit juste et la plus expéditive et économique possible — Les facteurs à prendre en considération sont énoncés au paragraphe 400(3) des Règles des Cours fédérales — La règle générale veut que la partie victorieuse ait droit aux dépens, même si elle n'a pas eu gain de cause sur chacun des arguments qu'elle a avancés — Il est possible de diverger de

beginning at mid-point of 25–50 percent range — Reasonable, appropriate here to award costs on lump sum basis — Plaintiff Allergan Inc. ordered to pay lump sum amount to defendant Sandoz.

These were the reasons for an order concerning the costs claimed in relation to the patent infringement action filed by the plaintiff Allergan Inc. (Allergan) against the defendant Sandoz Canada Inc. (Sandoz), as well as the latter's counterclaim in this proceeding.

In the underlying action, Allergan, the exclusive licensee of Canadian Patent No. 2507002 ('002 patent) that pertains to the prescription drug RAPAFL0, commenced an infringement action against Sandoz pursuant to subsection 6(1) of the *Patented Medicines (Notice of Compliance) Regulations*. Sandoz filed a statement of defence and counterclaim in which it denied that its product would infringe the '002 patent and claimed that the patent was invalid on the grounds of obviousness. A judgment was issued in December 2020 addressing the merits of Allergan's action and Sandoz's counterclaim. Three principal issues were addressed in that judgment: whether Sandoz's product would infringe the '002 patent; whether representations that were made during the patent application process on behalf of Kissei Pharmaceuticals Co., Ltd. (Kissei) could be introduced as evidence in this proceeding; and whether the '002 patent was invalid on the ground of obviousness. Sandoz was successful on the first issue and Allergan was successful on the second and third issues. The parties were invited to make submissions on costs to identify a lump sum amount that reflected certain identified factors as well as any additional relevant factors, including those identified in rule 400 of the *Federal Courts Rules* (Rules).

The main issue herein was whether it was reasonable to fix the costs by way of a lump sum.

Held, the plaintiff Allergan should be ordered to pay a lump sum amount to the defendant Sandoz.

In recent years, the granting of a lump sum award has become increasingly common. To the extent that a lump sum award can be expected to reduce the time and effort typically

cette approche dans les cas réels de « succès partagé » ou de « succès partiels » — Était contraignante la jurisprudence portant que la défense victorieuse ne constitue pas un « succès partagé » ni un « succès partiel » lorsque le défendeur ne réussit pas à imposer l'ensemble de ses allégations d'invalidité — Sandoz avait donc droit aux dépens — La taxation d'une somme globale appropriée débute au milieu de la fourchette de 25 à 50 p. 100 — Il était raisonnable et approprié en l'espèce d'adjuger les dépens sous la forme d'une somme globale — Il a été ordonné à la demanderesse, Allergan Inc., de verser une somme globale à la défenderesse, Sandoz.

Il s'agissait de motifs d'ordonnance concernant les dépens réclamés à l'égard de l'action en contrefaçon de brevet déposée par la demanderesse, Allergan Inc. (Allergan), contre la défenderesse, Sandoz Canada Inc. (Sandoz), ainsi que la demande reconventionnelle introduite par cette dernière dans la présente instance.

Dans l'action principale, Allergan, la titulaire exclusive d'une licence sur le brevet canadien n° 2507002 (le brevet '002), qui concerne le médicament sur ordonnance RAPAFL0, a intenté contre Sandoz une action en contrefaçon, conformément au paragraphe 6(1) du *Règlement sur les médicaments brevetés (avis de conformité)*. Sandoz a déposé une défense et demande reconventionnelle, dans laquelle elle niait que son produit contreferaient le brevet '002 et soutenait que celui-ci était invalide pour des motifs d'évidence. Un jugement sur le fond a été rendu en décembre 2020 concernant l'action d'Allergan et la demande reconventionnelle de Sandoz. Trois questions principales ont été examinées dans ce jugement : la question de savoir si le produit de Sandoz contreviendrait au brevet '002; si des observations présentées durant le processus de demande de brevet pour le compte de Kissei Pharmaceuticals Co., Ltd. (Kissei) pouvaient être produites en preuve en l'espèce; et si le brevet '002 était invalide pour cause d'évidence. Sandoz a obtenu gain de cause à l'égard de la première question et Allergan a eu gain de cause pour ce qui est des deuxième et troisième questions. Les parties ont été invitées à présenter des observations concernant les dépens afin de trouver une somme globale qui tienne compte de certains facteurs cernés ainsi que tout autre facteur pertinent, notamment ceux prévus à la règle 400 des *Règles des Cours fédérales* (Règles).

Il s'agissait principalement de savoir dans la présente affaire s'il était raisonnable de fixer les dépens sous forme de somme globale.

Jugement : il doit être ordonné à la demanderesse Allergan de verser une somme globale à la défenderesse Sandoz.

Au cours des dernières années, il est devenu de plus en plus courant d'adjuger une somme globale. Dans la mesure où l'on peut s'attendre à ce que l'adjudication d'une somme globale

associated with preparing and reviewing the type of detailed bill of costs that is required for the purposes of an assessment under Tariff B, it will further the objective of securing “the just, most expeditious and least expensive determination” of proceedings and should be favoured. The principal factors the Court may consider in its determination of a cost award are set forth in a non-exhaustive list in subsection 400(3) of the Rules. The general rule is that the successful party is entitled to have its costs, even if it was not successful in respect of each and every argument it pursued. However, the Court may depart from this approach in cases of truly “divided success” or “mixed results”. The case law is split on the issue of whether the successful defence of a patent infringement action constitutes “divided success” when the defendant in the main action is not successful with respect to one or more other allegations of invalidity. In one line of cases, the cost award in favour of the defendant who prevailed was reduced to reflect the fact that it did not succeed with respect to some or all of its allegations of invalidity. The second line of cases holds that this type of outcome does not constitute “divided success” or “mixed results” and that therefore the defendant is entitled to its costs. The second line of cases was considered to be binding herein. With this in mind, where a defendant prevails with respect to either the plaintiff’s allegation of infringement or one or more of its allegations of invalidity, an assessment of an appropriate lump sum award should begin at the mid-point of the 25–50 percent range. This would provide a better incentive than the lower end of this range for parties to conduct their litigation in a manner that permits the Court to achieve its objective of shorter trials in the drug patent area.

It was reasonable and appropriate in this case to award costs on a lump sum basis, calculated as a percentage of the prevailing party’s legal fees. Among the relevant factors analysed in this case were the lump sum versus assessment pursuant to Tariff B of the Rules, the result of the proceeding, the importance and complexity of the issues, written offers to settle, and any conduct that tended to shorten or unnecessarily lengthen the proceeding. Sandoz succeeded in defending Allergan’s patent infringement allegation in the main action of this proceeding. However, it was unsuccessful with respect to its counterclaim based on obviousness and the relevance of the prosecution history of the ‘002 patent. There should be consequences for having advanced and then failed to succeed on these issues. Granting Allergan its costs in relation to these issues, or at least reducing the award to which Sandoz would otherwise be entitled, would be consistent with the important rationale of sanctioning behaviour that increases the duration and expense of litigation. However, the controlling case law did not permit granting Allergan its costs in relation to the

réduire le temps et les efforts généralement requis par la préparation et l’examen du type de mémoire de dépens détaillé nécessaire aux fins d’une taxation au titre du tarif B, elle facilitera davantage l’objectif consistant à apporter « une solution au litige qui soit juste et la plus expéditive et économique possible » et devrait être favorisée. Les principaux facteurs dont la Cour peut tenir compte dans son calcul des dépens à adjuger sont énoncés dans une liste non exhaustive au paragraphe 400(3) des Règles. La règle générale veut que la partie victorieuse ait droit aux dépens, même si elle n’a pas eu gain de cause sur chacun des arguments qu’elle a avancés. Cependant, la Cour peut diverger de cette approche dans les cas réels de « succès partagé » ou de « succès partiels ». La jurisprudence est divisée quant à la question de savoir si la défense victorieuse dans une action en contrefaçon de brevet constitue un « succès partagé » lorsque le défendeur dans l’action principale ne parvient pas à faire aboutir au moins une autre allégation d’invalidité. Dans certaines décisions, les montants adjugés au défendeur ayant eu gain de cause ont été réduits pour tenir compte du fait qu’il n’avait pas réussi à imposer certaines ou l’ensemble de ses allégations d’invalidité. Un autre courant jurisprudentiel a explicitement jugé que ce type de résultats ne constituait pas un « succès partagé » ni des « succès partiels » et, donc, que le défendeur a droit aux dépens. Le second courant jurisprudentiel était contraignant en l’espèce. En gardant cela à l’esprit, lorsqu’un défendeur dans l’action principale a gain de cause à l’égard de l’allégation de contrefaçon du demandeur, ou d’au moins une de ses allégations d’invalidité, la taxation d’une somme globale appropriée devrait débiter au milieu de la fourchette de 25 à 50 p. 100. L’adoption du milieu, plutôt que de l’extrémité inférieure, de la fourchette, inciterait davantage les parties à mener leur litige d’une manière qui permette à la Cour d’atteindre son objectif de raccourcir les procès liés aux brevets de médicaments.

Il était raisonnable et approprié en l’espèce d’adjuger les dépens sous la forme d’une somme globale, correspondant à un pourcentage des honoraires d’avocat de la partie victorieuse. Les facteurs pertinents suivants figurent parmi ceux qui ont été analysés dans la présente affaire : la somme globale par rapport à la taxation au titre du tarif B des Règles, le résultat de l’instance, l’importance et la complexité des questions en litige, les offres écrites de règlement et tout comportement ayant eu pour effet d’abrèger ou de prolonger inutilement la durée de l’instance. Sandoz s’est défendue avec succès contre l’allégation de contrefaçon de brevet avancée par Allergan dans l’action principale. Cependant, elle n’a pas eu gain de cause à l’égard de sa demande reconventionnelle fondée sur l’évidence ainsi que la pertinence de l’historique des poursuites du brevet ‘002. Le fait d’avoir soulevé ces questions puis échoué à les faire aboutir devrait être assorti de conséquences. Adjuger à Allergan des dépens à l’égard de ces questions, ou à tout le moins réduire ceux auxquels Sandoz aurait autrement droit, serait totalement conforme à l’objectif important de sanctionner

two issues on which it prevailed, or to reduce Sandoz's award to reflect Allergan's success on those issues. In the past, the practice of alleging many grounds of invalidity appears to have been ingrained in the drug patent bar. This has considerably increased the time and cost associated with drug patent disputes, and has consumed substantial scarce Court resources. This is an important part of the existing culture that has to change. The Court will not hesitate to use its discretion with respect to costs to support that change, when it considers it appropriate to do so.

Allergan was ordered to pay a lump sum amount to Sandoz, who ultimately prevailed in the main action. Among other things, the award for legal fees included an upward adjustment to reflect the fact that Sandoz made a *bona fide* written offer to settle that would have provided Allergan with a more favourable outcome than what it ultimately achieved by continuing on to trial. Given that Kissei completely prevailed in its defence, it was awarded reasonable costs and disbursements.

STATUTES AND REGULATIONS CITED

Federal Courts Rules, SOR/98-106, rr. 3, 400, 407, 420, Tariff B, column IV.
Patent Act, R.S.C., 1985, c. P-4, ss. 53.1, 60(1).
Patented Medicines (Notice of Compliance) Regulations, SOR/93-133, ss. 5(3), 6(1),(2), 8.

CASES CITED

CONSIDERED:

British Columbia (Minister of Forests) v. Okanagan Indian Band, 2003 SCC 71, [2003] 3 S.C.R. 371; *Air Canada v. Thibodeau*, 2007 FCA 115; *Nova Chemicals Corporation v. Dow Chemical Company*, 2017 FCA 25; *Venngo Inc. v. Concierge Connection Inc. (Perkopolis)*, 2017 FCA 96, 146 C.P.R. (4th) 182, leave to appeal to S.C.C. refused, [2017] 2 S.C.R. x, [2017] S.C.C.A. No. 302 (QL); *Seedlings Life Science Ventures, LLC v. Pfizer Canada ULC*, 2020 FC 505, 172 C.P.R. (4th) 375; *Bauer Hockey Ltd. v. Sport Maska Inc. (CCM Hockey)*, 2020 FC 862, 176 C.P.R. (4th) 245; *Teva Canada Limited v. Janssen Inc.*, 2018 FC 1175; *Canwell Enviro-Industries Ltd. v. Baker Petrolite Corp.*, 2002 FCA 482, 21 C.P.R. (4th) 349.

les comportements ayant pour effet de prolonger la durée et d'augmenter les coûts du litige. Cependant, la jurisprudence dominante ne permet pas d'accorder à Allergan des dépens en ce qui touche les deux questions sur lesquelles elle a prévalu, ou de réduire la somme adjugée à Sandoz pour tenir compte du succès d'Allergan à cet égard. Dans le passé, il semble que la pratique consistant à alléguer de nombreux motifs d'invalidité s'est enracinée dans le milieu des avocats spécialisés dans les brevets de médicaments. Cette pratique a eu pour effet d'augmenter considérablement le temps et les coûts engagés dans les litiges relatifs aux brevets de médicaments, et de mobiliser une part importante des ressources judiciaires déjà limitées. Il s'agit là d'un aspect notable de la mentalité présente qui doit changer. La Cour n'hésitera pas à user de son pouvoir discrétionnaire à l'égard des dépens pour appuyer ce changement, lorsqu'elle estimera approprié de le faire.

Il a été ordonné à Allergan de verser une somme globale à Sandoz, qui a en fin de compte prévalu dans l'action principale. Entre autres choses, les honoraires d'avocat ont été majorés pour tenir compte du fait que Sandoz avait fait, de bonne foi, une offre écrite de règlement, laquelle aurait fait bénéficier à Allergan d'un résultat plus favorable que ce qu'elle a obtenu en fin de compte en poursuivant le procès. Comme Kissei a complètement prévalu dans sa défense, elle s'est vue adjuger des dépens et des frais raisonnables.

LOIS ET RÈGLEMENTS CITÉS

Loi sur les brevets, L.R.C. (1985), ch. P-4, art. 53.1, 60(1).
Règlement sur les médicaments brevetés (avis de conformité), DORS/93-133, art. 5(3), 6(1),(2), 8.
Règles des Cours fédérales, DORS/98-106, règles, 3, 400, 407, 420, tarif B, colonne IV.

JURISPRUDENCE CITÉE

DÉCISIONS EXAMINÉES :

Colombie-Britannique (Ministre des Forêts) c. Banque indienne Okanagan, 2003 CSC 71, [2003] 3 R.C.S. 371; *Air Canada c. Thibodeau*, 2007 CAF 115; *Nova Chemicals Corporation c. Dow Chemical Company*, 2017 CAF 25; *Venngo Inc. c. Concierge Connection Inc. (Perkopolis)*, 2017 CAF 96, autorisation de pourvoi à la C.S.C. refusée, [2017] 2 R.C.S. x, [2017] C.S.C.R. n° 302 (QL); *Seedlings Life Science Ventures, LLC c. Pfizer Canada SRI*, 2020 CF 505; *Bauer Hockey Ltd. c. Sport Maska Inc. (CCM Hockey)*, 2020 CF 862; *Teva Canada Limited c. Janssen Inc.*, 2018 CF 1175; *Canwell Enviro-Industries Ltd. c. Baker Petrolite Corp.*, 2002 CAF 482.

REFERRED TO:

Eli Lilly and Company v. Teva Canada Limited, 2011 FCA 220; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38; *Philip Morris Products S.A. v. Marlboro Canada Limited*, 2015 FCA 9; *Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc.*, 2002 FCA 417, [2003] 2 F.C. 451; *Barzelex Inc. v. EBN Al Waleed (The)* (1999), 94 A.C.W.S. (3d) 434, [1999] F.C.J. No. 2002 (QL) (T.D.), affd 2001 FCA 111, (2001), 107 A.C.W.S. (3d) 353; *Pfizer Canada Inc. v. Novopharm Limited*, 2010 FC 668, 85 C.P.R. (4th) 300; *Sanofi-Aventis Canada Inc. v. Novopharm Limited*, 2009 FC 1139, 183 A.C.W.S. (3d) 371, affd 2012 FCA 265; *Apotex Inc. v. Sanofi-Aventis*, 2012 FC 318; *Dennis v. Canada*, 2017 FC 1011; *Bernard v. Professional Institute of the Public Service of Canada*, 2020 FCA 211; *Novopharm Limited v. Eli Lilly and Company*, 2010 FC 1154; *Lainco Inc. v. Commission scolaire des Bois-Francs*, 2018 FC 186; *Loblaws Inc. v. Columbia Insurance Company*, 2019 FC 1434, 172 C.P.R. (4th) 327; *Raydan Manufacturing Ltd. v. Emmanuel Simard & Fils (1983) Inc.*, 2006 FCA 293, 53 C.P.R. (4th) 178; *Eurocopter v. Bell Helicopter Textron Canada Limitée*, 2012 FC 842, 415 F.T.R. 29, affd 2013 FCA 220, 449 N.R. 306; *Bristol-Myers Squibb Canada Co. v. Teva Canada Limited*, 2016 FC 991; *Fournier Pharma Inc. v. Canada (Health)*, 2012 FC 1121; *GlaxoSmithKline Inc. v. Pharmascience Inc.*, 2008 FC 849; *Illinois Tool Works Inc. v. Cobra Anchors Co.*, 2003 FCA 358, 29 C.P.R. (4th) 417; *Betsler-Zilevitch v. Petrochina Canada Ltd.*, 2021 FC 151; *Johnson & Johnson Inc. v. Boston Scientific Ltd.*, 2008 FC 817; *Mediatube Corp. v. Bell Canada*, 2017 FC 495; *Farmobile, LLC v. Farmers Edge Inc.*, 2018 FC 1269; *Canada (Attorney General) v. Chrétien*, 2011 FCA 53, 198 A.C.W.S. (3d) 296; *Betsler-Zilevitch v. Petrochina Canada Ltd.*, 2021 FC 85, 182 C.P.R. (4th) 175; *Pelletier v. Canada (Attorney General)*, 2006 FCA 418.

AUTHORS CITED

Federal Court. “Case and Trial Management Guidelines for Complex Proceedings and Proceedings under the *PM(NOC) Regulations*”, online: <www.fct-cf.gc.ca>.

REASONS for order concerning the costs claimed in relation to the patent infringement action filed by the plaintiff Allergan Inc. against the defendant Sandoz Canada Inc., as well as the latter’s counterclaim. A judgment with respect to that action and counterclaim was issued in December 2020 (2020 FC 1189). Plaintiff

DÉCISIONS CITÉES :

Eli Lilly and Company c. Teva Canada Limited, 2011 CAF 220; *Little Sisters Book and Art Emporium c. Canada (Commissaire des Douanes et du Revenu)*, 2007 CSC 2, [2007] 1 R.C.S. 38; *Philip Morris Products S.A. c. Marlboro Canada Limitée*, 2015 CAF 9; *Consorzio del Prosciutto di Parma c. Maple Leaf Meats Inc.*, 2002 CAF 417, [2003] 2 C.F. 451; *Barzelex Inc. c. EBN Al Waleed (Le)*, [1999] A.C.F. n° 2002 (QL) (1^{re} inst.), conf. par 2001 CAF 111; *Pfizer Canada Inc. c. Novopharm Limited*, 2010 CF 668; *Sanofi-Aventis Canada Inc. c. Novopharm Limited*, 2009 CF 1139, conf. par 2012 CAF 265; *Apotex Inc. c. Sanofi-Aventis*, 2012 CF 318; *Dennis c. Canada*, 2017 CF 1011; *Bernard c. Canada (Institut professionnel de la fonction publique)*, 2020 CAF 211; *Novopharm Limited c. Eli Lilly and Company*, 2010 CF 1154; *Lainco Inc. c. Commission scolaire des Bois-Francs*, 2018 CF 186; *Loblaws Inc. c. Columbia Insurance Company*, 2019 CF 1434; *Raydan Manufacturing Ltd. c. Emmanuel Simard & Fils (1983) Inc.*, 2006 CAF 293; *Eurocopter c. Bell Helicopter Textron Canada Limitée*, 2012 CF 842, conf. par 2013 CAF 220; *Bristol-Myers Squibb Canada Co. c. Teva Canada Limitée*, 2016 CF 991; *Fournier Pharma Inc. c. Canada (Santé)*, 2012 CF 1121; *GlaxoSmithKline Inc. c. Pharmascience Inc.*, 2008 CF 849; *Illinois Tool Works Inc. c. Cobra Fixations Cie Ltée/Cobra Anchors Co.*, 2003 CAF 358; *Betsler-Zilevitch c. Petrochina Canada Ltd.*, 2021 CF 151; *Johnson & Johnson Inc. c. Boston Scientific Ltd.*, 2008 CF 817; *Mediatube Corp. c. Bell Canada*, 2017 CF 495; *Farmobile, LLC c. Farmers Edge Inc.*, 2018 CF 1269; *Canada (Procureur général) c. Chrétien*, 2011 CAF 53; *Betsler-Zilevitch c. Petrochina Canada Ltd.*, 2021 CF 85; *Pelletier c. Canada (Procureur général)*, 2006 CAF 418.

DOCTRINE CITÉE

Cour fédérale. « Lignes directrices sur la gestion des instances et des instructions pour les procédures complexes et les procédures visées par le *Règlement sur les médicaments brevetés (Avis de conformité)* », en ligne : <www.fct-cf.gc.ca>.

MOTIFS d’ordonnance concernant les dépens réclamés à l’égard de l’action en contrefaçon de brevet déposée par la demanderesse, Allergan Inc., contre la défenderesse, Sandoz Canada Inc., ainsi que la demande reconventionnelle introduite par cette dernière. Un jugement a été rendu en décembre 2020 (2020 CF 1189)

Allergan Inc. ordered to pay lump sum amount to defendant Sandoz Canada Inc.

relativement à l'action et à la demande reconventionnelle. Il a été ordonné à la demanderesse, Allergan Inc., de verser une somme globale à la défenderesse, Sandoz Canada Inc.

WRITTEN SUBMISSIONS BY:

David Tait, Steven Tanner, Sanjaya Mendis and Kendra Levasseur for plaintiff/defendant by counterclaim Allergan Inc.

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J. Sheldon Hamilton for defendant/patent owner/defendant by counterclaim Kissei Pharmaceutical Co., Ltd.

OBSERVATIONS ÉCRITES

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The following are the reasons for order and order rendered in English by

Ce qui suit est la version française des motifs de l'ordonnance et de l'ordonnance rendus par

[1] CRAMPTON C.J.: These reasons and the accompanying order concern the costs claimed in relation to the patent infringement action filed by the plaintiff Allergan Inc. (Allergan) against the defendant Sandoz Canada Inc. (Sandoz), as well as the latter's counterclaim in this proceeding.

[1] LE JUGE EN CHEF CRAMPTON : Les présents motifs et l'ordonnance y afférente concernent les dépens réclamés à l'égard de l'action en contrefaçon de brevet déposée par la demanderesse, Allergan Inc. (Allergan), contre la défenderesse, Sandoz Canada Inc. (Sandoz), ainsi que la demande reconventionnelle introduite par cette dernière dans la présente instance.

[2] For the reasons that follow, Allergan will be ordered to pay a lump sum amount of \$384,505.69 to Sandoz, who ultimately prevailed in the main action. The legal fees component of this award (\$272,000) represents approximately 45 percent of the fees incurred by Sandoz in connection with the issues in this proceeding, as ultimately narrowed. The other components are HST

[2] Pour les motifs qui suivent, il sera ordonné à Allergan de verser la somme globale de 384 505,69 \$ à Sandoz, qui a finalement eu gain de cause dans l'action principale. Les honoraires d'avocat compris dans cette somme (272 000 \$) représentent environ 45 p. 100 des honoraires engagés par Sandoz en lien avec les questions soulevées en l'espèce, telles qu'elles ont, en fin de

on those fees (\$35,360), plus Sandoz's reasonable disbursements (\$77,145.69). Among other things, the fee award amount includes an upward adjustment to reflect the fact that Sandoz made a *bona fide* written offer to settle that would have provided Allergan with a more favourable outcome than what it ultimately achieved by continuing on to trial.

[3] The defendant Kissei Pharmaceutical Co. Ltd. (Kissei) did not take any position in the main action. However, it filed a brief defence to Sandoz's counterclaim and incurred certain additional costs, primarily in relation to the discovery process. Given that Kissei completely prevailed in its defence, it will be awarded its reasonable costs of \$40,296.34. The fees component of this award (\$23,670) has been calculated in accordance with the upper end of column IV of Tariff B to the *Federal Courts Rules*, SOR/98-106 (the Rules). The other component of this award is Kissei's reasonable disbursements of \$16,626.34.

I. Background

[4] Allergan is the exclusive licensee of Canadian Patent No. 2507002 (the '002 Patent). That patent pertains to the prescription drug RAPAFLO[®], which is indicated for the treatment of benign prostatic hyperplasia. Kissei is the owner of that patent.

[5] In 2018, Sandoz sought approval from Health Canada to market a generic alternative to RAPAFLO[®] in Canada (the Sandoz Product). Soon thereafter, it served Allergan with a notice of allegation, as contemplated by subsection 5(3) of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 (the Regulations). Allergan then commenced an infringement action against Sandoz pursuant to subsection 6(1) of the Regulations. In its statement of claim, it named Kissei as a co-defendant. In response, Sandoz filed a statement of defence and counterclaim in which it denied that its product would infringe the '002 Patent and claimed

compte, été délimitées. Le restant de la somme correspond à la TVH sur les honoraires en question (35 360 \$), plus les débours raisonnables que Sandoz a engagés (77 145,69 \$). Entre autres choses, le montant des dépens accordés a été majoré pour tenir compte du fait que Sandoz avait fait, de bonne foi, une offre écrite de règlement, laquelle aurait fait bénéficier à Allergan d'un résultat plus favorable que ce qu'elle a obtenu en fin de compte en poursuivant le procès.

[3] La défenderesse Kissei Pharmaceutical Co. Ltd. (Kissei) n'a pas pris position dans l'action principale. Cependant, elle a déposé une défense succincte contre la demande reconventionnelle de Sandoz et a engagé certains frais supplémentaires, principalement en rapport avec le processus de communication préalable. Comme elle a eu complètement gain de cause dans sa défense, Kissei se verra adjuger à titre de dépens les frais raisonnables qu'elle a engagés, lesquels s'élèvent à 40 296,34 \$. Les honoraires compris dans cette somme (23 670 \$) ont été calculés suivant l'échelon supérieur de la colonne IV du tarif B des *Règles des Cours fédérales*, DORS/98-106 (les Règles). Le restant de la somme correspond aux débours raisonnables engagés par Kissei, lesquels s'élèvent à 16 626,34 \$.

I. Le contexte

[4] Allergan est la titulaire exclusive d'une licence sur le brevet canadien n° 2507002 (le brevet '002). Ce brevet concerne le RAPAFLO[®], un médicament sur ordonnance indiqué dans le traitement de l'hyperplasie prostatique bénigne. Kissei est la titulaire du brevet.

[5] En 2018, Sandoz a demandé à Santé Canada l'autorisation de commercialiser au Canada une version générique de RAPAFLO[®] (le produit Sandoz). Peu après, elle a signifié à Allergan un avis d'allégation, comme le prévoit le paragraphe 5(3) du *Règlement sur les médicaments brevetés (avis de conformité)*, DORS/93-133 (le Règlement). Allergan a alors intenté contre elle une action en contrefaçon, conformément au paragraphe 6(1) du Règlement, désignant Kissei comme codéfenderesse dans sa déclaration. En réponse, Sandoz a déposé une défense et demande reconventionnelle, dans laquelle elle niait que son produit contreferaient le brevet '002 et

that the patent is invalid on the grounds of obviousness, overbreadth and insufficiency. However, it ultimately narrowed its counterclaim to a single allegation of invalidity based on obviousness. Sandoz has confirmed that the costs it is now seeking do not include aspects of the counterclaim that were not ultimately pursued (including the claims based on overbreadth and insufficiency). Indeed, Sandoz has also excluded the costs associated with the preparation of the counterclaim itself.

[6] Allergan's statement of claim also alleged that the Sandoz Product would infringe at least one of the claims in a second patent, namely, Canadian Patent No. 2496780 (the '780 Patent). Once again, Sandoz claimed that its product would not infringe the patent and alleged that the patent is invalid on several grounds. Approximately one week before the trial in this matter, the parties discontinued their dispute with respect to this second patent on consent, and on a without cost basis. They have confirmed that they are not seeking costs incurred in respect of the '780 Patent, and I am satisfied that the approach they have respectively taken to the calculation of their costs represents a reasonable attempt to exclude those costs (including disbursements).¹

[7] In December 2020, I issued a judgment and reasons addressing the merits of Allergan's action and Sandoz's counterclaim: *Allergan Inc. v. Sandoz Canada Inc.*, 2020 FC 1189 (*Allergan*). There were three principal issues addressed. The first was whether the Sandoz Product will infringe the '002 Patent. (This issue essentially turned on claims construction.) The second was whether representations that were made during the patent application process on behalf of Kissei could be introduced as evidence in this proceeding, pursuant to section 53.1 of the *Patent Act*, R.S.C., 1985, c. P-4 (the

¹ Sandoz's approach in this regard is described in considerable detail at pages 3-13 of the affidavit of Marta Wysokinski, affirmed on January 27, 2021 (the Wysokinski affidavit). In essence, where it was readily apparent that work was performed solely in respect of the '780 Patent, the time recorded on the docket in question was excluded from Sandoz's calculations. Where Sandoz was unable to proceed in that fashion, it simply reduced various categories of its actual fees by 50 percent. It took a similar approach to disbursements. For its part, Allergan simply reduced certain items by 50 percent.

soutenait que celui-ci était invalide pour des motifs d'évidence, de portée excessive et d'insuffisance. Elle a toutefois fini par limiter la portée de sa demande reconventionnelle à une seule allégation d'invalidité fondée sur l'évidence. Sandoz a confirmé que les dépens qu'elle réclame à présent ne concernent pas les arguments de sa demande reconventionnelle auxquels a fini par renoncer (notamment les allégations fondées sur la portée excessive et l'insuffisance). En fait, elle a également exclu les dépens liés à la préparation de la demande reconventionnelle même.

[6] Dans sa déclaration, Allergan alléguait aussi que le produit Sandoz contreferaît au moins l'une des revendications d'un second brevet, à savoir le brevet canadien n° 2496780 (le brevet '780). Encore une fois, Sandoz a affirmé que son produit ne contreferaît pas le brevet en question et que celui-ci était invalide pour plusieurs motifs. Environ une semaine avant la tenue du procès dans la présente affaire, les parties ont mis fin sur consentement à leur différend concernant ce second brevet, et ce, sans dépens. Elles ont confirmé qu'elles ne sollicitaient pas les frais engagés à l'égard du brevet '780, et je suis convaincu qu'elles ont raisonnablement tenté, dans leurs calculs respectifs des dépens, d'exclure les frais en question (y compris les débours).¹

[7] En décembre 2020, j'ai rendu un jugement et des motifs sur le fond concernant l'action d'Allergan et la demande reconventionnelle de Sandoz : *Allergan Inc. c. Sandoz Canada Inc.*, 2020 CF 1189 (*Allergan*). Trois questions principales ont été examinées. La première était de savoir si le produit de Sandoz contreviendrait au brevet '002. (Cette question reposait essentiellement sur l'interprétation des revendications.) La deuxième, si des observations présentées durant le processus de demande de brevet pour le compte de Kissei pouvaient être produites en preuve en l'espèce, aux

¹ L'approche de Sandoz à ce sujet est décrite de manière très détaillée aux pages 3 à 13 de l'affidavit de Marta Wysokinski, souscrit sous serment le 27 janvier 2021 (l'affidavit Wysokinski). Essentiellement, lorsqu'il était évident que des travaux concernaient uniquement le brevet '780, les heures inscrites au dossier en cause étaient exclues des calculs de Sandoz. Lorsque cette dernière ne pouvait procéder de cette manière, elle réduisait simplement de 50 p. 100 les diverses catégories d'honoraires réellement engagés, adoptant une approche analogue à l'égard des débours. Pour sa part, Allergan a simplement réduit certains montants de 50 p. 100.

Act). The third was whether the '002 Patent is invalid on the ground of obviousness.

[8] Ultimately, I found in favour of Sandoz on the first issue and in favour of Allergan on the second and third issues. I then invited Allergan and Sandoz to make submissions regarding costs. In this regard, I encouraged them to attempt to reach a settlement on this issue, failing which to identify a lump sum amount that reflected certain identified factors as well as any additional relevant factors, including those identified in rule 400 of the Rules and the jurisprudence. After becoming aware that Kissei had incurred material cost beyond simply filing a brief defence to Sandoz's counterclaim, I also granted Kissei leave to make submissions on costs.

II. Overview of the Parties' Submissions

A. *Sandoz*

[9] Sandoz submits that in light of the fact that it prevailed in the infringement action initiated by Allergan, it is entitled to its costs, without any offset to reflect the fact that it was unsuccessful with respect to two of the three principal issues in the proceeding. Given the complexity of the proceeding and the fact that Sandoz also made two offers to settle approximately two months prior to trial, it requests a lump sum award reflecting 50 percent of its assessable fees plus its reasonable disbursements and HST, for a total costs award of \$462,876.45.

[10] In the alternative, Sandoz requests a lump sum award of 30 percent of its assessable fees plus its above-mentioned disbursements and HST, for a total award of \$327,567.99.

[11] In the further alternative, Sandoz requests that costs be fixed at the high end of column IV of Tariff B, with double costs awarded from the date of offer until the date of my judgment on the merits, plus its reasonable disbursements and HST, for a total costs award of \$265,958.13.

termes de l'article 53.1 de la *Loi sur les brevets*, L.R.C. (1985), ch. P-4 (la Loi). La troisième visait à déterminer si le brevet '002 était invalide pour cause d'évidence.

[8] En fin de compte, j'ai statué en faveur de Sandoz à l'égard de la première question et en faveur d'Allergan pour ce qui est des deuxième et troisième questions. Je les ai ensuite invitées toutes deux à présenter des observations concernant les dépens, en les encourageant à tenter de parvenir à un règlement sur cette question, à défaut de trouver une somme globale qui tienne compte de certains facteurs cernés ainsi que tout autre facteur pertinent, notamment ceux prévus à la règle 400 et dans la jurisprudence. Lorsque j'ai appris que Kissei avait engagé des frais importants allant au-delà du simple dépôt d'une défense succincte contre la demande reconventionnelle de Sandoz, je l'ai également autorisée à présenter des observations concernant les dépens.

II. Aperçu des observations des parties

A. *Sandoz*

[9] Sandoz soutient qu'elle a droit aux dépens qu'elle sollicite, étant donné qu'elle a remporté l'action en contrefaçon intentée par Allergan, et ajoute qu'aucune compensation ne doit être opérée du fait qu'elle n'a pas eu gain de cause sur deux des trois principales questions soulevées dans l'instance. Comme elle a également fait deux offres de règlement environ deux mois avant le procès et vu la complexité de la procédure, Sandoz sollicite une somme globale correspondant à 50 p. 100 de ses honoraires taxables, plus les débours raisonnables qu'elle a engagés et la TVH, pour un total de 462 876,45 \$.

[10] Subsidièrement, Sandoz réclame une somme globale correspondant à 30 p. 100 de ses honoraires taxables, plus la TVH et les débours susmentionnés, pour un total de 327 567,99 \$.

[11] Subsidièrement encore, elle demande à ce que les dépens soient fixés à l'échelon supérieur de la colonne IV du tarif B et sollicite le doublement des dépens adjugés de la date de l'offre jusqu'à celle de mon jugement sur le fond, plus les débours raisonnables qu'elle a engagés et la TVH, pour un total de 265 958,13 \$.

B. *Allergan*

[12] Allergan submits that it should be awarded costs for having completely prevailed in relation to Sandoz's counterclaim. However, it seeks only to use that success as a set off against any costs payable to Sandoz. It maintains that such a set off is also warranted by the fact that it prevailed in relation to the issue Sandoz raised with respect to the prosecution history of the '002 Patent. As discussed above, this was one of the three principal issues in dispute in this proceeding.

[13] The specific set off sought by Allergan is \$201,277.73, which is the sum of its bill of costs for costs incurred in relation to Sandoz's counterclaim, calculated by reference to the upper end of column IV of Tariff B.

[14] In the alternative, Allergan submits that any cost award granted to Sandoz should be discounted by two thirds of what Sandoz has claimed, to reflect that Allergan prevailed in respect of two of the three principal issues in dispute. Allergan maintains that such a reduction is particularly appropriate given that this case was ultimately narrowed to three principal issues involving a single patent, and Sandoz narrowed its invalidity case to obviousness and one prior art document late in the day.

[15] More specifically, Allergan maintains that a lump sum award to Sandoz based on a percentage of actual legal fees would not be appropriate, essentially because Allergan prevailed with respect to two of the three main issues in dispute between the parties. Instead, Allergan insists that any cost award in favour of Sandoz should be calculated by reference to the high end of column IV of Tariff B, and then discounted by two thirds.

[16] Regarding expert fees, Allergan submits that Dr. Felton's fees should be fully assessable, essentially because the bulk of her time was spent addressing Sandoz's invalidity claims. Allergan adds that

B. *Allergan*

[12] Allergan soutient que les dépens devraient lui être adjugés, étant donné qu'elle a totalement eu gain de cause à l'égard de la demande reconventionnelle de Sandoz. Cependant, elle n'invoque cette victoire qu'à titre de compensation à l'encontre des dépens payables à Sandoz et maintient que cette compensation est également justifiée par le fait qu'elle a eu gain de cause à l'égard de la question que Sandoz a soulevée concernant l'historique des poursuites du brevet '002. Comme je l'ai déjà mentionné, il s'agissait de l'une des trois principales questions en litige dans la présente affaire.

[13] La compensation précise sollicitée par Allergan s'élève à 201 277,73 \$, ce qui correspond aux dépens, figurant dans son mémoire, engagés à l'égard de la demande reconventionnelle de Sandoz, et calculés suivant l'échelon supérieur de la colonne IV du tarif B.

[14] Subsidiairement, Allergan soutient que les dépens adjugés à Sandoz devraient faire l'objet d'une déduction correspondant aux deux tiers de la somme réclamée, afin de tenir compte de la victoire d'Allergan sur deux des trois principales questions en litige. Elle maintient qu'une telle réduction est particulièrement appropriée, étant donné que la portée de la présente affaire a en fin de compte été limitée à trois questions principales concernant un seul brevet, et Sandoz a restreint tardivement ses arguments touchant à l'invalidité au motif de l'évidence et à un document d'antériorité.

[15] Plus précisément, Allergan maintient qu'il serait inapproprié d'accorder à Sandoz une somme globale basée sur un pourcentage des honoraires d'avocat réellement engagés, essentiellement parce qu'Allergan a eu gain de cause à l'égard de deux des trois principales questions en litige entre les parties. Allergan affirme plutôt avec insistance que les dépens adjugés à Sandoz devraient être calculés selon l'échelon supérieur de la colonne IV du tarif B, puis réduits des deux tiers.

[16] Quant aux frais d'expert, Allergan soutient que les frais de M^{me} Felton devraient être totalement taxables, essentiellement parce qu'elle a passé l'essentiel de son temps sur les allégations d'invalidité avancées par

Ms. Wilson’s fees should be assessed at 50 percent, because the Court found her evidence regarding the legislative history of section 53.1 to be “straightforward and helpful”. Allegan further maintains that the fees of Dr. Stewart should not be assessable, and that Dr. Fassihi’s fees should be substantially reduced, as further discussed in part III.B.(7) of these reasons.

C. *Kissei*

[17] *Kissei* was required to be added to Allergan’s action pursuant to subsection 6(2) of the Regulations. However, it took no position in that action and did not participate in the trial. It simply filed a defence to Sandoz’s counterclaim for declarations of invalidity of the ‘780 Patent and the ‘002 Patent. It also incurred some additional costs, primarily in respect of the examinations of one of its representatives and one of the inventors of the ‘002 Patent. Given that Sandoz’s Counterclaim was not successful, *Kissei* seeks its costs taxable at the upper end of column IV of Tariff B (\$23,670) together with “reasonable disbursements comprising business class airfare, accommodations and meals, translation services (if any) and transcript costs”. It has represented that none of those costs or disbursements pertain to the ‘780 Patent.²

[18] In the alternative, if it does not succeed in obtaining a cost award, *Kissei* maintains that no costs should be assessed against it, either in the main action or the counterclaim, because it was successful on the issues in which it engaged.

III. Assessment

A. *General Principles*

[19] The principal objectives underlying an award of costs are to (i) provide indemnification for costs

² In this regard, it has reduced by 50 percent the costs incurred in respect of the examinations for discovery. I am satisfied that this represents a reasonable approach to excluding costs incurred in respect of the ‘780 Patent.

Sandoz. Allergan ajoute que les honoraires de M^e Wilson devraient être taxés à 50 p. 100, car la Cour a conclu que sa preuve concernant l’historique législatif de l’article 53.1 était « simple et utile ». Allergan maintient en outre que les frais de M. Stewart ne devraient pas être taxables et que ceux de M. Fassihi devraient être substantiellement réduits, comme nous l’aborderons plus en détail dans la partie III.B.(7) des présents motifs.

C. *Kissei*

[17] *Kissei* a dû être constituée partie à l’action d’Allergan, en application du paragraphe 6(2) du Règlement. Cependant, elle n’a pris aucune position dans cette action et n’a pas participé au procès, déposant simplement une défense contre la demande reconventionnelle de Sandoz, au regard des déclarations d’invalidité du brevet ‘780 et du brevet ‘002. Elle a également engagé des frais additionnels, principalement pour l’interrogatoire de l’un de ses représentants et de l’un des inventeurs du brevet ‘002. Comme la demande reconventionnelle de Sandoz n’a pas abouti, *Kissei* demande à ce que ses dépens soient taxés suivant l’échelon supérieur de la colonne IV du tarif B (23 670 \$), et réclame aussi [TRADUCTION] « les débours raisonnables comprenant des billets d’avion en classe affaires, des frais d’hébergement et de repas, des services de traduction (le cas échéant) et des frais de transcription ». Elle fait valoir qu’aucun de ces frais ou débours ne se rapporte au brevet ‘780².

[18] Subsidièrement, si elle ne réussit pas à se faire adjuger les dépens, *Kissei* maintient qu’aucuns dépens ne devraient être adjugés contre elle, que ce soit dans l’action principale ou dans la demande reconventionnelle, parce qu’elle a eu gain de cause sur les questions à l’égard desquelles elle a présenté des arguments.

III. La taxation des dépens

A. *Les principes généraux*

[19] Les principaux objectifs sous-tendant l’adjudication des dépens sont les suivants : (i) fournir une

² Sur ce point, elle a réduit de 50 p. 100 les frais engagés pour les interrogatoires préalables. Je suis convaincu qu’il s’agit là d’une approche raisonnable aux fins de l’exclusion des frais engagés à l’égard du brevet ‘780.

associated with successfully pursuing a valid legal right or defending an unfounded claim, (ii) penalize a party who has refused a reasonable settlement offer, and (iii) sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 (*Okanagan Indian Band*), at paragraph 25; *Air Canada v. Thibodeau*, 2007 FCA 115 (*Thibodeau*), at paragraph 24. In certain types of “special cases”, an award of costs can also facilitate access to justice: *Okanagan Indian Band*, above, at paragraph 27.

[20] By virtue of being “a tool in the furtherance of the efficient and orderly administration of justice”, the power of courts to order cost awards can provide an important “disincentive to those who might be tempted to harass others with meritless claims”: *Okanagan Indian Band*, above, at paragraphs 25–26.

[21] The Court has broad discretion over the amount and allocation of costs: subsection 400(1) [of the Rules]; *Eli Lilly and Company v. Teva Canada Limited*, 2011 FCA 220 (*Eli Lilly v. Teva*), at paragraph 55; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38, at paragraphs 47 and 49. However, that discretion must be exercised in accordance with established principles pertaining to costs, unless the circumstances justify a different approach: *Okanagan Indian Band*, above, at paragraph 22; *Nova Chemicals Corporation v. Dow Chemical Company*, 2017 FCA 25 (*Nova v. Dow*), at paragraph 19.

[22] In this Court, costs may be fixed by reference to Tariff B of the Rules or by way of a lump sum: Rules, subsection 400(4). In recent years, the granting of a lump sum award has become increasingly common: *Nova v. Dow*, above, at paragraph 11; *Philip Morris Products S.A. v. Marlboro Canada Limited*, 2015 FCA 9, at paragraph 4. This trend is in part attributable to the Court’s desire to reduce the significant time and effort typically

indemnisation pour les frais engagés pour faire reconnaître un droit valide ou pour se défendre contre une action infondée; (ii) pénaliser une partie qui a refusé une offre raisonnable de règlement; (iii) sanctionner les comportements qui prolongent la durée du litige et en augmentent les coûts, ou qui sont par ailleurs déraisonnables ou vexatoires : *Colombie-Britannique (Ministre des Forêts) c. Banque indienne Okanagan*, 2003 CSC 71, [2003] 3 R.C.S. 371 (*Bande indienne Okanagan*), au paragraphe 25; *Air Canada c. Thibodeau*, 2007 CAF 115 (*Thibodeau*), au paragraphe 24. Dans certains types de « cas spéciaux », l’attribution des dépens peut également faciliter l’accès à la justice : *Bande indienne Okanagan*, précité, au paragraphe 27.

[20] En étant un « instrument destiné à favoriser l’administration efficace et ordonnée de la justice », le pouvoir des tribunaux d’adjuger les dépens peut servir d’important « moyen dissuasif sur ceux qui pourraient être tentés d’en harceler d’autres par des demandes non fondées » : *Bande indienne Okanagan*, précité, aux paragraphes 25–26.

[21] La Cour jouit d’un large pouvoir discrétionnaire de déterminer le montant des dépens et de les répartir : paragraphe 400(1) des Règles; *Eli Lilly and Company c. Teva Canada Limited*, 2011 CAF 220 (*Eli Lilly c. Teva*), au paragraphe 55; *Little Sisters Book and Art Emporium c. Canada (Commissaire des Douanes et du Revenu)*, 2007 CSC 2, [2007] 1 R.C.S. 38, aux paragraphes 47 et 49. Cependant, ce pouvoir discrétionnaire doit être exercé conformément aux principes établis en matière de dépens, à moins que les circonstances ne justifient une approche différente : *Bande indienne Okanagan*, précité, au paragraphe 22; *Nova Chemicals Corporation c. Dow Chemical Company*, 2017 CAF 25 (*Nova c. Dow*), au paragraphe 19.

[22] Devant notre Cour, les dépens peuvent être fixés suivant le tarif B des Règles ou au moyen d’une somme globale : paragraphe 400(4) des Règles. Au cours des dernières années, il est devenu de plus en plus courant d’adjuger une somme globale : *Nova c. Dow*, précité, au paragraphe 11; *Philip Morris Products S.A. c. Marlboro Canada Limitée*, 2015 CAF 9, au paragraphe 4. Cette tendance s’explique en partie par le désir de la Cour

associated with preparing and reviewing the type of detailed bill of costs that is required for the purposes of an assessment under Tariff B: *Conorzio del Prosciutto di Parma v. Maple Leaf Meats Inc.*, 2002 FCA 417, [2003] 2 F.C. 451 (*Conorzio*), at paragraph 12; *Venngo Inc. v. Concierge Connection Inc. (Perkopolis)*, 2017 FCA 96, 146 C.P.R. (4th) 182 (*Venngo*), at paragraphs 85–86, leave to appeal to S.C.C. refused, [2017] 2 S.C.R. x, [2017] S.C.C.A. No. 302 (QL). Given that submissions in support of a lump sum award can significantly decrease such time and effort for parties as well as the Court (if they are accepted), they facilitate access to justice. This is particularly so where such submissions reduce the legal costs that would otherwise be incurred in the preparation of the more detailed type of bill of costs that is required when costs are assessed pursuant to Tariff B. Nevertheless, a lump sum award of costs may not be appropriate in all cases: *Conorzio*, above.

[23] To the extent that a lump sum award can be expected to achieve the benefits mentioned above, it will further the objective of securing “the just, most expeditious and least expensive determination” of proceedings (*Nova v. Dow*, above, at paragraph 11, citing rule 3) and should be favoured: *Barzelex Inc. v. EBN Al Waleed (The)* (1999), 94 A.C.W.S. (3d) 434, [1999] F.C.J. No. 2002 (QL) (T.D.), at paragraph 11, affd 2001 FCA 111, (2001), 107 A.C.W.S. (3d) 353; *Pfizer Canada Inc. v. Novopharm Limited*, 2010 FC 668, 85 C.P.R. (4th) 300, at paragraph 57.

[24] Regardless of whether parties favour a lump sum award or an amount fixed in accordance with Tariff B, counsel are encouraged to be prepared to address costs, ideally on consent, at the conclusion of the proceeding or shortly thereafter: *Conorzio*, above.

[25] The “default” level of costs in this Court is the midpoint of column III in Tariff B: rule 407; *Sanofi-Aventis Canada Inc. v. Novopharm Limited*, 2009 FC 1139, 183 A.C.W.S. (3d) 371 (*Sanofi-Novopharm FC*), at paragraph 4, affd 2012 FCA 265; *Apotex Inc. v. Sanofi-Aventis*, 2012 FC 318 (*Apotex v. Sanofi-Aventis*), at paragraph 5; *Dennis v. Canada*, 2017 FC 1011, at paragraph 8; *Bernard*

de réduire le temps et les efforts importants généralement requis par la préparation et l’examen du type de mémoire de dépens détaillé nécessaire aux fins d’une taxation au titre du tarif B : *Conorzio del Prosciutto di Parma c. Maple Leaf Meats Inc.*, 2002 CAF 417, [2003] 2 C.F. 451 (*Conorzio*), au paragraphe 12; *Venngo Inc. c. Concierge Connection Inc. (Perkopolis)*, 2017 CAF 96 (*Venngo*), aux paragraphes 85–86, autorisation de pourvoi à la C.S.C. refusée, [2017] 2 R.C.S. x, [2017] C.S.C.R. n° 302 (QL). Comme les observations à l’appui de l’attribution d’une somme globale peuvent sensiblement réduire ce temps et ces efforts pour les parties comme pour la Cour (si elles sont acceptées), elles facilitent l’accès à la justice. Ceci est particulièrement le cas lorsqu’elles entraînent une réduction des frais juridiques qui seraient autrement engagés pour préparer le type plus détaillé de mémoire de dépens requis lorsque les dépens sont taxés selon le tarif B. Néanmoins, l’attribution des dépens sous la forme d’une somme globale pourrait ne pas convenir dans tous les cas : *Conorzio*, précité.

[23] Dans la mesure où l’on peut s’attendre à ce que l’adjudication d’une somme globale procure les avantages susmentionnés, elle facilitera davantage l’objectif consistant à apporter « une solution au litige qui soit juste et la plus expéditive et économique possible » (*Nova c. Dow*, précité, au paragraphe 11, citant la règle 3) et devrait être favorisée : *Barzelex Inc. c. EBN Al Waleed (Le)*, [1999] A.C.F. n° 2002 (QL) (1^{re} inst.), au paragraphe 11, conf. par 2001 CAF 111; *Pfizer Canada Inc. c. Novopharm Limited*, 2010 CF 668, au paragraphe 57.

[24] Sans égard à la question de savoir si les parties sont favorables à l’attribution d’une somme globale ou d’un montant fixé conformément au tarif B, les avocats sont encouragés à se préparer à aborder la question des dépens, idéalement sur consentement, au terme de l’instance ou peu après : *Conorzio*, précité.

[25] Le niveau « par défaut » des dépens devant notre Cour se situe au milieu de la colonne III du tarif B : règle 407; *Sanofi-Aventis Canada Inc. c. Novopharm Limited*, 2009 CF 1139 (*Sanofi-Novopharm CF*), au paragraphe 4, conf. par 2012 CAF 265; *Apotex Inc. c. Sanofi-Aventis*, 2012 CF 318 (*Apotex c. Sanofi-Aventis*), au paragraphe 5; *Dennis c. Canada*, 2017 CF 1011, au paragraphe 8;

v. *Professional Institute of the Public Service of Canada*, 2020 FCA 211, at paragraph 38. Column III is intended to provide partial indemnification (as opposed to substantial or full indemnification) for “cases of average or usual complexity”: *Thibodeau*, above, at paragraph 21; *Novopharm Limited v. Eli Lilly and Company*, 2010 FC 1154 (*Novopharm v. Eli Lilly*), at paragraph 5.

[26] In recognition of the particular attributes of intellectual property proceedings, it is common for increased costs to be awarded in those proceedings: see, e.g., *Conorzio*, above, at paragraph 6; *Lainco Inc. v. Commission scolaire des Bois-Francs*, 2018 FC 186, at paragraph 8(c). Those particular attributes include greater than average complexity, sophisticated parties, legal bills far in excess of what is contemplated by column III of Tariff B, and “giving parties an incentive to litigate efficiently”: *Seedlings Life Science Ventures, LLC v. Pfizer Canada ULC*, 2020 FC 505, 172 C.P.R. (4th) 375 (*Seedlings*), at paragraph 4. For cases that involve drug patent disputes and a cost award fixed by reference to the Tariff, the high end of column IV is often considered to be reasonable and appropriate: *Sanofi-Novopharm FC*, above, at paragraph 13, affd 2012 FCA 265; *Novopharm v. Eli Lilly*, above, at paragraph 7; *Apotex v. Sanofi-Aventis*, above. See also Federal Court of Appeal and Federal Court Rules Committee, *Review of the Rules on Costs: Discussion Paper*, October 5, 2015, at page 8.

[27] For essentially the same reasons identified immediately above, it is also increasingly common in intellectual property cases to award a significant lump sum amount “well in excess of the Tariff”: *Venngo*, above, at paragraph 85; *Bauer Hockey Ltd. v. Sport Maska Inc. (CCM Hockey)*, 2020 FC 862, 176 C.P.R. (4th) 245 (*Bauer*), at paragraph 12. In this regard, a lump sum award in the range of 25–50 percent of actual fees, plus reasonable disbursements, is often made: *Nova v. Dow*, above, at paragraphs 17 and 21; *Seedlings*, above, at paragraph 6; *Bauer*, above, at paragraph 13. See also *Loblaws Inc. v. Columbia Insurance Company*, 2019 FC 1434, 172 C.P.R. (4th) 327, at paragraph 15. In approaching this assessment, it should

Bernard c. Canada (Institut professionnel de la fonction publique), 2020 CAF 211, au paragraphe 38. La colonne III vise à fournir une indemnisation partielle (par opposition à une indemnisation substantielle ou complète) dans les « cas d’une complexité moyenne ou habituelle » : *Thibodeau*, précité, au paragraphe 21; *Novopharm Limited c. Eli Lilly and Company*, 2010 CF 1154 (*Novopharm c. Eli Lilly*), au paragraphe 5.

[26] Des dépens plus importants sont couramment adjugés dans les instances de propriété intellectuelle, compte tenu de leurs caractéristiques particulières : voir par exemple l’arrêt *Conorzio*, précité, au paragraphe 6; *Lainco Inc. c. Commission scolaire des Bois-Francs*, 2018 CF 186, au paragraphe 8c). Ces caractéristiques, qui comprennent notamment une complexité supérieure à la moyenne, des parties averties, des notes d’honoraires d’avocat qui dépassent largement ce qui est prévu par la colonne III du tarif B, « incit[ent] les parties à prendre des décisions efficaces dans la conduite de l’instance judiciaire » : *Seedlings Life Science Ventures, LLC c. Pfizer Canada SRI*, 2020 CF 505 (*Seedlings*), au paragraphe 4. Dans les litiges portant sur des brevets de médicaments et où les dépens adjugés sont fixés en se référant au tarif, l’échelon supérieur de la colonne IV est souvent jugé raisonnable et approprié : *Sanofi-Novopharm CF*, précitée, au paragraphe 13, conf. par 2012 CAF 265; *Novopharm c. Eli Lilly*, précitée, au paragraphe 7; *Apotex c. Sanofi-Aventis*, précitée. Voir également le document du Comité des Règles de la Cour d’appel fédérale et de la Cour fédérale, intitulé *Examen des règles relatives aux dépens : Document de travail*, le 5 octobre 2015, à la page 8.

[27] Pour essentiellement les mêmes raisons que celles que nous venons d’évoquer, il est également de plus en plus courant dans les affaires de propriété intellectuelle d’adjuger une somme globale importante « dépassant largement le Tarif » : *Venngo*, précité, au paragraphe 85; *Bauer Hockey Ltd. c. Sport Maska Inc. (CCM Hockey)*, 2020 CF 862 (*Bauer*), au paragraphe 12. À cet égard, une somme globale qui se situe entre 25 et 50 p. 100 des frais réels, plus les débours raisonnables, est souvent accordée : *Nova c. Dow*, précité, aux paragraphes 17 et 21; *Seedlings*, précitée, au paragraphe 6; *Bauer*, précitée, au paragraphe 13. Voir également *Loblaws Inc. c. Columbia Insurance Company*, 2019 CF 1434, au paragraphe 15.

be kept in mind that determining the level of a lump sum award “is not an exact science”: *Nova v. Dow*, above, at paragraph 21.

[28] In recognition of the fact that Tariff B no longer provides an adequate level of partial indemnification, the Federal Courts Rules Committee decided in 2016 that the amount recoverable under Tariff B should be increased by approximately 25 percent: Minutes of the October 28, 2016, Meeting of the Rules Committee. Following a further consultation with the bar, a sub-committee of the Rules Committee is preparing proposed amendments for publication in Part I of the *Canada Gazette* and approval of the Governor in Council. In the meantime, it is relevant to bear in mind that the existing tariff “is considered particularly inadequate in Intellectual Property litigation [and in] maritime proceedings”: Report from the Federal Court of Appeal and Federal Court Rules sub-Committee on Costs (June 3, 2016), at section D.

[29] The principal factors the Court may consider in its determination of a cost award are set forth in a non-exhaustive list in subsection 400(3) [of the Rules], which is reproduced in Appendix 1 below.

[30] The general rule is that the successful party is entitled to have its costs, even if it was not successful in respect of each and every argument it pursued: *Okanagan Indian Band*, above, at paragraphs 20–21; *Raydan Manufacturing Ltd. v. Emmanuel Simard & Fils (1983), Inc.*, 2006 FCA 293, 53 C.P.R. (4th) 178 (*Raydan*), at paragraphs 2–5. However, the Court may depart from this approach in cases of truly “divided success” or “mixed results”: *Eurocopter v. Bell Helicopter Textron Canada Ltée*, 2012 FC 842 (*Eurocopter FC*), at paragraphs 23 and 56, affd 2013 FCA 220, at paragraphs 10 and 15; *Sanofi-Novopharm FC*, above, at paragraphs 8–9; *Apotex v. Sanofi-Aventis*, above, at paragraph 11; *Bristol-Myers Squibb Canada Co. v. Teva Canada Limited*, 2016 FC 991, at paragraphs 9–14.

[31] The jurisprudence is split on the issue of whether the successful defence of a patent infringement action,

Pour en venir à la taxation en l’espèce, il faut garder à l’esprit que la détermination de l’ordre de grandeur de la somme globale « n’est pas une science exacte » : *Nova c. Dow*, précité, au paragraphe 21.

[28] Comme le tarif B ne garantit plus un ordre de grandeur adéquat d’indemnisation partielle, le Comité des règles des Cours fédérales a décidé en 2016 que le montant recouvrable au titre de ce tarif devait être augmenté d’environ 25 p. 100 : Compte rendu de la réunion du 28 octobre 2016 du Comité des règles. À la suite d’une consultation supplémentaire avec le Barreau, un sous-comité du Comité des règles prépare des propositions de modifications en vue de leur publication dans la partie I de la *Gazette du Canada* et de leur approbation par le gouverneur en conseil. Entre-temps, il est pertinent de garder à l’esprit que le tarif existant « est jugé particulièrement inadéquat dans les litiges sur la propriété intellectuelle, mais aussi dans les procédures en droit maritime » : Rapport du Sous-comité des règles de la Cour fédérale et de la Cour d’appel fédérale sur les dépens (3 juin 2016), à la section D.

[29] Les principaux facteurs dont la Cour peut tenir compte dans son calcul des dépens à adjuger sont énoncés dans une liste non exhaustive au paragraphe 400(3) des Règles, reproduit ci-après dans l’annexe 1.

[30] La règle générale veut que la partie victorieuse ait droit aux dépens, même si elle n’a pas eu gain de cause sur chacun des arguments qu’elle a avancés : *Bande indienne Okanagan*, précité, aux paragraphes 20–21; *Raydan Manufacturing Ltd. c. Emmanuel Simard & Fils (1983) Inc.*, 2006 CAF 293 (*Raydan*), aux paragraphes 2–5. Cependant, la Cour peut diverger de cette approche dans les cas réels de « succès partagé » ou de « succès partiels » : *Eurocopter c. Bell Helicopter Textron Canada Limitée*, 2012 CF 842 (*Eurocopter CF*), aux paragraphes 23 et 56, conf. par 2013 CAF 220, aux paragraphes 10 et 15; *Sanofi-Novopharm CF*, précitée, aux paragraphes 8–9; *Apotex c. Sanofi-Aventis*, précitée, au paragraphe 11; *Bristol-Myers Squibb Canada Co. c. Teva Canada Limitée*, 2016 CF 991, aux paragraphes 9–14.

[31] La jurisprudence est divisée quant à la question de savoir si la défense victorieuse dans une action en

or success with respect to only some grounds of invalidity, constitutes “divided success” when the defendant in the main action is not successful with respect to one or more other allegations of invalidity. In one line of cases, the cost award in favour of the defendant who prevailed on the infringement issue was reduced to reflect the fact that it did not succeed with respect to some or all of its allegations of invalidity: see e.g., *Fournier Pharma Inc. v. Canada (Health)*, 2012 FC 1121, at paragraphs 4–6; *GlaxoSmithKline Inc. v. Pharmascience Inc.*, 2008 FC 849, at paragraph 4. In a second line of cases, it has been explicitly held that this type of outcome does not constitute “divided success” or “mixed results” and that therefore the defendant is entitled to its costs: *Raydan*, above; *Illinois Tool Works Inc. v. Cobra Anchors Co.*, 2003 FCA 358, 29 C.P.R. (4th) 417, at paragraphs 10–11; *Betser-Zilevitch v. Petrochina Canada Ltd.*, 2021 FC 151 (*Betser-Zilevitch 2*), at paragraph 11; *Johnson & Johnson Inc. v. Boston Scientific Ltd.*, 2008 FC 817, at paragraph 4. This is so regardless of whether the defendant’s allegations of invalidity were made in a defence to the main action or in a separate counterclaim: *Raydan*, above, at paragraphs 6–7; *Eurocopter FC*, above, at paragraph 11. Notwithstanding my sympathy for the approach taken in the first line of cases, I consider myself bound by this second line of cases.

[32] With this in mind, I further consider that where a defendant in the main action prevails with respect to either the plaintiff’s allegation of infringement or one or more of its allegations of invalidity, an assessment of an appropriate lump sum award should begin at the mid-point of the 25–50 percent range discussed at paragraph 27 above, plus reasonable disbursements. This would be subject to any adjustment to reflect factors that may support a departure from this level of award in such a case.

[33] I recognize that this Court has recently suggested that the proper method for determining a lump sum award based on a percentage of fees is to start at the lower end of the 25–50 percent range: *Seedlings*, above, at paragraph 22; *Bauer*, above, at paragraph 14.

contrefaçon de brevet, ou un succès à l’égard de certains motifs d’invalidité seulement, constitue un « succès partagé » lorsque le défendeur dans l’action principale ne parvient pas à faire aboutir au moins une autre allégation d’invalidité. Dans certaines décisions, les montants adjugés au défendeur ayant eu gain de cause sur la question de la contrefaçon ont été réduits pour tenir compte du fait qu’il n’avait pas réussi à imposer certaines ou l’ensemble de ses allégations d’invalidité : voir, par exemple, *Fournier Pharma Inc. c. Canada (Santé)*, 2012 CF 1121, aux paragraphes 4–6; *GlaxoSmithKline Inc. c. Pharmascience Inc.*, 2008 CF 849, au paragraphe 4. Un autre courant jurisprudentiel a explicitement jugé que ce type de résultats ne constituait pas un « succès partagé » ni des « succès partiels » et, donc, que le défendeur a droit aux dépens : *Raydan*, précité; *Illinois Tool Works Inc. c. Cobra Fixations Cie Ltée/Cobra Anchors Co.*, 2003 CAF 358, aux paragraphes 10–11; *Betser-Zilevitch c. Petrochina Canada Ltd.*, 2021 CF 151 (*Betser-Zilevitch 2*), au paragraphe 11; *Johnson & Johnson Inc. c. Boston Scientific Ltd.*, 2008 CF 817, au paragraphe 4. Il en est ainsi, que les allégations d’invalidité du défendeur aient été formulées dans le cadre d’une défense à l’action principale ou d’une demande reconventionnelle distincte : *Raydan*, précité, aux paragraphes 6–7; *Eurocopter CF*, précitée, au paragraphe 11. Nonobstant la sympathie que m’inspire l’approche adoptée par le premier courant jurisprudentiel, je me sens lié par le second.

[32] En gardant cela à l’esprit, je considère en outre que, lorsqu’un défendeur dans l’action principale a gain de cause à l’égard de l’allégation de contrefaçon du demandeur, ou d’au moins une de ses allégations d’invalidité, la taxation d’une somme globale appropriée devrait débiter au milieu de la fourchette de 25 à 50 p. 100 évoquée au paragraphe 27 ci-dessus, plus les débours raisonnables. Ce montant serait ajusté pour tenir compte de facteurs pouvant justifier de s’écarter de ce niveau d’indemnisation dans une telle affaire.

[33] Je reconnais que notre Cour a récemment laissé entendre que la bonne méthode pour calculer une somme globale basée sur un pourcentage des honoraires consiste à débiter à l’extrémité inférieure de la fourchette de 25 à 50 p. 100 : *Seedlings*, précitée, au paragraphe 22; *Bauer*,

However, in *Seedlings*, this was because neither party had demonstrated that a greater or lesser award was justified (*Seedlings*, above, at paragraph 24), and in *Bauer* the Court adopted the 25 percent starting threshold “[i]n the interests of consistency and predictability”: *Bauer*, above, at paragraph 14.

[34] In my view, there are very good reasons for beginning with the mid-point of the 25–50 percent range in complex drug patent proceedings under the Regulations. In particular, the Court is still in the process of effecting a change in the litigation culture in the area of drug patent disputes. For many years, trials of such disputes have typically taken several weeks and pre-trial processes have been complicated, lengthy and costly. This contrasts with the experience elsewhere, such as in the U.K., where trials apparently are ordinarily of much shorter duration. Given that the shift from paper-based applications to full trials under the new Regulations was not accompanied by a lengthening of the 24-months statutory stay period, the Court adopted a standard of 10 days as the new default duration for drug patent trials, unless the Court determines that additional time is required: “Case and Trial Management Guidelines for Complex Proceedings and Proceedings under the *PM(NOC) Regulations*”, at paragraph 37 (available on the Federal Court website <www.fct-cf.gc.ca>). This policy was adopted after considerable consultation with representatives of the drug patent bar.

[35] Adopting the mid-point of the 25–50 percent range as the starting point for determining a lump sum cost award to the prevailing party in this type of proceeding would provide a better incentive than the lower end of this range for parties to conduct their litigation in a manner that permits the Court to achieve its objective of shorter trials in the drug patent area. This is particularly so given that legal costs tend to be very small compared to what is at stake in these types of proceedings. This has been repeatedly drawn to the Court’s attention

précitée, au paragraphe 14. Cependant, dans la décision *Seedlings*, cette démarche a été adoptée en raison du fait qu’aucune des parties n’avait démontré que l’adjudication d’un montant plus ou moins élevé était justifiée (*Seedlings*, précitée, au paragraphe 24); dans la décision *Bauer*, la Cour a établi le taux de base à 25 p. 100 « [p]ar souci de cohérence et de prévisibilité » : *Bauer*, précitée, au paragraphe 14.

[34] À mon avis, de très bonnes raisons justifient de commencer au milieu de la fourchette de 25 à 50 p. 100 dans les instances complexes de brevets de médicaments au titre du Règlement. En particulier, la Cour s’efforce encore de changer la culture du contentieux dans le domaine des litiges en matière de brevet. Pendant de nombreuses années, les procès dans ces affaires prenaient généralement plusieurs semaines, et les processus préalables au procès étaient compliqués, longs et coûteux. Cela tranche avec l’expérience d’autres pays, comme le Royaume-Uni, où les procès sont apparemment d’ordinaire beaucoup plus courts. Comme le passage des demandes papier à des procès complets au titre du nouveau règlement n’a pas donné lieu à une prolongation de la période de sursis de 24 mois prévue par la loi, la Cour a adopté une nouvelle durée par défaut de dix jours pour les procès en matière de brevet de médicaments, à moins qu’elle ne détermine qu’un délai supplémentaire est nécessaire : « Lignes directrices sur la gestion des instances et des instructions pour les procédures complexes et les procédures visées par le *Règlement sur les médicaments brevetés (Avis de conformité)* », au paragraphe 42 (disponible sur le site Web de la Cour fédérale <www.fct-cf.gc.ca>). Cette politique a été adoptée après de très nombreuses consultations avec des représentants des avocats spécialisés en brevets de médicaments.

[35] L’adoption du milieu, plutôt que de l’extrémité inférieure, de la fourchette de 25 à 50 p. 100 comme point de départ pour calculer la somme globale adjugée à la partie ayant gain de cause dans ce type de procédure inciterait davantage les parties à mener leur litige d’une manière qui permette à la Cour d’atteindre son objectif de raccourcir les procès liés aux brevets de médicaments. Cela est d’autant plus vrai que les frais juridiques tendent à être très modestes par rapport à ce qui est en jeu dans ce type de procédures. Les représentants des

by representatives of the intellectual bar over the course of the last several years, in support of their efforts to persuade the Court to increase its cost awards in complex IP litigation. Moreover, the parties to such disputes generally are very sophisticated commercial litigants who can be assumed to calibrate the strategic decisions made over the course of the proceeding with a keen eye on the economic consequences of those decisions.

[36] In addition to the foregoing general principles applicable to legal fees, disbursements are typically assessed in full, provided they are reasonable: *Mediatube Corp. v. Bell Canada*, 2017 FC 495, at paragraph 21.

B. Analysis of the relevant factors in this case

[37] I have considered all of the circumstances of this proceeding, including the various submissions made by each of the parties with respect to costs, in determining the appropriate cost award to issue in this case. Below is my assessment of the factors addressed in the parties' respective submissions.

(1) Lump sum versus assessment pursuant to Tariff B

[38] In my view, it is reasonable and appropriate in this case to award costs on a lump sum basis, calculated as a percentage of the prevailing party's legal fees. This was a complex drug patent proceeding, the parties are sophisticated litigants, their legal fees were substantially above the amounts contemplated by Tariff B, and the parties "are in a position to respond to the incentives provided by an elevated award of costs": *Bauer*, above, at paragraph 22.

[39] For the reasons discussed at paragraphs 34–35 above, I consider that the appropriate starting point in determining a lump sum award in this case is the middle of the 25–50 percent range that is typically used when

avocats spécialisés en droit de la propriété intellectuelle ont plusieurs fois porté cette question à l'attention de la Cour au cours des dernières années, alors qu'ils tentaient de la convaincre d'augmenter le montant des dépens adjugés dans les litiges complexes en matière de propriété intellectuelle. De plus, les parties à ces litiges sont généralement des plaideurs très avertis dans le domaine commercial dont on peut supposer qu'ils mesurent les décisions stratégiques prises au cours de l'instance en suivant de près les conséquences économiques qui en découlent.

[36] En plus des principes généraux déjà mentionnés qui s'appliquent aux honoraires d'avocat, les débours sont généralement inclus dans leur totalité, à condition qu'ils soient raisonnables : *MediaTube Corp. c. Bell Canada*, 2017 CF 495, au paragraphe 21.

B. Analyse des facteurs pertinents dans la présente affaire

[37] J'ai considéré l'ensemble des circonstances de la présente instance, y compris les différentes observations présentées par chacune des parties à l'égard des dépens, pour déterminer la somme qu'il convient d'adjuger en l'espèce. Voici mon appréciation des facteurs évoqués par les parties dans leurs observations respectives.

1) La somme globale par rapport à la taxation au titre du tarif B

[38] À mon avis, il est raisonnable et approprié en l'espèce d'adjuger les dépens sous la forme d'une somme globale, correspondant à un pourcentage des honoraires d'avocat de la partie victorieuse. Il s'agissait d'une instance complexe portant sur des brevets de médicaments, les parties sont expérimentées, leurs honoraires d'avocat dépassaient largement les montants envisagés par le tarif B, et elles « peuvent répondre aux mesures incitatives qu'offrent les dépens » : *Bauer*, précitée, au paragraphe 22.

[39] Pour les motifs analysés aux paragraphes 34 et 35 ci-dessus, j'estime que pour calculer la somme globale qui sera adjugée en l'espèce, le point de départ approprié est le milieu de la fourchette de 25 à 50 p. 100

granting lump sum awards in intellectual property proceedings. Coincidentally, this is also the approximate proportion (36 percent) of the overall legal fees claimed by Sandoz (before HST) that relate to the claim construction issue, in respect of which it prevailed.

(2) The result of the proceeding

[40] Sandoz succeeded in defending Allergan's patent infringement allegation in the main action of this proceeding. However, it was unsuccessful with respect to the other two principal issues in dispute, namely, its Counterclaim based on obviousness and the relevance of the prosecution history of the '002 Patent.

[41] I am sympathetic to Allergan's position that it should be entitled to a set-off for its costs incurred in (i) successfully defending Sandoz's counterclaim, which was a distinct action under subsection 60(1) of the Act (*Farmobile, LLC v. Farmers Edge Inc.*, 2018 FC 1269, at paragraph 46), and (ii) dealing with the prosecution history issue. Among other things, Sandoz made a strategic decision to bring that counterclaim, rather than simply defending Allergan's action based on claims construction—which proved to be the decisive issue in permitting Sandoz to launch its generic product on the market. Sandoz also made the strategic choice to raise the prosecution history issue.

[42] In my view, there should be consequences for having advanced and then failed to succeed on these issues. This is particularly so given the substantial costs that Allergan had to incur to address them, and given the very real practical result that Allergan achieved by avoiding the declaration of invalidity *in rem* that was sought by Sandoz. Granting Allergan its costs in relation to these issues, or at least reducing the award to which Sandoz would otherwise be entitled, would be entirely consistent with the important rationale of sanctioning behaviour that increases the duration and expense

habituellement utilisée pour adjuger des sommes globales dans les instances de propriété intellectuelle. Incidemment, cela correspond aussi au pourcentage approximatif (36 p. 100) des honoraires d'avocat globaux réclamés par Sandoz (avant la TVH) quant à la question de l'interprétation des allégations, pour laquelle elle a eu gain de cause.

2) Le résultat de l'instance

[40] En l'espèce, Sandoz s'est défendue avec succès contre l'allégation de contrefaçon de brevet avancée par Allergan dans l'action principale. Cependant, elle n'a pas eu gain de cause à l'égard des deux autres principales questions en litige, à savoir sa demande reconventionnelle fondée sur l'évidence ainsi que la pertinence de l'historique des poursuites du brevet '002.

[41] Je comprends la position d'Allergan suivant laquelle elle devrait avoir droit à une compensation pour les frais qu'elle a engagés, puisqu'elle (i) s'est défendue avec succès contre la demande reconventionnelle de Sandoz, laquelle était une action distincte au titre du paragraphe 60(1) de la Loi (*Farmobile, LLC c. Farmers Edge Inc.*, 2018 CF 1269, au paragraphe 46), et (ii) a fait face à la question de l'historique des poursuites. Entre autres choses, Sandoz a pris la décision stratégique d'introduire cette demande reconventionnelle, plutôt que de se défendre simplement contre l'action d'Allergan basée sur l'interprétation des revendications, question qui s'est avérée décisive pour permettre à Sandoz de lancer son produit générique sur le marché. Cette dernière a également fait le choix stratégique de soulever la question de l'historique des poursuites.

[42] À mon avis, le fait d'avoir soulevé ces questions puis échoué à les faire aboutir devrait être assorti de conséquences. Cela est particulièrement vrai au vu des frais substantiels qu'Allergan a dû engager pour traiter ces questions et du résultat pratique très concret qu'elle a obtenu en évitant la déclaration d'invalidité en matière réelle sollicitée par Sandoz. Adjuger à Allergan des dépens à l'égard de ces questions, ou à tout le moins réduire ceux auxquels Sandoz aurait autrement droit, serait totalement conforme à l'objectif important de sanctionner les comportements ayant pour effet de prolonger

of litigation: *Okanagan Indian Band*, above, at paragraph 25. This would also be entirely consistent with paragraph 400(6)(a) [of the Rules], which permits the Court to award or refuse costs in respect of a particular issue or step in a proceeding.

[43] However, the controlling jurisprudence does not permit me to grant Allergan its costs in relation to the two issues on which it prevailed, or to reduce Sandoz's award to reflect Allergan's success on those issues: see discussion at paragraph 31 above. While I recognize that Sandoz effectively initiated the dispute by serving a notice of allegation on Allergan, this does not provide a basis for departing from that jurisprudence.

[44] The situation with respect to Kissei is very different. It did not participate in the trial and only participated to a very limited degree in the pre-trial phase of these proceedings. It did not take a position with respect to the patent infringement issue. Instead, it filed only a short defence to Sandoz's counterclaim and incurred some additional costs, primarily in respect of the examinations of one of its representatives and one of the inventors of the '002 Patent. It was successful in that defence. Accordingly, it can legitimately be viewed as having been a successful party.

(3) The importance and complexity of the issues

[45] This factor is already reflected in what I consider to be the appropriate starting point for the determination of a lump sum award in a drug patent proceeding, namely, the mid-point of the 25–50 percent range: see discussion at paragraphs 32–35 above.

[46] Although the trial in this proceeding ultimately concerned only one patent and a single allegation of invalidity based on obviousness, I do not consider that this warrants a reduction from the above-mentioned starting point. As this Court has observed, “[p]atent litigation is typically complex, and obviousness is typically among the most complex legal issues that are raised in patent

la durée et d’augmenter les coûts du litige : *Bande indienne Okanagan*, précité, au paragraphe 25. Une telle démarche concorderait totalement avec l’alinéa 400(6)a) des Règles, aux termes duquel la Cour peut adjuger ou refuser d’adjuger les dépens à l’égard d’une question litigieuse ou d’une procédure particulières.

[43] Cependant, la jurisprudence dominante ne me permet pas d’accorder à Allergan des dépens en ce qui touche les deux questions sur lesquelles elle a prévalu, ou de réduire la somme adjugée à Sandoz pour tenir compte du succès d’Allergan à cet égard : voir l’analyse au paragraphe 31 ci-dessus. Je reconnais que Sandoz a, dans les faits, engagé le litige en signifiant un avis d’allégation à Allergan, mais cela ne justifie pas de s’écarter de cette jurisprudence.

[44] La situation concernant Kissei est très différente. Elle n’a pas participé au procès, n’a pris part que très modestement à l’étape préalable au procès, et n’a pas pris position quant à la question de la contrefaçon du brevet. Elle n’a plutôt déposé qu’une défense succincte contre la demande reconventionnelle de Sandoz, et a engagé des frais supplémentaires, surtout pour l’interrogatoire de l’un de ses représentants et de l’un des inventeurs du brevet '002. Sa défense a abouti. Par conséquent, elle peut légitimement être considérée comme une partie gagnante.

3) L’importance et la complexité des questions en litige

[45] Ce facteur est déjà pris en compte dans ce que j’estime être le point de départ adéquat pour calculer la somme globale adjugée dans une instance de brevet de médicaments, à savoir le milieu de la fourchette de 25 à 50 p. 100 : voir l’analyse aux paragraphes 32–35 ci-dessus.

[46] Le procès en l’espèce ne concernait qu’un seul brevet et une seule allégation d’invalidité fondée sur l’évidence, mais je ne crois pas que cela justifie de réduire le point de départ susmentionné. Comme l’a fait remarquer notre Cour, « [h]abituellement, un litige portant sur un brevet est complexe; en outre, la question de l’évidence figure habituellement parmi les questions

litigation”: *Teva Canada Limited v. Janssen Inc.*, 2018 FC 1175, at paragraph 14. This was no less true in this proceeding, which involved five expert witnesses and required a 241-paragraph decision on the merits.

(4) Written offers to settle

[47] Sandoz made two offers to settle its dispute with Allergan on August 27, 2020, approximately two months prior to the commencement of the trial in this proceeding. Neither of those offers was accepted. It submits that both of those offers met the requirements set forth in subsection 420(2) [of the Rules] for a doubling of its party and party costs from the date of service of its offer to the date of this Court’s judgment on the merits.

[48] To trigger subsection 420(2), the plaintiff either has to obtain a judgment that is less favourable than the terms of the settlement offer, or fail to obtain judgment. Subsection 420(3) imposes two additional conditions: (i) the offer must be made at least 14 days before the commencement of the hearing or trial, and (ii) the offer must not have been withdrawn, and cannot expire, before the commencement of the hearing or trial. The jurisprudence has added that “the offer must be clear and unequivocal, must contain an element of compromise ... and must bring the litigation to an end”: *Venngo*, above, at paragraph 87.

[49] Both of Sandoz’s offers met the timing conditions set forth in subsection 420(3) [of the Rules].

[50] The essence of the first of the offers (Offer No. 1) was that Sandoz would not seek damages under section 8 of the Regulations in exchange for a discontinuance of the main action on a without cost basis and a payment that increased over time from \$3,000,000 (if it was accepted before or on September 1, 2020) to \$12,000,000 (if it was accepted on or after January 15, 2021). The essence of the second offer (Offer No. 2) was that Allergan would discontinue its action in exchange for a \$50,000 payment from Sandoz and an agreement by Sandoz not to seek its costs of the action.

juridiques les plus complexes qui sont soulevées dans un litige en matière de brevet » : *Teva Canada Limited c. Janssen Inc.*, 2018 CF 1175, au paragraphe 14. C’était tout aussi vrai dans la présente procédure, à laquelle ont pris part cinq témoins experts et qui a nécessité une décision sur le fond de 241 paragraphes.

4) Les offres écrites de règlement

[47] Le 27 août 2020, environ deux mois avant le début du procès dans la présente instance, Sandoz a fait deux offres en vue de régler le litige l’opposant à Allergan. Aucune de ces offres n’a été acceptée. Elle fait valoir que ces deux offres remplissaient les exigences énoncées au paragraphe 420(2) des Règles aux fins du doublement de ses dépens partie-partie, et ce, de la date de la signification de son offre à celle du jugement de la Cour sur le fond.

[48] Pour que le paragraphe 420(2) entre en jeu, il faut que le demandeur obtienne un jugement moins avantageux que les conditions de l’offre, ou qu’il n’ait pas gain de cause lors du jugement. Le paragraphe 420(3) impose deux conditions supplémentaires : (i) l’offre doit être faite au moins 14 jours avant le début de l’audience ou de l’instruction, et (ii) l’offre ne doit pas être révoquée et ne peut expirer avant le début de l’audience ou de l’instruction. La jurisprudence ajoute que « l’offre en question doit être claire et non équivoque, comporter un élément de compromis [...] et mettre fin au litige entre les parties » : *Venngo*, précité, au paragraphe 87.

[49] Les deux offres de Sandoz remplissaient les conditions énoncées au paragraphe 420(3) des Règles quant au moment des offres.

[50] La première offre (l’offre n° 1) prévoyait essentiellement que Sandoz ne réclamerait pas de dommages-intérêts au titre de l’article 8 du Règlement en échange du désistement de l’instance principale, sans dépens, et du paiement d’une somme qui augmenterait avec le temps, passant de 3 millions de dollars (si l’offre était acceptée au plus tard le 1^{er} septembre 2020) à 12 millions de dollars (si elle était acceptée le 15 janvier 2021 ou après cette date). La seconde offre (l’offre n° 2) prévoyait essentiellement le désistement de l’action d’Allergan en échange du versement d’une somme de 50 000 \$ par

[51] Allergan maintains that Offer No. 1 does not trigger rule 420 because there has been no determination of liability under section 8 of the Regulations. (Sandoz states that its damages under section 8 would have been for any and all losses that it suffered starting from January 19, 2019.) In such circumstances, Allergan asserts that it cannot be said that Sandoz has obtained a more favourable judgment than the offer.

[52] I agree. In the absence of any evidence regarding the extent of Sandoz's potential claims under section 8, let alone a judgment on those claims, it cannot be said that Allergan obtained a judgment less favourable than Offer No. 1. In addition, it is not possible to ascertain whether Offer No. 1 met the element of compromise.

[53] Turning to Offer No. 2, Allergan states that it constituted "a demand to surrender", rather than a compromise, in exchange for a small payment. It adds that Offer No. 2 also did not address Sandoz's counterclaim, which turned out to be unsuccessful.

[54] Sandoz responds that Offer No. 2 would have provided Allergan with several advantages that it did not obtain by proceeding to trial. Specifically, Allergan would have received \$50,000, no additional costs would have been incurred to litigate the dispute, any future claim for section 8 damages would have been reduced, and Sandoz would not have sought costs in this proceeding.

[55] I am sympathetic with Allergan's position that Offer No. 2 effectively constituted a "demand to surrender", rather than a meaningful compromise: *Canwell Enviro-Industries Ltd. v. Baker Petrolite Corp.*, 2002 FCA 482, 21 C.P.R. (4th) 349 (*Canwell*), at paragraph 4(b). The only one of the advantages identified by Sandoz that related to the parties' underlying dispute was that Allergan would have received \$50,000 for ceasing to oppose the issuance of a notice of compliance to Sandoz. In the context of this particular proceeding, I can understand how \$50,000 may have been perceived to represent a nominal

Sandoz qui accepterait en outre de ne pas réclamer les dépens à l'égard de l'action.

[51] Allergan maintient que l'offre n° 1 ne fait pas entrer en jeu la règle 420, car la responsabilité n'a pas été déterminée au titre de l'article 8 du Règlement. (Sandoz affirme que les dommages-intérêts qui lui auraient été accordés au titre de cette disposition auraient couvert toutes les pertes qu'elle a subies à compter du 19 janvier 2019.) Dans les circonstances, Allergan prétend que l'on ne peut pas dire que Sandoz a obtenu un jugement plus avantageux que l'offre.

[52] Je suis d'accord. En l'absence de la moindre preuve concernant la portée des réclamations potentielles de Sandoz au titre de l'article 8, sans parler d'un jugement s'y rapportant, il n'est pas possible de dire qu'Allergan a obtenu un jugement moins avantageux que l'offre n° 1. De plus, il n'est pas possible d'établir si l'offre n° 1 satisfaisait à l'élément de compromis.

[53] Quant à l'offre n° 2, Allergan affirme qu'elle constituait « une demande de capitulation », plutôt qu'un compromis, en échange d'une petite somme. Elle ajoute que cette offre n'abordait pas la demande reconventionnelle de Sandoz, laquelle n'a pas abouti.

[54] Sandoz répond que l'offre n° 2 aurait offert à Allergan plusieurs avantages qu'elle n'a pas obtenus en optant pour le procès. En particulier, Allergan aurait reçu 50 000 \$, elle n'aurait engagé aucuns frais supplémentaires pour plaider le litige, elle aurait bénéficié d'une réduction de toute demande future de dommages-intérêts au titre de l'article 8, et Sandoz n'aurait pas réclamé les dépens dans la présente instance.

[55] Je comprends la position d'Allergan portant que l'offre n° 2 constituait en réalité une « demande de capitulation », plutôt qu'un compromis important : *Canwell Enviro-Industries Ltd. c. Baker Petrolite Corp.*, 2002 CAF 482 (*Canwell*), au paragraphe 4b). Le seul avantage évoqué par Sandoz quant au litige sous-jacent opposant les parties tenait au fait qu'Allergan aurait reçu 50 000 \$ si elle avait accepté de ne plus s'opposer à ce qu'un avis de conformité lui soit délivré. Dans le contexte de la présente instance en particulier, je peux comprendre que la somme de 50 000 \$ ait pu être perçue comme un

amount, compared to what was at stake between the parties.

[56] Unfortunately, Allergan did not adduce any evidence in that regard or to otherwise support its position. In the absence of such evidence, all I am left with is a bare assertion by Allergan. That does not provide a sufficient basis for concluding that Sandoz's offer to pay \$50,000, which is not a trivial amount of money in absolute terms, constituted a "demand to surrender" rather than a "real offer of compromise": *Canwell*, above. In very real practical terms, Offer No. 2 would have provided Allergan with a more favourable outcome than it obtained in the judgment on the merits that was ultimately issued in this proceeding. Offer No. 2 therefore met the requirements of paragraph 420(2)(a) [of the Rules], and I see no reason why Sandoz should not be entitled to its costs calculated at double the applicable rate, from the date of the offer to the date of the judgment on the merits.

[57] The doubling of costs to which Sandoz is entitled is double its "party-and-party" costs. Such costs can either be the costs to which it would be entitled under the high end of column IV of Tariff B, or such other costs as the Court may in its discretion allow: *Canada (Attorney General) v. Chrétien*, 2011 FCA 53, 198 A.C.W.S. (3d) 296, at paragraph 3. In the present case, I see no reason to materially depart from the amount that Sandoz has requested, which is double the amount of the costs to which it would be entitled under the high end of column IV. This works out to \$47,026.08, which is the difference between the total costs (including HST) calculated with and without a doubling of costs, in parts A and B, respectively, of the revised bill of costs of Sandoz, dated January 27, 2021. Given the lump sum nature of the award that will be made, I consider it appropriate to round this down to \$47,000.

[58] I will pause to add two things. First, in light of the conclusion reached immediately above, it is not necessary to address paragraph 420(2)(b) [of the Rules], which was not addressed by the parties in their submissions. Second, even if an offer to settle does not meet the requirements of rule 420, the Court can give credit

montant symbolique, comparativement à ce qui était en jeu entre les parties.

[56] Malheureusement, Allergan n'a produit aucun élément de preuve sur la question ni autrement à l'appui de sa position. En l'absence d'une telle preuve, il ne me reste qu'une simple affirmation de sa part. Cela ne suffit pas pour conclure que l'offre de paiement de 50 000 \$ faite par Sandoz, montant qui n'est pas insignifiant en termes absolus, constituait une « demande de capitulation » plutôt qu'une « véritable offre de règlement » : *Canwell*, précité. En termes très pratiques, l'offre n° 2 aurait donné à Allergan un résultat plus favorable que celui qu'elle a obtenu dans le jugement sur le fond finalement rendu en l'espèce. Par conséquent, l'offre n° 2 satisfaisait aux exigences de l'alinéa 420(2)a) des Règles, et je ne vois pas pourquoi Sandoz ne devrait pas avoir droit aux dépens calculés suivant le double du taux applicable, et ce, de la date de l'offre à celle du jugement sur le fond.

[57] Le doublement des dépens auxquels Sandoz a droit concerne les dépens « partie-partie ». Ces dépens peuvent être ceux auxquels elle aurait droit suivant l'échelon supérieur de la colonne IV du tarif B, ou ceux que la Cour pourrait adjuger en vertu de son pouvoir discrétionnaire : *Canada (Procureur général) c. Chrétien*, 2011 CAF 53, au paragraphe 3. Dans le cas présent, je ne vois aucune raison de m'écarter sensiblement du montant réclamé par Sandoz, lequel correspond au double des dépens auxquels elle aurait droit suivant l'échelon supérieur de la colonne IV. Ce montant s'élève à 47 026,08 \$, ce qui correspond à la différence entre les dépens totaux (y compris la TVH) calculés avec et sans doublement des dépens, dans les parties A et B, respectivement, du mémoire de dépens révisé de Sandoz, daté du 27 janvier 2021. Comme la somme que j'adjugerai est globale, j'estime qu'il est approprié de l'arrondir à 47 000 \$.

[58] Je m'arrête ici pour ajouter deux choses. Premièrement, compte tenu de la conclusion que je viens de tirer, il n'est pas nécessaire d'examiner l'alinéa 420(2)b) des Règles qui n'a pas été abordé par les parties dans leurs observations. Deuxièmement, même si une offre de règlement ne satisfait pas aux exigences de

to the party who made that offer, in the exercise of its discretion: paragraph 400(3)(e) [of the Rules]; *Sanofi-Novopharm CF*, above, at paragraph 20. Accordingly, I would have increased the cost award in favour of Sandoz to reflect Offer No. 2, even if I had concluded that the offer did not meet the requirements of rule 420. Considering all of the circumstances of the case, including the nature of Offer No. 2 and the fact that I have decided to make a lump sum cost award, the amount of such increase would have been approximately the same as the \$47,000 discussed above.

- (5) Conduct that tended to shorten or unnecessarily lengthen the proceeding

[59] Sandoz submits that it should be given credit for having: (i) cooperated with Allergan in settling all of the motions in this proceeding; (ii) agreed to the discontinuance of the action relating to the '780 Patent on a without costs basis; and (iii) agreed to narrow the issues for trial, including by abandoning its invalidity claims based on overbreadth and insufficiency.

[60] Generally speaking these are all actions that should be encouraged by the Court and given positive consideration when considering costs.

[61] Of course, where the other party or parties to the proceeding engage in similar actions, those actions also deserve similar consideration.

[62] This is precisely what happened in this proceeding. Accordingly, I will give this factor a neutral weighting in my assessment. In so doing, I have considered that Sandoz has not sought to recover any costs in respect of the fees or disbursements incurred in respect of aspects of its counterclaim that ultimately were not pursued, including its claims of invalidity based on overbreadth and insufficiency. I have also considered that the issue of overbreadth was effectively abandoned by Sandoz in December 2019, when Sandoz served the first report of Dr. Fassihi. That report did not consider or opine on

la règle 420, la Cour peut, dans l'exercice de son pouvoir discrétionnaire, attribuer le mérite qu'il revient à la partie qui l'a faite : alinéa 400(3)e des Règles; *Sanofi-Novopharm CF*, précitée, au paragraphe 20. Par conséquent, j'aurais augmenté le montant des dépens adjugés à Sandoz pour tenir compte de l'offre n° 2, même si j'avais conclu qu'elle ne remplissait pas les exigences de la règle 420. Compte tenu de l'ensemble des circonstances de l'affaire, notamment la nature de l'offre n° 2 et ma décision d'adjuger une somme globale pour les dépens, le montant d'une telle augmentation aurait été environ le même que celui de 47 000 \$ évoqué précédemment.

- 5) Le comportement ayant eu pour effet d'abrégé ou de prolonger inutilement la durée de l'instance

[59] Sandoz fait valoir qu'elle devrait se voir reconnaître qu'elle a : (i) coopéré avec Allergan en réglant toutes les requêtes présentées en l'espèce; (ii) accepté le désistement de l'action liée au brevet '780, sans dépens; (iii) convenu de restreindre la portée des questions à trancher durant le procès, notamment en renonçant à ses allégations d'invalidité fondées sur la portée excessive et l'insuffisance.

[60] De manière générale, ce sont là des actions qui devraient toutes être encouragées par la Cour et prises en compte favorablement au moment de considérer les dépens.

[61] Bien entendu, lorsque l'autre ou les autres parties à l'instance posent des actes similaires, ceux-ci méritent également d'être considérés sous le même jour.

[62] C'est précisément ce qui s'est passé en l'espèce. Par conséquent, j'accorderai à ce facteur un poids neutre dans mon appréciation. Ce faisant, j'ai tenu compte du fait que Sandoz n'avait pas tenté de recouvrer de dépens relatifs aux honoraires ou débours engagés à l'égard de certains aspects de sa demande reconventionnelle auxquels elle a fini par renoncer, notamment ses allégations d'invalidité fondées sur la portée excessive et l'insuffisance. J'ai également considéré que Sandoz avait effectivement abandonné l'argument de la portée excessive en décembre 2019, lorsqu'elle avait signifié le premier

the issue of overbreadth and contained only two paragraphs of opinion regarding the issue of insufficiency (plus two others that explained the nature of his retainer in that regard). As a consequence, Allergan filed no evidence regarding the issue of overbreadth, and its evidence on the issue of insufficiency was limited to four paragraphs in Dr. Felton's responding report on the issue of the validity of the '002 Patent.

[63] I will pause to observe that had Allergan incurred substantially greater costs in relation to the overbreadth and insufficiency issues, I may very well have made a significant downward adjustment in the lump sum amount awarded to Sandoz. In the past, the practice of alleging many grounds of invalidity appears to have been ingrained in the drug patent bar. This has considerably increased the time and cost associated with drug patent disputes, and has consumed substantial scarce Court resources. This is an important part of the existing culture that has to change. The Court will not hesitate to use its discretion with respect to costs to support that change, when it considers it to be appropriate to do so: see, for example, *Betsler-Zilevitch 2*, above, at paragraph 14; *Betsler-Zilevitch v. Petrochina Canada Ltd.*, 2021 FC 85, 182 C.P.R. (4th) 175, at paragraphs 142–144.

(6) Conclusion regarding fees

[64] In summary, I consider it appropriate to make a lump sum award of costs in favour of Sandoz. I also consider it appropriate to make that award by reference to a percentage of the legal fees incurred by Sandoz in respect of the '002 Patent, plus HST and disbursements, and to begin my assessment at the mid-point of the 25–50 percent range. So, I will begin my assessment with an amount that corresponds to 37.5 percent of the legal fees reasonably incurred by Sandoz in respect of the '002 Patent, less the fees associated with aspects of its counterclaim that were abandoned (Eligible Fees). Based on Sandoz's total Eligible Fees of \$598,710.00,

rapport de M. Fassihi. Ce rapport n'examinait pas la portée excessive ni ne formulait d'avis sur la question et ne contenait que deux paragraphes d'opinion concernant l'insuffisance (en plus de deux autres expliquant la nature de son mandat en la matière). Par conséquent, Allergan n'a déposé aucun élément de preuve concernant la portée excessive, et sa preuve ayant trait à l'insuffisance se limitait à quatre paragraphes dans le rapport produit en réponse par M^{me} Felton au sujet de la validité du brevet '002.

[63] Je m'arrête ici pour faire remarquer que, si Allergan avait engagé des frais substantiellement plus élevés en rapport avec les questions de la portée excessive et de l'insuffisance, j'aurais très bien pu minorer sensiblement le montant de la somme globale adjugée à Sandoz. Dans le passé, il semble que la pratique consistant à alléguer de nombreux motifs d'invalidité s'est enracinée dans le milieu des avocats spécialisés dans les brevets de médicaments. Cette pratique a eu pour effet d'augmenter considérablement le temps et les coûts engagés dans les litiges relatifs aux brevets de médicaments, et de mobiliser une part importante des ressources judiciaires déjà limitées. Il s'agit là d'un aspect notable de la mentalité présente qui doit changer. La Cour n'hésitera pas à user de son pouvoir discrétionnaire à l'égard des dépens pour appuyer ce changement, lorsqu'elle estimera approprié de le faire : voir par exemple *Betsler-Zilevitch 2*, précitée, au paragraphe 14; *Betsler-Zilevitch c. Petrochina Canada Ltd.*, 2021 CF 85, aux paragraphes 142–144.

6) Conclusion en ce qui concerne les honoraires

[64] En résumé, j'estime qu'il est approprié d'allouer, en guise de dépens, une somme globale à Sandoz et qu'il convient d'adjuger cette somme en se référant à un pourcentage des honoraires d'avocat qu'elle a engagés à l'égard du brevet '002, plus la TVH et les débours, et de commencer ma taxation au milieu de la fourchette de 25 à 50 p. 100. J'entamerai donc ma taxation avec un montant correspondant à 37,5 p. 100 des honoraires d'avocat raisonnables engagés par Sandoz à l'égard du brevet '002, moins ceux liés aux aspects de sa demande reconventionnelle qui ont été abandonnés (les frais admissibles). En se basant sur des frais admissibles totaux

this works out to \$224,516.25, which I will round up to \$225,000. For greater certainty, I have reviewed the detailed statement of those fees that is provided in Appendix A to the second Wysokinski affidavit, and I consider them all to be reasonable, notwithstanding the significant number of lawyers and clerks whose fees are being claimed by Sandoz.

[65] For the reasons I have explained, I will not make any downward adjustment or set off in favour of Allergan to reflect the fact that Allergan prevailed with respect to two of the three principal issues in this case. Given that the importance and complexity of this case is already reflected in my above-mentioned starting point, I will also not make any adjustment to reflect that factor. Likewise, I will not make any adjustment to reflect conduct that tended to shorten the duration of the proceeding, as Allergan and Sandoz made approximately equivalent contributions in this regard.

[66] However, for the reasons discussed at paragraphs 56–57 above, I will increase Sandoz’s cost award by \$47,000 to take account of one of its settlement offers (Offer No. 2). Accordingly, the fees component of the lump sum amount that will be awarded to Sandoz will be $\$225,000 + \$47,000 = \$272,000$. This equates to slightly over 45 percent of Sandoz’s Eligible Fees. Adding HST of \$35,360 (13 percent) produces a total of \$307,360.

(7) Disbursements

[67] Given that I am unable to make any cost award or set-off in favour of Allergan, this section of these reasons will deal solely with the disbursements claimed by Sandoz.

[68] Sandoz claims total disbursements of \$124,605.30 incurred in respect of the dispute regarding the ‘002 Patent. In reaching this figure, Sandoz made various adjustments described in the Wysokinski affidavit, in an effort to remove disbursements incurred in relation to the

de 598 710,00 \$ engagés par Sandoz, ce montant correspond à 224 516,25 \$, que j’arrondirai à 225 000 \$. Pour plus de certitude, j’ai examiné le relevé détaillé de ces frais fournis en annexe A du second affidavit Wysokinski, et j’estime qu’ils sont tous raisonnables, nonobstant le nombre significatif d’avocats et d’auxiliaires juridiques dont Sandoz réclame les frais.

[65] Pour les motifs que j’ai expliqués, je ne ferai pas de réajustement à la baisse ni n’accorderai de compensation à Allergan pour tenir compte du fait qu’elle a prévalu sur deux des trois principales questions en litige dans la présente instance. Compte tenu du fait que l’importance et la complexité de la présente affaire sont déjà prises en compte dans le point de départ que j’ai déjà mentionné, je ne ferai pas non plus de réajustement pour prendre ce facteur en considération. De même, je ne ferai aucun réajustement tenant compte des comportements ayant eu pour effet d’abrèger la durée de l’instance, les contributions d’Allergan et de Sandoz à cet égard étant approximativement équivalentes.

[66] Cependant, pour les motifs mentionnés aux paragraphes 56 et 57 ci-dessus, j’augmenterai de 47 000 \$ les dépens adjugés à Sandoz, pour tenir compte de l’une de ses offres de règlement (l’offre n° 2). Par conséquent, les honoraires compris dans la somme globale qui sera adjugée à Sandoz seront de 225 000 \$ + 47 000 \$ = 272 000 \$. Cela équivaut à un peu plus de 45 p. 100 des frais admissibles de Sandoz. L’ajout de la TVH qui s’élève à 35 360 \$ (13 p. 100) donne un total de 307 360 \$.

7) Les débours

[67] Comme je ne peux adjuger de dépens à Allergan ni lui accorder de compensation, cette section des présents motifs traitera exclusivement des débours réclamés par Sandoz.

[68] Sandoz réclame des débours totaux de 124 605,30 \$ engagés à l’égard du litige relatif au brevet ‘002. Pour parvenir à ce chiffre, elle a effectué divers réajustements décrits dans l’affidavit Wysokinski, dans le but d’éliminer les débours engagés à l’égard du brevet ‘780. Sous réserve des

'780 Patent. Subject to the comments below, I am satisfied that those adjustments are reasonable.

[69] The total disbursements claimed by Sandoz include a portion of Dr. Stewart's fees (\$15,626.25)³ and 75 percent of Dr. Fassihi's fees (\$59,687.54).

[70] Given the conclusion I reached with respect to the prosecution history of the '002 Patent, Dr. Stewart's evidence did not have any bearing on my decision on the merits. Accordingly, I do not consider it appropriate to make an award in favour of Sandoz in respect of Dr. Stewart's fees.

[71] Turning to Dr. Fassihi, Allergan submits that his fees should be discounted by 85 percent, to reflect the fact that the majority of his evidence was directed to the obviousness issue and that evidence was not accepted by the Court. Given the conclusions I reached in respect of his testimony (*Allergan*, above, at paragraph 35), I consider that his fees should be substantially discounted, but not to the extent suggested by Allergan. I consider a discount of 65 percent to be more appropriate. Consequently, Sandoz should be indemnified for only 35 percent of Dr. Fassihi's total fees of \$79,583.39. This amounts to \$27,854.19.

[72] Accordingly, I consider it appropriate to reduce the total disbursements of \$124,605.30 claimed by Sandoz by (i) \$15,626.25 (the amount claimed for Dr. Stewart), and (ii) \$31,833.36, which is the difference between the amount it claimed for Dr. Fassihi (\$59,687.54) and the amount that I have decided to award (\$27,854.19).

[73] Therefore, the total disbursements that will be awarded to Sandoz will be \$77,145.69. For greater certainty, I consider all of the disbursements included in this final amount to be reasonable.

commentaires ci-après, je suis convaincu que ces réajustements sont raisonnables.

[69] Les débours totaux réclamés par Sandoz comprennent une partie des frais de M. Stewart (15 626,25 \$)³ et 75 p. 100 des frais de M. Fassihi (59 687,54 \$).

[70] Compte tenu de la conclusion à laquelle je suis parvenu concernant l'historique des poursuites du brevet '002, la preuve de M. Stewart n'a eu aucune incidence sur ma décision quant au fond. Par conséquent, je ne pense pas qu'il convienne d'adjuger les frais de M. Stewart à Sandoz.

[71] Quant à M. Fassihi, Allergan soutient que ses frais devraient être réduits de 85 p. 100, étant donné que la plus grande partie de sa preuve concernait la question de l'évidence et que cette preuve n'a pas été acceptée par la Cour. Compte tenu des conclusions que j'ai tirées au sujet de son témoignage (*Allergan*, précitée, au paragraphe 35), je pense que ses frais devraient être substantiellement réduits, mais pas dans la mesure suggérée par Allergan. J'estime qu'une réduction de 65 p. 100 est plus appropriée. Par conséquent, Sandoz ne devrait être indemnisée qu'à raison de 35 p. 100 des frais totaux de M. Fassihi qui s'élèvent à 79 583,39 \$. Cela donne 27 854,19 \$.

[72] Par conséquent, j'estime qu'il convient de soustraire des débours totaux de 124 605,30 \$ réclamés par Sandoz les montants suivants : (i) 15 626,25 \$ (réclamés pour M. Stewart) et ii) 31 833,36 \$, montant qui correspond à la différence entre celui qu'elle a réclamé pour M. Fassihi (59 687,54 \$) et celui que j'ai décidé d'adjuger (27 854,19 \$).

[73] Par conséquent, les débours totaux qui seront adjugés à Sandoz seront de 77 145,69 \$. Pour plus de certitude, je considère que l'ensemble des débours inclus dans ce montant final sont raisonnables.

³ Sandoz reduced the amount claimed in respect of three of Dr. Stewart's four invoices by 50 percent, to exclude work performed in respect of the '780 Patent.

³ Sandoz a réduit de 50 p. 100 le montant réclamé à l'égard de trois des quatre factures de M. Stewart, afin d'exclure les travaux effectués concernant le brevet '780.

(8) Kissei's costs

[74] Kissei seeks its costs taxable at the upper end of column IV of Tariff B (\$23,670) together with disbursements totalling \$22,719.12. The latter are comprised of \$22,075.12 for travel and accommodation, plus \$644.00 for transcripts.

[75] As I have noted, Kissei did not take any position in the main action in this proceeding. However, it filed a defence to Sandoz's counterclaim and incurred some additional costs, primarily in respect of the examinations of one of its representatives (Yasuhiko Kirisawa) and one of the inventors of the '002 Patent (Mitsuo Muramatsu).

[76] For the reasons discussed at paragraph 44 above, it is appropriate to consider Kissei as having been a successful party in this proceeding. Therefore, it is entitled to the costs that it is seeking, with the following minor adjustments. Sandoz took a calculated risk in seeking an *in rem* declaration of invalidity in respect of the '002 Patent. It was unsuccessful in that regard. Costs should follow the event, particularly given that the interests of Kissei and Allergan were not fully coincident.

[77] Sandoz relies on *Pelletier v. Canada (Attorney General)*, 2006 FCA 418 (*Pelletier*), at paragraph 9 to support its assertion that Kissei is precluded from seeking costs in this proceeding because it failed to request costs in its pleadings or during the trial, which it did not attend. However, Sandoz's reliance on *Pelletier* is misplaced. This is because I granted leave to Kissei to make submissions on costs after I became aware that it had incurred material costs in connection with this proceeding.

[78] Sandoz further submits that if Kissei is entitled to any costs, they should be borne by Allergan, because Allergan was the party who initially added Kissei as a defendant in this proceeding, and because it is not uncommon for licensing agreements to include provisions for costs incurred by the licensor in defending impeachment actions. I do not consider either of those arguments

8) Les dépens de Kissei

[74] Kissei souhaite que les dépens auxquels elle a droit soient taxables suivant l'échelon supérieur de la colonne IV du tarif B (23 670 \$) avec des débours totalisant 22 719,12 \$. Cette dernière somme comprend des frais de déplacement et d'hébergement de 22 075,12 \$ plus 644 \$ pour des transcriptions.

[75] Comme je l'ai déjà noté, Kissei n'a pas pris position dans l'action principale en l'espèce. Cependant, elle a déposé une défense contre la demande reconventionnelle de Sandoz et a engagé des frais supplémentaires, principalement pour l'interrogatoire de l'un de ses représentants (Yasuhiko Kirisawa) et de l'un des inventeurs du brevet '002 (Mitsuo Muramatsu).

[76] Pour les motifs mentionnés au paragraphe 44 ci-dessus, il convient de considérer que Kissei a eu gain de cause en l'espèce. Elle a donc droit aux dépens qu'elle réclame, sous réserve des réajustements mineurs qui suivent. Sandoz a pris un risque calculé en sollicitant une déclaration d'invalidité en matière réelle en rapport avec le brevet '002 et elle a échoué sur ce point. Les dépens doivent suivre l'issue de la cause, d'autant plus que les intérêts de Kissei et d'Allergan ne concordaient pas totalement.

[77] Sandoz s'appuie sur l'arrêt *Pelletier c. Canada (Procureur général)*, 2006 CAF 418 (*Pelletier*), au paragraphe 9, à l'appui de sa prétention selon laquelle Kissei ne peut en l'espèce solliciter des dépens, parce qu'elle n'en a pas réclamé ni dans ses actes de procédure ni durant le procès auquel elle n'a pas participé. Cependant, Sandoz a tort de s'appuyer sur l'arrêt *Pelletier*, parce que j'ai autorisé Kissei à présenter des observations au sujet des dépens après avoir découvert qu'elle avait engagé des frais importants en lien avec la présente instance.

[78] Sandoz soutient en outre que, si Kissei a droit à des dépens, ceux-ci devraient être assumés par Allergan, cette dernière étant celle qui l'a initialement constituée en partie défenderesse, et aussi parce qu'il n'est pas rare que les ententes de licences prévoient des dispositions sur les frais engagés par le concédant de licence pour se défendre contre des actions en invalidation. Je ne pense

to be particularly relevant. Allergan was required to add Kissei to the proceeding, pursuant to subsection 6(2) of the Regulations. In addition, Sandoz is engaging in pure speculation regarding the contents of Allergan's licensing agreement with Kissei.

[79] I am satisfied that the claims for fees set forth in Kissei's bill of costs are all reasonable. In brief, they relate to the preparation of Kissei's defence and amended defence to Sandoz's counterclaim, the preparation of Kissei's affidavit of documents, the preparation for examination of discovery of one of its representatives and one of the inventors of the '002 Patent, attendance at those examinations, and participation in various case management conferences.

[80] Turning to Kissei's disbursements, Sandoz objects to Kissei's claim for business class travel and the number of days of accommodation for which it has sought reimbursement.

[81] Given the very long distance that Messrs. Kirisawa and Muramatsu had to travel (from Japan) for their examinations, I am satisfied that Kissei's claim for business class travel is reasonable.

[82] With respect to their accommodation expenses, Kissei is claiming 13 days of hotel accommodation for Mr. Kirisawa and 9 days for Mr. Muramatsu. I agree with Sandoz that those claims are excessive.

[83] In the Direction to attend that Sandoz served on each of Mr. Kirisawa and Mr. Muramatsu, Sandoz stated that it would reimburse travel expenses and witness fees for two days of attendance, if requested. Ultimately Messrs. Kirisawa and Muramatsu were examined for a total of approximately three days in relation to the '002 Patent (one day for the former and two days for the latter). Sandoz submits that if any of Kissei's accommodation claims are allowed, they should be limited to a maximum of four days for each of Messrs. Kirisawa and

pas que l'un ou l'autre de ces arguments soit particulièrement pertinent. Allergan devait ajouter Kissei à l'instance en application du paragraphe 6(2) du Règlement. De plus, Sandoz se livre à de pures conjectures quant au contenu de l'entente de licence conclue entre Allergan et Kissei.

[79] Je suis convaincu que les réclamations d'honoraires énoncées dans le mémoire de dépens de Kissei sont toutes raisonnables. En bref, elles concernent la préparation de sa défense puis de sa défense modifiée à la demande reconventionnelle de Sandoz, la préparation de son affidavit de documents ainsi que de l'interrogatoire préalable de l'un de ses représentants et de l'un des inventeurs du brevet '002, puis la participation à ces interrogatoires et à diverses conférences de gestion de l'instance.

[80] En ce qui a trait aux débours de Kissei, Sandoz s'oppose aux billets d'avion en classe affaires qu'elle a réclamés ainsi qu'au nombre de jours d'hébergement dont elle a demandé le remboursement.

[81] Compte tenu de la très longue distance que MM. Kirisawa et Muramatsu ont dû parcourir (du Japon) en vue de leurs interrogatoires, je suis persuadé que les billets d'avion en classe affaires réclamés par Kissei sont raisonnables.

[82] Pour ce qui est des frais d'hébergement, Kissei réclame le remboursement de séjours à l'hôtel d'une durée de 13 jours pour M. Kirisawa et de 9 jours pour M. Muramatsu. Je conviens avec Sandoz que ces demandes sont excessives.

[83] Dans l'assignation à comparaître qu'elle a signifiée à M. Kirisawa et à M. Muramatsu, Sandoz a déclaré que, s'ils en faisaient la demande, elle rembourserait leurs frais de déplacement et leur indemnité de témoin pour deux jours de présence. En fin de compte, MM. Kirisawa et Muramatsu ont été interrogés en tout pendant près de trois jours à l'égard du brevet '002 (un jour pour le premier et deux jours pour le second). Sandoz soutient que, si une ou l'autre des réclamations de Kissei pour l'hébergement étaient accueillies, elles

Muramatsu, having regard to the need for them to get acclimatized prior to their examinations.

[84] I agree. Accordingly, Kissei's claims for accommodation will be adjusted downward to exclude the first nine days of hotel expenses claimed for Mr. Kirisawa (\$3,967.93)⁴ and the first five days of hotel expenses claimed for Mr. Muramatsu (\$2,124.85),⁵ for a total reduction of \$6,092.78. Applying this reduction to the \$22,075.12 claimed by Sandoz for travel and accommodations, and adding the disbursement of \$644.00 for transcripts, yields a figure of \$16,626.34.

[85] Accordingly, Sandoz will be required to indemnify Kissei for fees of \$23,670 (assessed at the upper end of column IV of Tariff B) plus reasonable disbursements of \$16,626.34, for a total of \$40,296.34.

IV. Conclusion

[86] For the reasons set forth above, Allergan will be ordered to pay a lump sum amount of \$384,505.69 to Sandoz, who ultimately prevailed in the main action. The fee component of this is \$272,000, which represents approximately 45 percent of Sandoz's Eligible Fees. The other components are HST on those legal fees, plus Sandoz's reasonable disbursements. Among other things, the award for legal fees includes an upward adjustment to reflect the fact that Sandoz made a *bona fide* written offer to settle that would have provided Allergan with a more favourable outcome than what it ultimately achieved by continuing on to trial.

[87] Given that Kissei completely prevailed in its defence, it will be awarded its reasonable costs of \$40,296.34, comprising \$23,670 for legal fees calculated

⁴ \$665.68 for the first two nights combined plus \$471.75 per night for the next seven nights.

⁵ \$424.97 per night times five nights.

devraient être limitées à un maximum de quatre jours chacun pour MM. Kirisawa et Muramatsu, eu égard à leur besoin de s'acclimater avant leur interrogatoire.

[84] Je suis d'accord. Par conséquent, les réclamations de Kissei pour l'hébergement seront minorées afin d'exclure les frais d'hôtel des neuf premiers jours réclamés pour M. Kirisawa (3 967,93 \$)⁴ et des cinq premiers jours pour M. Muramatsu (2 124,85 \$)⁵, soit une réduction totale de 6 092,78 \$. Je soustrais cette somme de la somme de 22 075,12 \$ réclamée par Sandoz pour les frais de déplacement et d'hébergement, et j'ajoute les débours de 644,00 \$ pour les transcriptions, ce qui totalise 16 626,34 \$.

[85] Par conséquent, Sandoz devra indemniser Kissei pour des honoraires de 23 670 \$ (taxés suivant l'échelon supérieur de la colonne IV du tarif B) plus les débours raisonnables qui s'élèvent à 16 626,34 \$, pour un total de 40 296,34 \$.

IV. Conclusion

[86] Pour les motifs énoncés ci-dessus, il sera ordonné à Allergan de verser une somme globale de 384 505,69 \$ à Sandoz, qui a en fin de compte prévalu dans l'action principale. Les honoraires compris dans cette somme s'élèvent à 272 000 \$, ce qui représente environ 45 p. 100 des frais admissibles de Sandoz. Le reste correspond à la TVH sur ces honoraires d'avocat, plus les débours raisonnables engagés par Sandoz. Entre autres choses, les honoraires d'avocat ont été majorés pour tenir compte du fait que Sandoz avait fait, de bonne foi, une offre écrite de règlement, laquelle aurait fait bénéficier à Allergan d'un résultat plus favorable que ce qu'elle a obtenu en fin de compte en poursuivant le procès.

[87] Comme Kissei a complètement prévalu dans sa défense, elle se verra adjuger, à titre de dépens, les frais de 40 296,34 \$ qu'elle a raisonnablement engagés,

⁴ 665,68 \$ pour les deux premières nuits combinées plus 471,75 \$ par nuit pour les sept nuits suivantes.

⁵ 424,97 \$ par nuit pour cinq nuits.

in accordance with the upper end of column IV of Tariff B, plus reasonable disbursements of \$16,626.34.

comprenant 23 670 \$ d'honoraires d'avocat calculés conformément à l'échelon supérieur de la colonne IV du tarif B, plus les débours raisonnables de 16 626,34 \$.

ORDER in T-2023-18

ORDONNANCE dans le dossier T-2023-18

THIS COURT ORDERS that:

LA COUR ORDONNE que :

1. Allergan shall pay to Sandoz lump sum costs of \$384,505.69, comprising reasonable fees of \$272,000, HST on those fees of \$35,360, plus reasonable disbursements of \$77,145.69.
2. Sandoz shall pay to Kissei costs of \$40,296.34, comprising fees of \$23,670.00 assessed in accordance with the upper end of column IV of Tariff B plus reasonable disbursements of \$16,626.34.

1. Allergan verse, à titre de dépens, à Sandoz une somme globale de 384 505,69 \$, comprenant les honoraires de 272 000 \$ qu'elle a raisonnablement engagés, la TVH de 35 360 \$ sur ces frais plus des débours raisonnables de 77 145,69 \$;
2. Sandoz verse à Kissei des dépens de 40 296,34 \$, comprenant des honoraires de 23 670 \$ taxés conformément à l'échelon supérieur de la colonne IV du tarif B, plus des débours raisonnables de 16 626,34 \$.

Appendix 1 – Relevant legislation

Annexe 1 – Dispositions législatives applicables

Federal Court Rules, SOR/98-106

Règles des Cours fédérales, DORS/98-106

COSTS

DÉPENS

Awarding of Costs Between Parties

Adjudication des dépens entre parties

Discretionary powers of Court

Pouvoir discrétionnaire de la Cour

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.

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.

Crown

La Couronne

(2) Costs may be awarded to or against the Crown.

(2) Les dépens peuvent être adjugés à la Couronne ou contre elle.

Factors in awarding costs

Facteurs à prendre en compte

(3) In exercising its discretion under subsection (1), the Court may consider

(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)** the result of the proceeding;
- (b)** the amounts claimed and the amounts recovered;
- (c)** the importance and complexity of the issues;

- a)** le résultat de l'instance;
- b)** les sommes réclamées et les sommes recouvrées;
- c)** l'importance et la complexité des questions en litige;

- | | |
|---|--|
| <p>(d) the apportionment of liability;</p> <p>(e) any written offer to settle;</p> <p>(f) any offer to contribute made under rule 421;</p> <p>(g) the amount of work;</p> <p>(h) whether the public interest in having the proceeding litigated justifies a particular award of costs;</p> <p>(i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;</p> <p>(j) the failure by a party to admit anything that should have been admitted or to serve a request to admit;</p> <p>(k) whether any step in the proceeding was</p> <p style="padding-left: 20px;">(i) improper, vexatious or unnecessary, or</p> <p style="padding-left: 20px;">(ii) taken through negligence, mistake or excessive caution;</p> <p>(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;</p> <p>(m) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;</p> <p>(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;</p> <p>(n.1) whether the expense required to have an expert witness give evidence was justified given</p> <p style="padding-left: 20px;">(i) the nature of the litigation, its public significance and any need to clarify the law,</p> <p style="padding-left: 20px;">(ii) the number, complexity or technical nature of the issues in dispute, or</p> | <p>d) le partage de la responsabilité;</p> <p>e) toute offre écrite de règlement;</p> <p>f) toute offre de contribution faite en vertu de la règle 421;</p> <p>g) la charge de travail;</p> <p>h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;</p> <p>i) la conduite d'une partie qui a eu pour effet d'abrèger ou de prolonger inutilement la durée de l'instance;</p> <p>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;</p> <p>k) la question de savoir si une mesure prise au cours de l'instance, selon le cas :</p> <p style="padding-left: 20px;">(i) était inappropriée, vexatoire ou inutile,</p> <p style="padding-left: 20px;">(ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;</p> <p>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;</p> <p>m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;</p> <p>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;</p> <p>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 :</p> <p style="padding-left: 20px;">(i) la nature du litige, son importance pour le public et la nécessité de clarifier le droit,</p> <p style="padding-left: 20px;">(ii) le nombre, la complexité ou la nature technique des questions en litige,</p> |
|---|--|

(iii) the amount in dispute in the proceeding; and

(o) any other matter that it considers relevant.

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.

...

Assessment according to Tariff B

407 Unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B.

...

Consequences of failure to accept plaintiff's offer

420 (1) Unless otherwise ordered by the Court and subject to subsection (3), where a plaintiff makes a written offer to settle and obtains a judgment as favourable or more favourable than the terms of the offer to settle, the plaintiff is entitled to party-and-party costs to the date of service of the offer and costs calculated at double that rate, but not double disbursements, after that date.

Consequences of failure to accept defendant's offer

(2) Unless otherwise ordered by the Court and subject to subsection (3), where a defendant makes a written offer to settle,

(a) if the plaintiff obtains a judgment less favourable than the terms of the offer to settle, the plaintiff is entitled to party-and-party costs to the date of service of the offer and the defendant shall be entitled to costs calculated at double that rate, but not double disbursements, from that date to the date of judgment; or

(b) if the plaintiff fails to obtain judgment, the defendant is entitled to party-and-party costs to the date of the service of the offer and to costs calculated at double that rate, but not double disbursements, from that date to the date of judgment.

Conditions

(3) Subsections (1) and (2) do not apply unless the offer to settle

(iii) la somme en litige;

(o) toute autre question qu'elle juge pertinente.

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.

[...]

Tarif B

407 Sauf ordonnance contraire de la Cour, les dépens partie-partie sont taxés en conformité avec la colonne III du tableau du tarif B.

[...]

Conséquences de la non-acceptation de l'offre du demandeur

420 (1) Sauf ordonnance contraire de la Cour et sous réserve du paragraphe (3), si le demandeur fait au défendeur une offre écrite de règlement, et que le jugement qu'il obtient est aussi avantageux ou plus avantageux que les conditions de l'offre, il a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et, par la suite, au double de ces dépens mais non au double des débours.

Conséquences de la non-acceptation de l'offre du défendeur

(2) Sauf ordonnance contraire de la Cour et sous réserve du paragraphe (3), si le défendeur fait au demandeur une offre écrite de règlement, les dépens sont alloués de la façon suivante :

a) si le demandeur obtient un jugement moins avantageux que les conditions de l'offre, il a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et le défendeur a droit, par la suite et jusqu'à la date du jugement au double de ces dépens mais non au double des débours;

b) si le demandeur n'a pas gain de cause lors du jugement, le défendeur a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et, par la suite et jusqu'à la date du jugement, au double de ces dépens mais non au double des débours.

Conditions

(3) Les paragraphes (1) et (2) ne s'appliquent qu'à l'offre de règlement qui répond aux conditions suivantes :

(a) is made at least 14 days before the commencement of the hearing or trial; and

(b) is not withdrawn and does not expire before the commencement of the hearing or trial.

a) elle est faite au moins 14 jours avant le début de l'audience ou de l'instruction;

b) elle n'est pas révoquée et n'expire pas avant le début de l'audience ou de l'instruction.

Federal Court



Cour fédérale

Date: 20131126

Docket: T-1407-09

Citation: 2013 FC 1188

Vancouver, British Columbia, November 26, 2013

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

APOTEX INC.

Plaintiff

and

H. LUNDBECK A/S

Defendant

AND BETWEEN:

H. LUNDBECK A/S

Plaintiff by Counterclaim

and

**APOTEX INC. AND
APOTEX PHARMACHEM INC.**

Defendants by Counterclaim

**REASONS FOR JUDGMENT AND JUDGMENT
(ON DIRECTIONS WITH RESPECT TO COSTS)**

[1] Following a hard fought 26-day trial, I dismissed Apotex's action for the impeachment of Lundbeck's Canadian Patent No. 1,339,452 in respect of Escitalopram and maintained Lundbeck's

counterclaim against Apotex Inc. and Apotex Pharmachem Inc. for infringement of the said patent. I condemned Apotex Inc. to pay by way of an accounting of profits \$1,410,906.21 and Apotex Pharmachem Inc. \$304,177.38 both with interest. Costs were reserved. The public version of my reasons is reported at *Apotex Inc v H. Lundbeck A/S*, 2013 FC 192, 111 CPR (4th) 171, [2013] FCJ No 274 (QL).

[2] Lundbeck has now moved the court for an order for directions to the taxing officer. Its prime submissions are that it should be awarded costs at the high-end of Column V of Tariff B of the *Federal Courts Rules* and that those costs should be doubled following a settlement offer as it fared better in the result. It also seeks directions on various ancillary points. It has not sought directions with respect to each and every tariff item. To the extent that directions have not been sought and given, the matter is left to the taxing officer.

[3] For its part, the collective Apotex submit that costs should be awarded in accordance with mid-level Column IV and that there should be no doubling up because of the settlement offer. It also takes issue with some of the other points raised.

[4] I shall deal with the submissions in their order of presentation, combining those which are very similar in nature.

[5] Rules 400 and following of the *Federal Courts Rules* give the Court full discretion with respect to the amount and allocation of costs. However, pursuant to rule 407, unless the Court orders otherwise, party-and-party costs are assessed in accordance with Tariff B, Column III.

This gives rise to Lundbeck's motion, pursuant to rule 403 for directions, to be given to the assessment officer.

[6] Lundbeck emphasizes several factors the Court may consider under rule 400(3) such as the result, the importance and complexity of the issues, any written offer to settle, the amount of work, the conduct of the parties, and improper or vexatious proceedings allegedly taken by Apotex. Apotex submits that all pharmaceutical patent cases are inherently difficult and that the practice is to award costs in accordance with Column IV. Furthermore, Lundbeck did not succeed in its claim for punitive damages based on alleged bad faith by Apotex and so the award should be reduced by 10%.

[7] In addition, Lundbeck claimed an accounting of profits in excess of \$10,000,000 while it was awarded less than \$2,000,000.

[8] As my reasons for judgment show, the case was complex. The validity of the patent was attacked on several fronts. However, pharmaceutical patent cases are inherently complex.

I. Item A – Which Scale

[9] There is a great deal of jurisprudence on this issue. Each party was able to muster up a number of cases in its favour, each, of course, turning on its particular facts and the appreciation thereof by the trial judge.

[10] This is not a case of divided success. All but a few days of the trial dealt with impeachment. Although Lundbeck's counterclaim was not as successful as it would have liked,

it nevertheless succeeded. Thus, there is no reason to take that factor into account either in holding which column should apply, or in discounting the amount ultimately to be determined by the taxing officer pursuant to rule 405 (*Liquilassie Shipping Ltd v MV Nipigon Bay (The)*, [1975] FCJ No 209 (QL)). I consider it appropriate to award costs based on the high-end of Column IV. See *Sanofi-Aventis Canada Inc v Apotex Inc*, 2009 FC 1138, [2009] FCJ No 1626 (QL), *aff'd* 2012 FCA 265, [2012] FCJ No 1352 (QL).

II. Item B – Lundbeck’s Settlement Offer

[11] Lundbeck, as defendant and counter-claimant, made a settlement offer on 21 September 2012 which was kept open until five minutes after the commencement of trial. The offer was that the parties drop hands each paying its own costs. Apotex did not respond.

[12] As mentioned above, Apotex’s impeachment action was dismissed and Lundbeck’s infringement counterclaim was maintained with an award by way of an accounting of profits in excess of \$1,700,000.

[13] Rules 419 and following deal with offers to settle. Unless the Court orders otherwise, if a plaintiff fails to obtain judgment, the defendant is entitled to party-and-party cost to the date of service of the offer and to costs calculated at double that rate, but not double disbursements, from that date to the date of judgment. Likewise, where a plaintiff, in which case Lundbeck as counterclaimant, makes a written offer to settle and obtains a judgment as favourable as or more favourable than the terms thereof, it is likewise entitled to party-and-party costs, doubled up from the date of the offer.

[14] Apotex submits that costs should not be doubled up. It submits there was no real compromise on Lundbeck's part. If Apotex succeeded, Lundbeck would have lost revenues, the details of which are subject to a confidentiality order, but which, prior to the expiration of the patent would at least have been in the hundreds of million of dollars.

[15] Lundbeck counters that Apotex, in a real sense, had nothing to lose, and had already lost the Patented Medicine (Notice of Compliance) proceedings in first instance and in appeal (*Lundbeck Canada Inc v Canada (Minister of Health)*, 2009 FC 146, 73 CPR (4th) 69, [2009] FCJ No 249 (QL), aff'd 2010 FCA 320, 88 CPR (4th) 325, [2010] FCJ No 1504 (QL), leave to appeal refused, [2011] SCCA No 43 (QL).

[16] Based on the report of their expert witness, Howard Rosen, and by their own admissions, the Apotex entities were well aware prior to trial that if an accounting of profits were granted, the amount awarded would at the very minimum be just over \$1,000,000.

[17] The offer was not that the proceedings be settled on the basis of a unilateral discontinuance by Apotex. This was not a demand for surrender.

[18] Consequently, I see no reason why I should adjudge that Lundbeck not be awarded double costs from the date of the offer. Although rule 420 speaks of double costs until judgment, since the Court is not aware of what might have gone on after the case was taken under reserve, double costs are awarded up to the date of close of argument on 14 December 2012.

III. Items C, D, E and F

[19] These items are all similar in the sense that Lundbeck is claiming fees and reasonable disbursements, including travel, accommodation and related expenses for one or two first counsel and two second counsel for all pre-trial proceedings (other than where costs were awarded to Apotex), for all trial proceedings and preparation for trial, fees for travel, accommodation and related expenses in respect of all pre-trial proceedings and in respect of all trial proceedings and preparation for trial. The difference between the parties relates to the number of counsel.

[20] As regards Item C, for all pre-trial proceedings, including discovery, Lundbeck submits that costs should be for one first counsel and two second counsel. Apotex suggests the direction should be for one first counsel and one second counsel at 50%, and that there should be no award with respect to experts or potential witnesses who did not testify at trial.

[21] As regards Item D, for all trial proceedings and preparation, Lundbeck seeks direction for two first counsel and two second counsel. Apotex agrees to two first counsel but only one second counsel in accordance with items 13 to 15 of Tariff B.

[22] As regards Item E, fees for travel, etc. in respect of all pre-trial proceedings, Lundbeck seeks directions for one first counsel and two second counsel. Apotex proposes one first counsel and one second counsel.

[23] As regards Item F, fees for travel, etc. in respect of trial proceedings and preparation for trial, Lundbeck seeks directions for two first counsel and two second counsel. Apotex proposes two first counsel and one second counsel.

[24] I agree with Apotex's submissions on these items. Save in exceptional circumstances, our tariff is not intended to make a party whole. For the most part, Lundbeck had six counsel present throughout the trial and Apotex had five on some days, and four on others. Big pharma is big business, and big litigation is part of that business. It has not been the practice to award fees for a second junior counsel and I decline to do so.

IV. Item G – Travel and Other Disbursements of Lundbeck Personnel

[25] Lundbeck submits that reasonable disbursements for its in-house counsel, its director of corporate patents and trade-marks, and one of its technical specialists should be awarded.

[26] Apotex agrees that the disbursements of John Meidahl Petersen in relation to his examination for discovery as a representative of Lundbeck should be recoverable, but disputes the rest.

[27] Although there are always cases on both sides of just about every issue in intellectual property cost disputes, the overall principle is that no disbursements are allowed with respect to those who did not testify. I agree with Apotex.

V. Item H – Reasonable Disbursements for all Fact Witnesses

[28] Apotex submits that the current practice is not to allow these disbursements unless, of course, one is under subpoena and conduct money is provided. Counsel referred to *Eurocopter v Bell Helicopter Textron Canada Limitée*, 2012 FC 842, [2012] FCJ No1055 (QL) at para 54. However, the rationale was not fully set out in what was a case of divided success. I note that the witnesses also acted as technical advisors. In this case, a paralegal testified for Lundbeck but she was local and incurred no additional expenses. In my experience, such expenses have always been allowed.

[29] In this case, there were a number of necessary fact witnesses, many coming from Denmark, Lundbeck's home office, and from the United States. All reasonable disbursements in connection therewith are allowed.

VI. Item I – Fees for the Assessment of Costs

[30] This item will be dealt with at the conclusion of these reasons.

VII. Item J – Fees for Services Rendered by Students at Law, Law Clerks and Paralegals throughout the Proceeding and During Trial

[31] These fees are not usually taxed, and I see no reason to depart from that practice. As Mr. Justice Hughes stated in *Janssen-Ortho Inc v Novopharm Ltd*, 2006 FC 1333, 57 CPR (4th) 58, [2006] FCJ No1684 (QL), at paragraph 25:

The attendance of a client or its representatives has traditionally been an expense borne by the client. Similarly, if client chooses to have Canadian or foreign lawyers also assist, that is an expense that it

should bear alone. The same applies to experts who did not appear as witnesses, but assisted in other capacities, that is the choice of the party, but not an expense to be borne by others. The same applies in respect of paralegals, clerks, students and any other persons engaged by the Plaintiffs in respect of this action unless otherwise expressly referred to in these Reasons.

Incidentally, this is another case in which fees were directed to be assessed at the upper end of Column IV.

VIII. Item K – Fees and Reasonable Disbursements for Lundbeck’s Experts who Testified at Trial

[32] Apotex agrees but points out that the hourly rate charged by an expert should be no more than the hourly rate charged by Lundbeck’s senior counsel. Apotex’s position reflects the current state of the law. The taxing officer is directed to take into account the decisions of Mr. Justice Hughes in *Janssen-Ortho*, above, and in *Bayer Inc v Cobalt Pharmaceuticals Company*, 2013 FC 1061.

[33] In addition, the reasonable fees and disbursements of Doctor Bode, who prepared a report with respect to toxicity, are allowed. Dr. Bode’s report was filed and constituted his evidence-in-chief. He did not attend at trial only because Apotex waived cross-examination.

IX. Item L – All Fees and Reasonable Disbursements of Lundbeck’s Experts Who Did Not Testify at Trial

[34] In accordance with the general rule, as stated above, I see no reason to direct that such fees and disbursements be paid. While it is true that Apotex only dropped its selection patent

allegation at the opening of trial, there have been many cases where points have been dropped in mid-trial and no costs have been awarded for witnesses who were no longer required to testify.

X. Item M – Stenography

[35] Apotex says that the recent jurisprudence indicates that stenography is no longer taxed. Reference was made to *Novopharm Ltd v Jansen-Ortho Inc*, 2012 FCA 29, [2012] FCJ No 126 (QL) where there was an assessment of costs by an assessment officer. However, the assessment officer, Mr. Preston, was dealing with court reporting services on the appeal which he allowed as being reasonable and justified. His reasons do not indicate that taxation of stenography at discovery or at trial was ever in issue.

[36] As every trial lawyer knows, an accurate transcript prepared by an independent reporter is crucial. Examinations for discovery are transcribed in order to adequately and properly deal with undertakings and objections. The transcript may be used at trial as read-ins or to bring an inconsistent testimony to a witness' attention.

[37] In this case, daily transcripts of the trial were agreed. They were extensively used by counsel, and by the Court. Furthermore, one could not have a proper record on appeal without them.

[38] If any one disbursement is recoverable, this is it.

XI. Item N – Reasonable Disbursements Relating to Computerized Services

[39] Following discussion, I held that this matter should be reserved for the taxing officer.

These disbursements very much depend on context rather than on principle.

XII. Cost of this Motion

[40] The fees, without doubling up, and the disbursements on this motion, are allowed as follows: fees are awarded under Tariff B, Item 21 for one senior and one junior counsel at the high-end of Column IV based on a four hour hearing and for travel for the same counsel under item 24. The Court had directed that the motion be heard at Ottawa which necessitated travel from Montréal by Lundbeck's counsel.

JUDGMENT

THIS COURT’S JUDGMENT is that the taxing officer is directed to tax one set of H. Lundbeck A/S costs in accordance with these reasons.

“Sean Harrington”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1407-09

STYLE OF CAUSE: APOTEX INC. v H. LUNDBECK A/S

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: NOVEMBER 20, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:**

HARRINGTON J.

DATED: NOVEMBER 26, 2013

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Competition Tribunal



Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 03

File No.: CT-2022-002

Registry Document No.: 865

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

Rogers Communications Inc.
Shaw Communications Inc.
(respondents)

and

Videotron Ltd.
(intervenor)



REASONS FOR ORDER AND ORDER

I. INTRODUCTION

[1] These reasons and the accompanying Order concern the costs claimed in relation to the application filed by the Commissioner of Competition for an Order under section 92 of the *Competition Act*, RSC 1985, c C-34 (the “**Act**”), prohibiting the completion of an Arrangement Agreement between the Respondents, dated March 13, 2021 (the “**Initially Proposed Transaction**”).

[2] Pursuant to the Initially Proposed Transaction, Rogers Communications Inc. (“**Rogers**”) agreed to purchase all of the issued and outstanding shares of Shaw Communications Inc. (“**Shaw**”) for approximately \$26 billion, inclusive of debt. That transaction included the indirect acquisition by Rogers of Shaw’s subsidiary, Freedom Mobile Inc. (“**Freedom**”), which carried on the substantial majority of Shaw’s mobile telephony business.

[3] On June 17, 2022, the Respondents, the Intervenor Videotron Ltd. (“**Videotron**”), and Quebecor Inc. (Videotron’s ultimate parent company) entered into a letter of agreement and term sheet concerning the sale of Freedom to Videotron for \$2 billion, plus \$850 million representing the present value of forward lease obligations (the “**Divestiture**”). Pursuant to this three-way arrangement (the “**Merger and Divestiture**”), Shaw would first transfer Freedom to Videotron. Rogers would *only then* acquire the remainder of Shaw through an amalgamation arrangement.

[4] On December 31, 2022, the Tribunal issued an Order dismissing the Commissioner’s application: *Commissioner of Competition v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 1 (“**Rogers-Shaw**”). In its accompanying Reasons for Order, the Tribunal stated that it would address the issue of costs in a subsequent decision.

[5] For the reasons that follow, the Commissioner will be ordered to pay counsel fees of \$414,720.00 to Rogers and \$416,187.00 to Shaw, plus applicable HST. The Commissioner will also be ordered to compensate Rogers and Shaw for reasonable disbursements in the amount of \$9,298,152.58 for Rogers and \$2,836,920.30 for Shaw, plus applicable HST.

[6] No costs shall be payable to Videotron.

II. BACKGROUND

[7] On December 21, 2022, the Tribunal directed the parties as follows:

The parties are encouraged to reach an agreement regarding costs in a lump sum amount, plus disbursements, before they know the outcome in this proceeding. If they are unable to reach an agreement, they shall provide submissions, not exceeding five pages for the Commissioner and five pages for the Respondents and the Intervener combined, before the close of business on December 29, 2022, or such earlier date as the Tribunal may advise. If the parties are unable to reach an agreement on a lump sum amount of costs payable to the prevailing party, they shall file their respective bills of costs together with their submissions.

[8] As it transpired, the parties were unable to reach an agreement. Consequently, the Commissioner and the Respondents together with Videotron provided separate submissions. Given that those submissions were filed roughly contemporaneously, the parties did not have the benefit of seeing each other's submissions or their respective Bills of Costs.

[9] After noting that the Respondents and Videotron had not provided any support whatsoever for their requested disbursements, the Tribunal issued a Direction, dated June 22, 2023, requiring them to provide meaningful support for those disbursements by way of affidavit evidence. After also observing that one of the objectives underlying the Tribunal's initial Direction regarding costs was to avoid the significant time and expense that would be associated with preparing a granular analysis and a detailed Bill of Costs, the Tribunal clarified that such a granular analysis was not required.

[10] The Respondents provided their affidavit evidence in support of their requested disbursements shortly thereafter. Videotron did the same.

[11] The Commissioner then requested an opportunity to provide additional submissions. After that opportunity was granted, those submissions were filed on August 4, 2023. The Respondents replied to those submissions in writing on August 9, 2023.

[12] In dismissing the Commissioner's application on the merits, the Tribunal noted that the application raised the following three principal issues:

- a) What relevance does the Initially Proposed Transaction have for this proceeding?
- b) Is the Merger, as modified by the Divestiture, likely to prevent or lessen competition substantially?
- c) If so, have the Respondents established the requirements of the efficiencies defence?

[13] Ultimately, the Tribunal found in favour of the Respondents on the first two of the abovementioned issues. Consequently, it was not necessary for the Tribunal to address the third issue, concerning the efficiencies defence.

III. OVERVIEW OF THE PARTIES' SUBMISSIONS

A. The Respondents and Videotron

[14] The Respondents provided submissions together with Videotron. They each requested a lump sum award representing 25% of actual legal fees, plus disbursements. In the alternative to such a lump sum award for legal fees, the Respondents and Videotron each requested legal fees guided by the top end of Column V of Tariff B of the *Federal Courts Rules*, SOR/98-106 (the "Rules").

[15] The abovementioned alternative requests, as amended, can be summarized as follows:

**Table 1 – Summary of Claimed Counsel Fees
(as amended, excluding HST where applicable)**

	Rogers	Shaw	Videotron
<i>Actual fees incurred</i>	\$7,967,640.00	\$9,686,275.00	\$1,949,180.48
Claim based on 25% of actual fees	\$1,991,910.00	\$2,421,568.75	\$487,295.12
Alternative claim guided by the high end of Column V of Tariff B	\$414,720.00	\$416,187.00	\$303,880.00

**Table 2 – Summary of Claimed Disbursements
(as amended, excluding HST where applicable)**

	Rogers	Shaw	Videotron
Taxable disbursements	\$163,302.27	\$86,173.59	\$85,639.16
Non-taxable disbursements	\$9,232,168.84	\$3,277,858.12	\$6,350.25
Total	\$9,395,471.11	\$3,364,031.71 ¹	\$91,989.41

[16] In support of their requests, the Respondents and Videotron submitted that the Commissioner’s intransigent pursuit of an order blocking the entire Initially Proposed Transaction, even after the Divestiture was publicly announced almost five months prior to the commencement of the hearing in this proceeding, should now have consequences. In any event, they maintained that the costs awarded should bear a meaningful relationship to the actual costs incurred. In this regard, they stated that a lump sum award representing 25% of actual legal fees, plus disbursements, is at the low end of the range that has been found to be acceptable in complex commercial cases. They asserted that this request was conservative, given the stakes involved, the complexity of the dispute, and the amount of work that was required from pleadings to trial, all within a matter of months.

[17] In addition to the foregoing, the Respondents and Videotron maintained that the Commissioner adopted an unnecessarily contentious approach throughout the litigation, which significantly increased the costs that they were required to incur. Moreover, they asserted that the Commissioner waited until his opening statement to resile from his claims with respect to the Ontario market – where approximately 72% of Freedom’s customers were located.

¹ The Tribunal notes that there appears to have been a miscalculation in the assessment of adjusted disbursements at paragraph 5 of Ms. Debra Theresa Ann Bilou’s affidavit on behalf of Shaw. While it is indicated therein that the total of taxable and non-taxable disbursements amounts to \$3,363,758.71, the actual sum of taxable disbursements (\$86,173.59) and non-taxable disbursements (\$3,277,858.12) is \$3,364,031.71.

B. The Commissioner

[18] The Commissioner requested a lump sum amount of \$10.9 million, inclusive of counsel fees and disbursements, in the event that the application in this proceeding was successful.

[19] If the application was dismissed, the Commissioner's submissions can be summarized as follows:

- a) Any cost award against the Commissioner should be materially reduced to reflect the important public interest in bringing the case;
- b) The Tribunal should take into account any success the Commissioner had on particular issues;
- c) The Tribunal should also take into account the Respondents' decision *not* to concede certain issues at the outset of the hearing, including concessions that would have simplified the proceeding;
- d) The Tribunal should make a downward adjustment to reflect the excessive nature of the Respondents' claims and the unnecessary duplication of work among their respective counsel teams;
- e) A further downward adjustment should be made to reflect the Commissioner's role in bringing about the Divestiture; and
- f) Videotron should not be awarded any costs.

IV. ASSESSMENT

A. General Principles

[20] The general principles applicable to the assessment of costs were recently summarized by the Tribunal in *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18 at paras 768-776 ("**P&H**"). They need not be repeated here.

[21] In essence, the Tribunal has full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid. The point of departure is the provisions governing costs in the Rules and the associated jurisprudence: *Competition Tribunal Act*, RSC 1985, c 19, s 8.1(1).

[22] In the Federal Court, the "default" level of costs is the mid-point of Column III in Tariff B of the Rules: Rule 407: *Sanofi-Aventis Canada Inc v Novopharm Limited*, 2009 FC 1139 at para 4, aff'd 2012 FCA 265; *Bernard v Professional Institute of the Public Service of Canada*, 2020 FCA 211 at para 38; *Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 at para 25 ("**Allergan-Sandoz**"). Column III is intended to provide partial indemnification (as opposed to substantial or full indemnification) for "cases of average or usual complexity": *Air Canada v Thibodeau*, 2007 FCA 115 at para 21 ("**Thibodeau**"); *Novopharm Ltd v Eli Lilly and Co*, 2010 FC 1154 at para 5.

[23] In *P&H*, the Tribunal found that proceedings under section 92 of the Act involve complex legal and factual matters that support higher cost awards under Column IV of Tariff B: *P&H*, at para 781. Of course, this would be subject to the Tribunal's consideration of the other relevant factors at play in any given case.

[24] The most important overall factor in arriving at a costs award is which party succeeded. The Tribunal will also have regard to other relevant factors. These include the public interest in bringing the case and the extent to which there may have been divided success on the issues in dispute. In addition, the Tribunal will consider behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious: *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 25; *Thibodeau*, at para 24.

[25] Having regard to all of the foregoing, the fixing of costs typically involves a compromise between compensating a successful party and not unduly burdening an unsuccessful party, bearing in mind the parties' conduct during the litigation. The costs ordered should not be excessive or punitive, but rather reflect a fair and reasonable relationship to the actual costs of litigation, keeping in mind that the Rules are based on a partial indemnification model.

[26] In considering what is fair and reasonable, it cannot be ignored that there is broad recognition that Tariff B no longer provides an adequate level of partial indemnification and that the *Federal Courts Rules* Committee has approved amendments that would increase the amounts recoverable under Tariff B by approximately 25% : *Allergan-Sandoz*, at para 28.

[27] Insofar as disbursements are concerned, the parties' claims must be reasonable, necessary, and justified.

[28] The Tribunal favours lump sum cost awards over formal taxation of Bills of Costs.

B. The Prevailing Party

[29] In this proceeding, the Respondents prevailed on the two principal issues that provided the basis for the Tribunal's dismissal of the Commissioner's application. Those were (i) the relevance of the Initially Proposed Transaction, and (ii) whether the Merger, as modified by the Divestiture, was likely to prevent or lessen competition substantially.

[30] The Respondents also prevailed with respect to the principal contentious sub-issues, including the Commissioner's allegations that: (i) Shaw's divestiture of Freedom to Videotron would result in Freedom being a less effective competitor than it was immediately prior to the announcement of the Initially Proposed Transaction; (ii) Rogers and Shaw were each other's closest competitor; (iii) Rogers' acquisition of Shaw Mobile would likely give rise to anti-competitive unilateral effects; and (iv) the Merger and Divestiture would likely facilitate the exercise of collective market power by Rogers, BCE Inc. ("**Bell**"), and TELUS Communications Inc. ("**Telus**").

[31] The Respondents' success with respect to the principal issues as well as the main sub-issues that were in dispute weighs strongly in their favour.

C. The Public Interest in Bringing the Application

[32] The Commissioner maintains that he should not be required to pay elevated legal costs in the absence of highly exceptional circumstances, which he asserts do not exist in this case.

[33] In support of this position, the Commissioner notes that the Tribunal has recognized that he is presumed to have acted in the public interest in seeking adjudication before the Tribunal, and that he is a public official with a statutory mandate to administer and enforce the Act: *Rona Inc v Commissioner of Competition*, 2005 Comp Trib 26 at para 17; *P&H*, at para 781. The Commissioner adds that there was a broad public interest in bringing this case.

[34] I agree that, *taken alone*, this factor weighs in favour of not imposing elevated legal costs against the Commissioner. This presumes that the Commissioner has in fact conducted himself in the public interest throughout the proceeding. As discussed below, that was not the case in the present proceeding.

D. Partial Success

[35] Before the issuance of the Tribunal's decision, the Commissioner submitted that the cost award issued by the Tribunal should reflect any success that he had on issues.

[36] Unfortunately for the Commissioner, the Tribunal did not find in his favour with respect to most of the key issues and sub-issues that were in dispute. The noteworthy exceptions were the relevant date for the commencement of the forward-looking "but for" analysis and Shaw's historical effectiveness as a vigorous and effective competitor. In addition, the Tribunal ultimately agreed with the Commissioner's positions with respect to market definition and barriers to entry, after the Respondents conceded to those positions during their final oral submissions. However, the parties did not spend a material amount of time on those issues during the hearing.

[37] In my view, when these exceptions are considered together with the large number of issues in respect of which the Respondents prevailed, and the small amount of time and effort they attracted relative to other issues, they do not warrant significant weight in the Commissioner's favour.

E. Unreasonable Behaviour

[38] The Commissioner maintains that any cost award in the Respondents' favour should be materially reduced to reflect conduct on the part of the Respondents that unnecessarily lengthened the hearing and the submissions he was required to make. In this regard, the Commissioner contrasted the abovementioned concessions that were made in final argument by the Respondents, with concessions that he made at the outset of the hearing. At that time, the Commissioner effectively withdrew his allegations with respect to (i) the impact of the Merger in Ontario, and (ii) the supply of services to *businesses* (as opposed to consumers).

[39] The Commissioner added that the Respondents' refusal to admit various matters that should have been admitted unnecessarily complicated the parties' dispute. As an example, the Commissioner noted that Rogers refused to admit that it experienced a service outage in 2022. As

a second example, the Commissioner asserted that Rogers refused to provide admissions with respect to certain of its wireless terms of service.

[40] The Respondents countered with the assertion that the Commissioner unreasonably pursued the Initially Proposed Transaction. The Respondents underscored that the Commissioner did so even after the public announcement of the Divestiture, almost five months before the commencement of the hearing, and even after the Minister of Innovation, Science and Industry officially announced, on October 25, 2022, that he would not approve the transfer of spectrum licenses from Shaw to Rogers.

[41] The Respondents added that the Commissioner also adopted an unnecessarily contentious approach throughout the litigation. They asserted that this resulted in excessive production of over 2.6 million documents, nine days of examinations for discovery, 16 contested pre-trial motions, the engagement of Bell and Telus in motions over documents and subpoenas, and the exchange of approximately 45 witness statements and expert reports in a very tight timeframe.

[42] On balance, I consider that the Commissioner's conduct, as described immediately above, was much more unreasonable than the conduct of the Respondents, as described at paragraphs 38 and 39 above.

[43] In the Tribunal's decision on the merits, it was observed that the Commissioner's pursuit of the Initially Proposed Transaction was "divorced from reality", because that transaction was no longer something that would ever happen: *Rogers-Shaw*, at para 110. On appeal, the Federal Court of Appeal observed that "[e]xamining the merger alone – a merger that, by itself, will not and cannot happen without the divestiture – would be a foray into fiction and fantasy": *Canada (Commissioner of Competition) v Rogers Communications Inc., Shaw Communications Inc. and Videotron Ltd.*, 2023 FCA 16 at para 18 ("**Rogers-Shaw FCA**"). The Court added that "in competition terms, this was far from a close case": *Rogers-Shaw FCA*, at para 10.

[44] I agree with the Respondents that the Commissioner's pursuit of the Initially Proposed Transaction was intransigent and should now have consequences. Among other things, the Commissioner's refusal to focus on the Divestiture, despite repeated suggestions from the Tribunal that he do so, resulted in substantial resources having to be devoted by the Respondents and the Tribunal to something that had become legally and practically foreclosed.

[45] I also agree with the Respondents that the Commissioner adopted an unnecessarily contentious approach at numerous points during the litigation. Once again, that approach resulted in significant additional time and effort being spent on various matters that were ultimately resolved in the Respondents' favour.

[46] I recognize that complex, high-stakes, and time-sensitive litigation can and does often require actions to be taken that may not objectively appear to be unreasonable at the time. I also acknowledge that the Respondents adopted at least some positions that were not entirely reasonable or ultimately accepted by the Tribunal.

[47] However, on balance, I find that the Commissioner engaged in much more serious unreasonable behaviour than did the Respondents, and that this behaviour had a very significant adverse impact on the time and costs that were associated with the proceeding. Consequently, I

conclude that this factor weighs in favour of awarding elevated legal costs in favour of the Respondents.

F. Excessive Claims

[48] The Commissioner submits that the legal fees claimed by the Respondents are unprecedented and excessive. By way of comparison, the Commissioner notes that the successful respondent in the recent *P&H* case was awarded a lump sum for legal fees of \$157,000, which represented approximately 75% of its legal fees as claimed under Colum IV of Tariff B: *P&H*, at para 785.

[49] With respect to the allegedly excessive claims, the Commissioner asserts that they include a substantial duplication of work as between the legal teams of Rogers and Shaw. In this regard, the Commissioner states that counsel for both of those parties were heavily involved in every aspect of the defence of the Commissioner's application, leading to parallel and overlapping defences and evidence led by each party.

[50] I acknowledge that Rogers and Shaw each had significant legal teams and that multiple members of both of those teams appeared to be very involved in several of the issues in this proceeding, as well as in the large number of pre-hearing motions that took place. This contrasted with what occurred in a number of other merger cases adjudicated by the Tribunal, where counsel to the acquiring party assumed responsibility for the bulk of the litigation.

[51] Nevertheless, it is difficult "to second guess successful counsel on the amount of time spent on the case or the allocation of counsel to the tasks at hand, unless the time spent is so grossly excessive as to be obvious overkill": *Shibish v Honda of Canada Inc.*, 2011 ONSC 2989 at para 21. In the absence of particularized support for the Commissioner's allegations, it is difficult to do more than to find that this factor weighs in favour of moderately reducing the cost award that might otherwise be made.

G. The Commissioner's Role in Bringing about the Divestiture

[52] The Commissioner submits that any costs awarded to the Respondents should be reduced to recognize the Commissioner's role in bringing about the Videotron Divestiture. The Commissioner maintains that he incurred significant expenses reviewing and challenging the Initially Proposed Transaction, including prior to the announcement of the Divestiture. The Commissioner notes that the Divestiture was only announced on the eve of examinations for discovery, and after the Tribunal issued its expedited Scheduling Order.

[53] To the extent that the Commissioner maintained his challenge of the Initially Proposed Transaction after he became aware of the Divestiture, his efforts to persuade the Tribunal to reduce the amount of costs to be awarded to the Respondents are somewhat beside the point.

[54] In any event, the Bills of Costs filed by the Respondents reflect only very minor legal fees, totalling approximately \$13,312, for work incurred prior to the announcement of the Divestiture, on June 17, 2022.

[55] I recognize that the Respondents incurred significant disbursements prior to the announcement of the Divestiture. I will deal with this in part IV.J. of these reasons below.

[56] In summary, with respect to the Respondents' claimed legal fees, the Commissioner's role in bringing about the Divestiture warrants only a minor reduction of the costs that would otherwise be awarded to the Respondents. For greater certainty, such reduction is significantly less than the increase in costs that is warranted by the Commissioner's continued challenge of the Initially Proposed Transaction, long after that transaction became a legal and practical impossibility.

H. Videotron's Costs

[57] The Commissioner submits that Videotron should not be awarded any costs because it failed to make any request in this regard in its motion for leave to intervene. In support of this position, the Commissioner notes that under Rule 46(2) of the *Competition Tribunal Rules*, SOR/2008-141, the Tribunal may allow a motion for leave to intervene, with or without conditions. The Commissioner adds that, in *Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 5 at paragraph 19 ("**HarperCollins**"), the Tribunal granted Rakuten Kobo Inc.'s request for leave to intervene on the basis that "Kobo shall be able to seek and be liable for costs in these proceedings."

[58] It is relevant to note that HarperCollins is not the only case in which a party requesting intervener status addressed the issue of costs in its application for leave to intervene. This was also done by the Canadian Real Estate Association in *Commissioner of Competition v Toronto Real Estate Board*, 2011 Comp Trib 22 at paragraph 43.

[59] Videotron was represented by sophisticated counsel from the outset of this proceeding. I am inclined to consider that Videotron's decision *not* to address the issue of costs in its motion for leave to intervene or at any time during the hearing was not an oversight.

[60] In any event, "[w]here costs are not requested in the pleadings or at the hearing" they cannot be awarded, unless leave is granted to seek costs: *Pelletier v Canada (Attorney General)*, 2006 FCA 418 at para 9; *Allergan-Sandoz*, at para 77.

[61] Consequently, and notwithstanding that I provided Videotron with an opportunity to make submissions on costs in my aforementioned Direction dated December 21, 2022, I consider it appropriate to exercise my discretion not to award Videotron any costs in this proceeding.

I. Conclusion regarding Counsel Fees

[62] Having regard to the parties' various submissions and to the general principles summarized in part IV.A above, I consider that the Respondents' alternative request for costs guided by the top end of Column V of Tariff B is fair and reasonable. In other words, I consider it appropriate to fix costs for the Respondents' legal fees at the amounts set forth in the bottom row of Table 1 above, namely, \$414,720.00 for Rogers and \$416,187.00 for Shaw, plus applicable HST.

[63] For the reasons given in the immediately preceding section, no costs will be awarded to Videotron.

[64] Although the amounts to be awarded to the Respondents represent only a small fraction of the legal fees actually incurred, it appears that they far exceed any amount that has previously been awarded by the Tribunal for legal fees.

[65] These amounts are very substantial for a public authority such as the Commissioner. I am mindful that the public interest may suffer if the level of costs awarded against the Commissioner were to begin to reach the point at which they have a chilling effect on his willingness to bring responsible cases that are in the public interest: *Commissioner of Competition v Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp Trib 10 at para 406 (“*Visa-MasterCard*”).

[66] Despite the fact that the Commissioner continued to pursue this case after the announcement of the Divestiture, it was by no means vexatious or irresponsible of him to have done so. It raised some novel issues, and there was a broad public interest in bringing the case, even though it should have been recast to focus on the Divestiture after it was announced in June 2022: *Visa-MasterCard*, at para 407.

[67] Having regard to the foregoing, I will fix the costs for counsel fees awarded to the Respondents as reflected in Table 3 below, which reproduces Table 1 above, with changes to reflect my foregoing reasons.

Table 3 – Counsel Fees to be Awarded (excluding HST)

	Rogers	Shaw	Videotron
<i>Actual fees incurred</i>	<i>\$7,967,640.00</i>	<i>\$9,686,275.00</i>	<i>\$1,949,180.48</i>
Claim based on 25% of actual fees	\$1,991,910.00	\$2,421,568.75	\$487,295.12—
Alternative claim guided by the high end of Column V of Tariff B	\$414,720.00	\$416,187.00	\$303,880.00

J. Disbursements

[68] The Commissioner submits that the Respondents’ claims for disbursements are excessive and duplicative with respect to (i) the amounts claimed for their experts, (ii) their claims for e-discovery costs, and (iii) their claims for certain costs associated with document review.

(1) The Respondents’ experts

[69] Rogers claims a total of \$8,105,079.70 for fees paid to its experts. The corresponding amount for Shaw is \$1,357,827.20.

[70] By comparison with the aggregate of these two amounts (\$9,462,906.90), the Commissioner sought a lump sum cost award of \$10.9 million, inclusive of counsel fees and disbursements. He subsequently identified his legal fees as having totalled \$178,561.70, which suggests that his expert fees amounted to approximately \$10,721,438.30. In any event, it appears as though the total expert fees paid by the Commissioner were at least roughly equivalent to the total expert fees paid by the Respondents.

[71] At a broad level, this suggests that the expert fees paid the Respondents were not generally excessive in nature.

[72] With respect to the Respondents' specific experts, the Commissioner begins by taking issue with the fees charged by Dr. Israel, who testified on behalf of Rogers. The Commissioner notes that Dr. Israel had total billings approaching the level of Dr. Miller's aggregate billings, despite the fact that Dr. Israel limited himself to a narrow critique of the reports filed by Dr. Miller on behalf of the Commissioner. The Commissioner maintains that the Tribunal should not compensate Rogers for the full amount invoiced by Dr. Israel.

[73] After reviewing and comparing the two expert reports prepared by each of Dr. Israel and Miller, respectively, and after considering the testimony they provided, I am not persuaded that the aggregate amount invoiced by Dr. Israel and his team at Compass Lexecon is excessive or otherwise unreasonable. I am also mindful of the fact that Dr. Israel's testimony generally held up, and, where he and Dr. Miller disagreed, the panel found Dr. Israel's testimony to be more robust and persuasive than that of Dr. Miller: *Rogers-Shaw*, at para 77.

[74] The Commissioner also submits that the work performed by Dr. Johnson on behalf of Shaw was (i) superfluous in light of Dr. Israel's work, and (ii) found to have been weak in a number of respects. Consequently, the Commissioner submits that Shaw should not be reimbursed for Dr. Johnson's work, or should only receive a partial reimbursement for that work.

[75] I agree with the Commissioner that Shaw's claims in respect of Dr. Johnson's fees ought to be reduced. The total amount claimed by Shaw in respect of work performed by Dr. Johnson and his colleagues at Bates White amounted to \$1,067,257.49. However, \$151,753.48 of that amount was for work provided by certain partners, economists and other business professionals in support of Dr. David Evans, who is associated with Global Economics Group, and who testified with respect to efficiencies. Although the Tribunal ultimately found it unnecessary to address the Respondents' efficiencies defence, I consider that it would not be fair or reasonable to deny Shaw's claims in relation to the work performed by Dr. Evans and those at Bates White who supported him. Of the remaining \$915,504.01 invoiced by Bates White for Dr. Johnson's work, I consider it appropriate to reduce the amount awarded by 50%, or \$457,752.01. This will be deducted from the amount claimed in Table 2 above.

[76] The Commissioner further maintains that there was duplication as between the work of Mr. Kenneth Martin on behalf of Rogers and Dr. William Webb on behalf of Shaw. However, he does not explain how this was so. Upon reviewing the panel's perceptions of the testimony given by those experts, I am not persuaded that their work was sufficiently duplicative to warrant reducing the amount of fees paid to them by the Respondents: *Rogers-Shaw*, at paras 78 and 82.

[77] The Commissioner also states that the Respondents called excessive evidence from three separate experts on the subject of the relevance of wealth transferred from consumers to the Respondents, in the context of the trade-off assessment contemplated by the efficiencies defence in section 96 of the Act. In this regard, the Commissioner notes that Drs. Roger Ware and Michael Smart testified on behalf of Rogers, and that Dr. David Evans testified on behalf of Shaw. The Commissioner observes that the Respondents claim an excessive amount (\$476,222.63²) for fees paid to these three experts, relative to what the Commissioner paid for expert opinion on issues related to the wealth transfer.

[78] Upon revisiting the reports filed on behalf of Drs. Ware, Smart and Evans, I agree that they reflect a significant degree of duplication, and that the aggregate amount claimed for fees paid to those experts is therefore excessive. I consider it appropriate to reduce the amount awarded in respect of those fees by 35%, that is to say, by \$69,359.40 for Dr. Evans on behalf of Shaw; and by \$11,713.18 for Dr. Smart and \$85,605.35 for Dr. Ware, both on behalf of Rogers – for a total reduction of \$ 166,677.93. Given that the Commissioner put the issue of the wealth transfer in play, the Respondents cannot be further penalized for having put a strong foot forward in response to the position taken by the Commissioner.

(2) E-discovery costs

[79] The Commissioner asserts that Shaw’s claim for almost \$2 million in electronic discovery costs is excessive, particularly given that the Commissioner hosted all of the documents in this case using e-discovery software and claimed no reimbursement for his associated disbursements.

[80] This is essentially a bald assertion. Shaw cannot be faulted or penalized for having retained a third party to assist with the e-discovery process, including managing document review and providing technical support services to Shaw. Electronic document discovery is increasingly becoming a necessity. With the Tribunal’s shift to using electronic records during its hearings, the same is true for electronic document management and technical support services: *Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 at para 823.

[81] As noted at paragraph 41 above, the approach adopted by the Commissioner in this proceeding resulted in the production of over 2.6 million documents, nine days of examinations for discovery, 16 contested pre-trial motions, the engagement of Bell and Telus in motions over documents and subpoenas, and the exchange of approximately 45 witness statements and expert reports. In addition, the affidavit sworn by Ms. Ashley McKnight, a law clerk at Lax O’Sullivan Lisus Gottlieb LLP (Rogers’ principal counsel) states that there were approximately 7 million documents in the document database that was managed by its third party provider.

[82] In the absence of any demonstrated shortcoming in the allegedly excessive nature of Shaw’s claims in respect of its disbursements for e-discovery, I am reluctant to disallow what

² The Tribunal notes that the portion of costs invoiced by Dr. Evans which pertained to Dr. Johnson’s work – *i.e.*, \$151,753.48 – was dealt with in paragraph 75 of these reasons. The Tribunal understands Dr. Evans’s claimed fees with respect to wealth transfer to be limited to \$198,169.71.

appears to be a legitimate claim on its face. Stated differently, the Commissioner has not demonstrated that Shaw's claim is unreasonable, having regard to the volume of documents.

(3) Document review

[83] Finally, the Commissioner claims that Rogers' claim for reimbursement of \$93,265 in disbursements paid to a lawyer conducting document review is excessive and unreasonable. He further claims that this amount is for legal fees, rather than disbursements.

[84] The documentation provided by Rogers in support of this claim reflects that the third party it retained (Mr. Bharath Kumar) docketed almost 550 hours for document review. The Commissioner does not suggest that such review was unnecessary or that the amount paid for the services rendered exceeds what Rogers' principal law firm would have charged to perform the same services. Having regard to the large number of documents produced in this proceeding, I am unable to conclude that either the approximately 550 hours spent reviewing documents, or the total amount disbursed in relation to such review, was unreasonable.

(4) Other disbursements

[85] The Commissioner has not raised any issues with respect to the other disbursements claimed by the Respondents. After having reviewed the Affidavits, including the exhibits thereto pertaining to those disbursements, I am satisfied that they are not unreasonable or unnecessary, and that they are sufficiently justified. Among other things, those disbursements relate to expert fees paid for services rendered by Mr. Harington (who testified in respect of efficiency gains), as well as for court transcripts, translation, court reporting services, online research, courier expenses, printing and photocopying, and travel expenses.

(5) Conclusion regarding disbursements

[86] Having regard to the foregoing, I consider that, with two exceptions, the disbursements claimed by the Respondents are not unreasonable or unnecessary, and that they are appropriately justified. Deductions in the amounts of \$457,752.01 and \$166,677.93 will be made for the reasons explained at paragraphs 75 and 78 above. These deductions are from the amounts claimed by Shaw and Rogers, as summarized in Table 2 above. These are reflected in Table 4 below:

**Table 4 – Summary of Claimed Disbursements
(as amended, excluding HST where applicable)**

	Rogers	Shaw	Videotron
Taxable disbursements	\$163,302.27	\$86,173.59	\$85,639.16
Non-taxable disbursements	\$9,232,168.84	\$3,277,858.12	\$6,350.22
	\$9,134,850.31 ³	\$2,750,746.71 ⁴	
Total	\$9,298,152.58	\$2,836,920.30	\$91,989.41

For greater certainty, I acknowledge that some of the disbursements claimed by the Respondents concerned work performed or other costs incurred prior to the announcement of the Divestiture. However, it was entirely understandable for the Respondents to incur costs in relation to their modified transaction as soon as they received the specific proposal from Videotron that led to the Divestiture. The Tribunal’s understanding is that this was no later than April 7, 2022: *Rogers-Shaw*, at para 115. Any expert fees or other disbursements that were incurred after that date were entirely reasonable. It is not immediately apparent that any of the claimed disbursements were incurred prior to that date.

V. ORDER

[87] The Commissioner shall pay Rogers and Shaw costs for legal fees fixed in the amounts of \$414,720.00 and \$416,187.00, respectively, plus any applicable HST.

[88] The Commissioner shall reimburse Rogers’ reasonable disbursements of \$9,298,152.58, plus any applicable HST.

[89] The Commissioner shall reimburse Shaw’s reasonable disbursements of \$2,836,920.30, plus any applicable HST.

[90] No costs are awarded in favour of Videotron.

³ \$9,232,168.84 (Rogers’ total non-taxable disbursement claim) – \$11,713.18 (Dr. Smart) – \$85,605.35 (Dr. Ware) = \$9,134,850.31

⁴ \$3,277,858.12 (Shaw’s total non-taxable disbursement claim) – \$457,752.01 (Dr. Johnson) – \$69,359.40 (Dr. Evans) = \$2,750,746.71

DATED this 28th day of August, 2023

SIGNED on behalf of the Tribunal by the Presiding Member.

(s) Paul Crampton C.J. (Presiding Member)

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Competition Tribunal



Tribunal de la concurrence

PUBLIC VERSION

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

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

BETWEEN:

The Commissioner of Competition
(applicant)

and

Vancouver Airport Authority
(respondent)



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

REASONS FOR ORDER AND ORDER

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I. EXECUTIVE SUMMARY

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

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

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

[4] For the reasons that follow, the Tribunal will dismiss the Application brought by the Commissioner. The Commissioner has failed to establish, on a balance of probabilities, that all three elements of section 79 have been satisfied. The Tribunal¹ first concludes that, in the circumstances of this case, the RCD does not shield VAA from the application of section 79 to its impugned conduct. The Tribunal further finds that VAA substantially or completely controls the supply of Galley Handling services at YVR, within the meaning of paragraph 79(1)(a) of the Act. However, even though the judicial members of the Tribunal consider that VAA has a PCI in the relevant market, the Tribunal unanimously concluded that VAA has not engaged in a practice of anti-competitive acts, as contemplated by paragraph 79(1)(b). The Tribunal is satisfied that VAA had and continues to have a legitimate business justification for its decision to limit the number of in-flight catering firms at YVR. This latter finding is sufficient to dismiss the

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

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

II. INTRODUCTION AND OVERVIEW

A. The parties

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

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

B. Section 79 of the Act

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

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

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

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

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

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

C. The parties’ pleadings

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

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

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

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

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

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

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

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

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

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

D. Procedural history

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

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

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

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

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

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

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

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

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

III. FACTUAL BACKGROUND

A. YVR

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

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

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

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

B. VAA

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

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

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

[...]

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

[...]

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

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

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

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

C. Airport revenues and fees

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

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

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

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

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

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

D. Airlines

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

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

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

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

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

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

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

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

E. In-flight catering

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

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

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

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

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

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

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

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

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

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

F. In-flight catering providers

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

G. In-flight caterers at YVR

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

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

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

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

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

H. The 2013-2015 events

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

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

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

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

[86] [CONFIDENTIAL].

I. The 2017 RFP

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

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

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

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

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

IV. EVIDENCE -- OVERVIEW

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

A. Lay witnesses

(1) The Commissioner

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

- Andrew Yiu: Mr. Yiu has been the Vice President, Product, at Air Canada since 2017. Mr. Yiu is responsible for the design of Air Canada's products, services and amenities experienced by customers at airports and onboard all flights worldwide. In this capacity, he knows about Air Canada's in-flight catering operations. He is the direct supervisor of Mr. Mark MacVittie, who signed two witness statements filed by the Commissioner but subsequently resigned from his position prior to the hearing. Mr. Yiu reviewed and reaffirmed Mr. MacVittie's witness statements.
- Barbara Stewart: until her retirement on June 1, 2017, Ms. Stewart worked as the Senior Director, Procurement, for Air Transat. In this capacity, she was responsible for all procurement activities at Air Transat as they relate to in-flight catering, ground handling and fuel, together with managing the relationship between Air Transat and the major airports it serves.
- Rhonda Bishop: Ms. Bishop has been the Director, In-flight Services and Onboard Product of Jazz since 2010. In this capacity, she is responsible for the oversight of four business units: (1) Inflight Services, where she performs the duties of Flight Attendant Manager; (2) Regulatory & Standards, where she is responsible for the operation and implementation of the *Canadian Aviation Regulations*, SOR/96-433 ("**Canadian Aviation Regulations**") including airline operations; (3) Inflight Training, where she is responsible for the professional standards of cabin crews; and (4) Onboard Product, where she oversees the efficient operation of the Inflight Services Department.
- Simon Soni: Mr. Soni has been the Director of Catering Services for WestJet since November 2017. In this capacity, he is responsible for development selection and safe provision of WestJet's on-board Catering products. He reviewed and adopted parts of the witness statements signed by Mr. Colin Murphy, who was the Director of Inflight Cabin Experience for WestJet and was responsible for WestJet Aircraft Catering operations,

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

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

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

- Ken Colangelo: Mr. Colangelo has been the President and Managing Director of Gate Gourmet Canada since 2012. In this capacity, he is responsible for all of Gate Gourmet Canada's operations, including those with respect to commercial, financial, legal and regulatory matters.
- Maria Wall: Ms. Wall has been the Financial Controller for CLS since 2008. She is responsible for the financial management and reporting of CLS. The Commissioner filed a very cursory witness statement prepared by Ms. Wall which did not address any of the issues in dispute in this proceeding. She was not called to testify at the hearing.
- Jonathan Stent-Torriani: Mr. Stent-Torriani is the Co-Chief Executive Officer of Newrest. He, along with Mr. Olivier Sadran, co-founded Newrest in 2005-2006.
- Geoffrey Lineham: Mr. Lineham has been the President and co-owner of Optimum Stratégies since 2015. He is also the Vice President of Business Development at Optimum Solutions.
- Mark Brown: Mr. Brown has been the President and CEO of Strategic Aviation since 2012. He oversees all the activities of Strategic Aviation, including its ground handling and Catering businesses.
- Robin Padgett: Mr. Padgett is the Divisional Senior Vice President of dnata. In this capacity, he has run the catering division of dnata for the past four years and has full responsibility of the operational and strategic direction of the division.

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

(2) VAA

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

- Craig Richmond: Mr. Richmond has been the President and CEO of VAA since June 18, 2013 and has over 40 years of experience in aviation, including as CEO of seven airports in four different countries (Bahamas, England, Cyprus and Canada). Mr. Richmond initially joined VAA in 1995 and spent the following 11 years there in various roles (including Manager of Airside Operations and Vice President of Operations).
- Tony Gugliotta: Mr. Gugliotta has held various roles at the managerial level for VAA, including Senior Vice President, Marketing and Business Development, from 2007 to 2014. He retired from VAA in 2016. Mr. Gugliotta's responsibilities included: all land and property management at YVR, including commercial real estate and retail development; YVR's marketing to airlines and passengers; and ground transportation.
- Scott Norris: Mr. Norris has been the Vice President of Commercial Development of VAA since September 2016. He is responsible for oversight of areas such as: terminal leasing; parking and ground transportation operations and business development; and airport estate lease management and development. Mr. Norris formerly held various positions in airport operations and management at several airports in Australia.
- John Miles: Mr. Miles has been the Director, Corporate Finance at VAA since 2007. Prior to that, he was Manager, Corporate Finance. Mr. Miles is responsible for oversight of the annual budget preparation, financial statement preparation, corporate financing, investment analyses and enterprise risk management at VAA. Budget and financial statement preparation includes monitoring the revenues derived from the flight kitchens.

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

B. Expert witnesses

(1) The Commissioner

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

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

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

(2) VAA

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

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

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

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

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

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

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

(a) Admissibility of expert evidence

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

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

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

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

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

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

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

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

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

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

(b) Dr. Tretheway’s evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Documentary evidence

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

V. PRELIMINARY ISSUES

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

A. Admissibility of evidence

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

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

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

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

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

(1) Rules of evidence at the Tribunal

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

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

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

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

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

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

[citations omitted]

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

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

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

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

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

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

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

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

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

(2) Lay opinion evidence

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

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

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

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

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

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

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

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

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

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

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

(3) Hearsay evidence

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

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

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

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

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

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

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

(4) Conclusion

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

B. Alleged late amendments to pleadings

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

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

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

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

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

(1) Analytical framework

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

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

[71] In the normal course of judicial proceedings, parties are entitled to have their disputes adjudicated on the basis of the issues joined in the pleadings. This is because when a trial court steps outside the pleadings to decide a case, it risks denying a party a fair opportunity to address the related evidentiary issues. [...]

[72] However, this does not mean that a trial judge can never decide a case on a basis other than that set out in the pleadings. In essence, a judicial decision may be reached on a basis which does not perfectly accord with the pleadings if no party to the proceedings was surprised or prejudiced. [...]

[73] A trial judge must decide a case according to the facts and the law as he or she finds them to be. Accordingly, there is no procedural unfairness where a trial judge, on his or her own initiative or at the initiative of one of the parties, raises and decides an issue in a proceeding that does not squarely fit within the

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

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

[citations omitted]

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

(2) Expansion of relevant markets

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

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

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

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

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

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

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

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

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

(3) Additional ground for VAA's PCI

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

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

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

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

(4) Conclusion

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

VI. ISSUES

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

- Does the RCD apply to exempt or shield VAA from the application of section 79 on the basis that the impugned conduct was undertaken pursuant to a validly enacted legislative or regulatory mandate?;
- What is or are the relevant market(s) for the purpose of this proceeding?;

- Does VAA substantially or completely control a class or species of business in any area of Canada, as contemplated by paragraph 79(1)(a) of the Act?;
- Has VAA engaged in, or is it engaging in, a practice of anti-competitive acts, as contemplated by paragraph 79(1)(b) of the Act? More specifically:
 - a. Does VAA have a PCI in the relevant market in which the Commissioner has alleged that competition has been, is being or is likely to be prevented or lessened substantially by a practice of anti-competitive acts?;
 - b. Was the “overall character” of VAA’s impugned conduct anti-competitive or legitimate? If the latter, does that continue to be the case?;
- Has the impugned conduct had the effect of preventing or lessening competition substantially in the market that is relevant for the purposes of paragraph 79(1)(c) of the Act, or is it having or likely to have that effect?;
- What costs should be awarded?

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

VII. ANALYSIS

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

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

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

(1) The RCD

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The parties' positions

(a) VAA

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

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

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

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

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

(b) The Commissioner

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

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

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

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

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

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

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

(3) Assessment

(a) Is the required leeway language present?

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

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

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

(i) *The wording of section 79*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) *The rationales underlying the RCD*

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

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

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

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

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

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

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

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

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

[...] an aggrieved party cannot bring a successful civil action based on a breach of s. 45 of the *Competition Act* if the accused party has a complete defence to a prosecution under s. 45. In such a case there would be no misconduct on which to base the civil action. Thus, if the regulated conduct defence provides a complete defence to a prosecution under s. 45, then a civil action under s. 36 cannot succeed.

Cami at para 50. See also *Milk* at p 476 and *Hughes* at paras 223-230.

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

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

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

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

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

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

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

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

<p>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).</p>	<p>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).</p>
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[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.

- VAA’s Statement of Purposes

[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 in 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 airside of the airport.” He added that his analysis of this issue is consistent with his “understanding of what the witnesses have said about [the] feasibility of

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

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

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

(iii) *Conclusion on the Galley Handling Market*

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

(4) **Conclusion**

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

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

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

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

(1) Analytical framework

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

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

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

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

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

(2) The parties’ positions

(a) The Commissioner

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

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

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

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

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

(b) VAA

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

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

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

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

(3) Assessment

(a) The Airside Access Market

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) The Galley Handling Market

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

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

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

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

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

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

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

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

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

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

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

(4) Conclusion

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

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

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

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

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

(a) Meaning of “plausible”

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

[281] In the case of an entity that is upstream or downstream from the relevant market, this may involve demonstrating that the entity has a plausible competitive interest that is different from the typical interest of a supplier in cultivating downstream competition for its goods or services, or the typical interest of a customer in cultivating upstream competition for the supply of the goods or services that it purchases. Among other things, this will ensure that garden-variety refusals to supply or other vertical conduct that has no link to a plausible competitive interest by the respondent in the relevant market will not be mistaken for the type of anti-competitive conduct that is contemplated by paragraph 79(1)(b).

[282] For greater certainty, if a respondent, who is a dominant supplier to, or customer of, participants in the relevant market, is found to have no plausible competitive interest in adversely impacting competition in the relevant market, other than as described immediately above, its practices generally will not be found to fall within the purview of paragraph 79(1)(b). This is so regardless of whether that entity’s conduct might incidentally adversely impact upon competition. For example, an upstream supplier who discontinues supply to a customer because the customer consistently breaches agreed-upon terms of trade typically would not be found to have engaged in a practice of anti-competitive acts solely because that customer is no longer able to obtain supply (perhaps because of its poor reputation) and is forced to exit the market, or becomes a weakened competitor in the market.

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

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

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

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

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

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

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

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

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

(b) The parties' positions

(i) *The Commissioner*

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

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

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

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

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

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

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

(ii) VAA

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

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

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

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

(c) Assessment

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

(i) *The Commissioner's submissions*

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

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

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

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

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

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

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

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

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

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

(ii) *VAA's submissions*

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

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

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

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

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

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

cross-examination, Dr. Reitman conceded that being a rational, profit-maximizing entity would be inconsistent with VAA's public interest mandate. Moreover, Dr. Trethewey 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*

- The evidence

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

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

The April 2014 events

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

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

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

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

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

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

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

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

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

101. The in-flight catering market was fulfilling an important objective for VAA, namely, to provide a reliable supply of full-service in-flight catering at competitive prices. In doing so, it helped attract airlines to YVR and grow the Airport for the benefit of the public, which is at the core of VAA’s mandate.

102. At the same time, there were compelling reasons to believe that the state of the in-flight catering market at YVR was precarious. The previous ten years had been tumultuous for the in-flight catering industry in Canada, which experienced significant declines in the demand for in-flight catering services. During that period, many airlines decided to eliminate fresh meal service for economy passengers and short-haul flights (where fresh meals had previously been standard) and replace them with “buy-on-board” offerings. Service of fresh meals was increasingly limited to overseas flights and the much smaller number of premium passengers (i.e. first class or business class). That contributed **[CONFIDENTIAL]**.

103. In addition, the airline industry had recently experienced several economic downturns, which significantly impacted airline traffic and passenger volumes. For example, over the previous decade, the airline industry in Canada faced significant challenges maintaining passenger volumes following events such as the September 11 terrorist attacks in 2001, the outbreak of SARS in 2003-2004, and the great recession in 2008. While there were indications that passenger volumes may have been stabilizing by late 2013, that was still uncertain given the information we had in early 2014.

104. There had previously been three in-flight caterers operating at YVR, but not since 2003. Those caterers were Cara Airline Solutions (now Gate Gourmet), CLS and LSG Sky Chefs (“Sky Chefs”). Sky Chefs primarily supplied Canadian Airlines, which was then Canada’s second-largest carrier. After Canadian Airlines was acquired by Air Canada in the early 2000s, a large portion of Sky Chefs’ business was redirected to Air Canada’s preferred caterer at the time, Cara. As a result of a downturn in its business that followed, Sky Chefs decided to leave YVR.

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

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

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

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

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

110. [CONFIDENTIAL].

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

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

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

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

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

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

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

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

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

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

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

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

The exchanges with Newrest and Strategic Aviation

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

Jonathan,

I have re-familiarized myself with the state of our in-flight catering, and unfortunately I can't see the need for another provider at this time. The market has been essentially flat for 10 years, with two providers, and our airlines are happy with the state of competition.

I would still be happy to meet with you on the 9th or the 10th if you would like to discuss further. Please contact [...] to set a time.

Kind regards,

Craig Richmond

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

Ray - further to our earlier discussion, Brett forwarded an email from Mark Brown of Strategic Aviation Services. Mark Brown is with a company interested in bidding on an RFP Jazz (not Westjet) recently put out for their flight Kitchen business across Canada. My understanding is the contract would essentially be the loading of prepackaged food onto Jazz aircraft. As it stands at YVR only CLS and Gate Gourmet have a concession license that allows that service.

Mark apparently contacted Steve Hankinson with a question about the possibility of obtaining a third concession license to carry out the work. Unfortunately, this goes to the root of the concern we had previously with the inquiry from the Newrest Grp. That is, based on past history we don't believe that YVR could support a third flight Kitchen operator. This latest inquiry from Strategic Aviation

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

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

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

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

94. Among other things, we were concerned about the significant disruptions of service that would follow the exit of either of the existing catering firms from the Airport. The departure from the Airport of a provider of in-flight catering services is disruptive to the airlines served by the departing provider. Those airlines are left in a situation of having to contract with a new provider at a time when the airline has less bargaining power due to its acute need. A new firm must also secure the necessary permits for its drivers to access the airport airside to serve airlines, and must also ramp up its capacity to serve those airlines formerly served by the departing firm.

95. Replacing a service provider that has departed involves transactional costs for the Airport, including the costs of licensing and setting up accounting systems for a new firm. As well, the departure of a service provider who is suffering difficult financial circumstances will often create significant transitional disruption as the Airport is forced to deal with creditors and competing claims on the departing firm's assets.

96. Furthermore, the abrupt or unexpected departure of such an important service provider can negatively affect an airport's reputation for stable, reliable and efficient operations, something that can adversely impact its efforts to encourage airlines to establish new routes.

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

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

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

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

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

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

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

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

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

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

The August 2014 Briefing Note

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

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

[emphasis added]

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

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

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

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

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

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

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

The 2017 events

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

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

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

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

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

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

- The legitimacy of VAA's justifications

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

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

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

Preservation of competition

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

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

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

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

Protecting YVR’s reputation

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

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

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

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

Avoiding disruption for airlines

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

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

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

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

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

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

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

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

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

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

- The adequacy and credibility of VAA’s justifications

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(v) *The “overall character” of VAA’s conduct*

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

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

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

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

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

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

(d) Conclusion

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

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

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

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

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

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

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

(1) Analytical framework

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The parties’ positions

(a) The Commissioner

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

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

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

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

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

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

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

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

(b) VAA

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

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

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

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

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

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

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

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

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

(3) Assessment

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

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

(a) Alleged anti-competitive effects

(i) *Entry*

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

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

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

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

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

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

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

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

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

(ii) *Switching*

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

- Switching by airlines

[671] On this issue, the Commissioner relied on Dr. Niels' analysis of the extent of switching at various Canadian airports. Dr. Niels' switching analysis consisted of counting the number of switches of in-flight catering providers made by the airlines at different airports over the period 2013-2017. In his analysis, Dr. Niels identified [CONFIDENTIAL] instances in which airlines switched in-flight caterers during that period. Of these, [CONFIDENTIAL] occurred at YVR, [CONFIDENTIAL]. Of the other [CONFIDENTIAL] which took place at other airports, [CONFIDENTIAL] involved switches to new entrants. A little more than half of these changes in in-flight caterers (i.e., [CONFIDENTIAL]) were made by [CONFIDENTIAL].

[672] The evidence from Dr. Niels also showed an important change in the average yearly percentage of total airline purchases of in-flight catering services from in-flight caterers who were switched in the period from 2013 to 2017. That percentage was at [CONFIDENTIAL]% at YVR whereas it was much higher at every other airport in Canada, ranging from [CONFIDENTIAL]% to [CONFIDENTIAL]%, including YYZ at [CONFIDENTIAL]%. In other words, Dr. Niels found that the proportion of airline spending on in-flight catering that was switched during the period 2013-2017 was much lower at YVR than at other large Canadian airports. Dr. Niels added in reply to Dr. Reitman that [CONFIDENTIAL], implying that VAA's refusal to permit entry has resulted in weaker competitive dynamics at YVR.

[673] According to the Commissioner, this analysis by Dr. Niels demonstrates that: (i) there was very little switching by airlines among the incumbent providers of in-flight catering services at YVR; (ii) comparatively, substantial switching occurred at airports other than YVR; and (iii) switching is often associated with the entry of new in-flight caterers.

[674] The Commissioner submits that this disparity in switching at YVR compared to other airports is relevant for two reasons. First, would-be entrants across Canada were ready to enter in 2014 and they remain ready to enter the Galley Handling Market. Therefore, "but for" VAA's Exclusionary Conduct, more switching would likely have occurred at YVR in the past and more would likely occur in the future. Second, the Commissioner suggests that Dr. Niels and Dr. Reitman agree that it is reasonable to presume that airlines benefit when they switch in-flight catering providers. Based on this, he maintains that there is a direct link between the fact of switching and benefits to airlines, and a direct link between a lack of switching and increased costs and/or reduced quality of service to airlines.

[675] The Tribunal acknowledges that there likely would have been at least some additional switching at YVR, "but for" the Exclusionary Conduct. However, the Tribunal considers that the switching analysis conducted by Dr. Niels has some important shortcomings. First, as pointed out by VAA, the switches counted by Dr. Niels in his analysis were for Catering and Galley Handling together. It is not possible to discern specific effects in the Galley Handling Market, *per se*, or to determine whether the switches observed related to that market or in respect of catering services. Second, Dr. Niels' analysis was incomplete. As Dr. Niels acknowledged, he did not factor into his analysis instances of partial switching made by airlines for their Galley Handling services. Third, apart from the fact that there has been more entry at some other airports than at YVR, it is not clear that there is any material difference between the intensity of

competition in the provision of Galley Handling services at YVR, relative to other airports. Dr. Niels essentially conceded this point.

[676] That said, further to its assessment of Dr. Niels’ evidence on this point, and considering also the evidence provided by Air Transat and Jazz showing that they would have switched to a new in-flight caterer further to their respective 2014 and 2015 RFPs, the Tribunal agrees with the Commissioner that, on a balance of probabilities, switching would have been and would likely be greater and more frequent in the absence of VAA’s Exclusionary Conduct. However, that is not the end of the analysis. As discussed above, the Commissioner must also address whether such switching likely would have been sufficient to result in materially lower prices, or materially higher levels of non-price benefits, in a substantial part of the market, “but for” the Exclusionary Conduct. For the reasons discussed in Section VII.E.3.b below, he has not satisfied his burden in this regard.

- Entry by dnata

[677] The Commissioner also submits that dnata’s entry as a third provider of in-flight catering services at YVR in 2019 will have limited impact on the Galley Handling Market. The Commissioner argues that, unlike the situation for Newrest, Strategic Aviation and Optimum, there is limited evidence that dnata will likely be an effective competitor at YVR.

[678] The Commissioner claims that dnata has no presence in Canada and virtually none in North America (being only present in Orlando, Florida). He submits that dnata’s limited presence in North America will be an obstacle to its success at YVR, as it will be unable to offer “network” pricing and satisfy airlines’ preferences for a single caterer supplier across Canada.

[679] The Commissioner also contends that [CONFIDENTIAL] (Commissioner’s Closing Argument, at para 78). The Commissioner further notes that, [CONFIDENTIAL]. Stated differently, despite the fact that domestic flights account for 67% of flights per week at YVR, [CONFIDENTIAL]. The Commissioner submits that since international flights account for a smaller proportion of flights per week at YVR, [CONFIDENTIAL].

[680] The Commissioner further argues that VAA’s process for selecting dnata – namely, the In-Flight Kitchen Report and the 2017 RFP itself – was fundamentally flawed in many respects, as were the results of the process.

[681] Finally, the Commissioner contends that dnata is a “[CONFIDENTIAL]” type of new competitor vis-à-vis the two incumbent caterers at YVR, in an in-flight catering environment where innovative business models exist and benefit airlines everywhere but YVR (Commissioner’s Closing Argument, at para 77).

[682] The Tribunal disagrees with the Commissioner’s position with respect to dnata. In brief, the evidence does not support the Commissioner’s contention that dnata is unlikely to be an effective competitor.

[683] Regarding the scope of dnata's presence, the evidence does not support the Commissioner's suggestion that dnata's entry will be limited and targeted. In his cross-examination by counsel for VAA, [CONFIDENTIAL].

[684] As to the RFP conducted by VAA in 2017, the Tribunal is not convinced by the Commissioner's arguments. The Tribunal agrees with VAA that, in light of the evidence regarding the In-Flight Kitchen Report and the RFP itself, the RFP was beyond reproach. The Tribunal does not find that the process was flawed or geared towards a given result. The Commissioner has not pointed to any persuasive evidence in that regard. Indeed, the RFP process was found to be fair by a third-party fairness advisor. It was expressly open to both full-service and non-full-service in-flight catering firms. It was also open to firms operating a kitchen on-Airport as well as those operating off-Airport. And the criteria for analyzing the bids were extremely detailed and objective. Contrary to the Commissioner's suggestion, the Tribunal finds no evidence showing that the RFP process was geared towards a "full-flight kitchen" operator or against providers like Strategic Aviation or Optimum.

[685] The Tribunal also disagrees with the Commissioner's comment that dnata is "[CONFIDENTIAL]" and will not be considering "innovative" new business models. On the contrary, the testimony of Mr. Padgett showed that dnata is ready and able to go after any type of in-flight catering work, whether that consists of catering or last-mile logistics or both. In other words, dnata has left the door open to the possibility of providing only Galley Handling services for airline customers who may not wish to source their catering services from dnata.

[686] The Tribunal considers that there is every indication that dnata will enter and compete fully with Gate Gourmet and CLS in the Galley Handling Market at YVR. In fact, Dr. Niels acknowledged that the entry of dnata will bring increased rivalry to the Galley Handling Market at YVR, as his evidence suggests that at least some switches occur upon the entry of new in-flight catering firms. Dr. Niels further accepted that, with the entry of dnata and the presence of three caterers at YVR going forward, there will be stronger competition than with two, though he qualified this increased competition as being a matter of degree. [CONFIDENTIAL].

[687] In light of the foregoing, the Tribunal is not persuaded that dnata will not be an effective competitor. On the contrary, the Tribunal is inclined to accept Mr. Padgett's testimony that [CONFIDENTIAL].

[688] That said, the Tribunal agrees with the Commissioner that as far as paragraph 79(1)(c) is concerned, the appropriate "but for" analysis is to compare outcomes with VAA's exclusionary practice in place to outcomes that would likely be realized absent that practice. It is not to compare outcomes with the presence of the two incumbent competitors to outcomes with those same two competitors plus dnata. However, the entry of dnata has made it more difficult for the Commissioner to demonstrate that, "but for" VAA's Exclusionary Conduct, prices likely would be materially lower, or non-price levels of competition likely would be materially greater, relative to the levels of prices and non-price competition that are in fact likely to prevail now that dnata has entered the Relevant Market.

(iii) *Price effects*

[689] The main focus of the Commissioner’s arguments pertaining to alleged anti-competitive effects was on the price dimensions of VAA’s Exclusionary Conduct and on how prices for Galley Handling services would likely have been and would likely be lower “but for” the impugned conduct. The Commissioner relied on evidence from a number of market participants, notably the various airlines called to testify, and on the expert evidence of Dr. Niels, to support his position that prices in the Galley Handling Market at YVR are materially higher than they would likely have been or would likely be, “but for” the Exclusionary Conduct. The Commissioner maintains that the aggregate savings resulting from reduced prices of Galley Handling services would likely have been and would likely be in the future, substantial.

[690] VAA responds that the Commissioner has not demonstrated that airlines would likely have benefitted from, or would likely be offered, materially lower prices in the Relevant Market in the absence of VAA’s Exclusionary Conduct.

[691] The Tribunal agrees with VAA. Further to its review of the evidence, the Tribunal is not persuaded that VAA’s Exclusionary Conduct has increased, is increasing or will likely increase the prices for Galley Handling services to a non-trivial degree in the Relevant Market, relative to the prices that likely would have existed “but for” the Exclusionary Conduct. Stated differently, the Commissioner has not demonstrated that, “but for” VAA’s Exclusionary Conduct, the prices of the Galley Handling services at YVR would likely have been or would likely be lower, let alone “materially” lower.

[692] The Tribunal pauses to underscore, at the outset, that the Commissioner’s evidence is essentially limited to [CONFIDENTIAL] of the total revenues generated by the in-flight catering firms operating at YVR, from 2013 to 2017. No evidence specifically addressed [CONFIDENTIAL] of in-flight catering revenues at YVR. This, says VAA, is a fatal flaw in the Commissioner’s case, as he has not alleged any form of collusion between Gate Gourmet and CLS. The Tribunal agrees that this significantly weakens the Commissioner’s case on paragraph 79(1)(c). In the circumstances of this case, the evidence does not allow the Tribunal to infer or imply anything with respect to [CONFIDENTIAL] in the absence of the Exclusionary Conduct.

[693] With respect to the alleged anti-competitive price effects of VAA’s Exclusionary Conduct, the Commissioner relied on: (i) Dr. Niels’ economic analyses of the price effects for airlines that did not switch providers, Jazz’s gains from switching, and [CONFIDENTIAL]; and (ii) evidence provided directly by various airlines (i.e., Jazz, Air Transat, Air Canada and WestJet, and the eight airlines having provided letters of complaint).

- 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.

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.

Administrative monetary penalty

(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.

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.

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.

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.

Purpose of order

(3.3) The purpose of an order made against a person under

(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 \$.

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.

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.

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.

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.

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

encourager la personne visée par l'ordonnance à adopter des pratiques compatibles avec les objectifs du présent article et non pas à la punir.

Efficienc e 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) 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.

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:

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Julie Rosenthal
Ryan Cookson
Sarah Stothart

Federal Court



Cour fédérale

Date: 20120112

Docket: T-2175-04

Citation: 2012 FC 48

BETWEEN:

**JANSSEN INC. and
DAIICHI SANKYO COMPANY LTD.**

**Plaintiffs
(Defendants by Counterclaim)**

and

TEVA CANADA LIMITED

**Defendant
(Plaintiff by Counterclaim)**

ASSESSMENT OF COSTS - REASONS

**Bruce Preston
Assessment Officer**

By way of Reasons for Judgment and Judgment as to Costs (the Costs Judgment) dated November 6, 2006, the Court ordered:

- a. The Plaintiffs are entitled to costs at the upper end of Column IV of the Tariff and to reasonable disbursements as set out in these Reasons
- b. The Defendant is entitled to fees and disbursements with respect to Dr. Gerster and with respect to Plaintiffs' amended pleadings as set out in these reasons: such costs are to be set off against those allowed to the Plaintiffs;

- c. An assessment officer of this Court shall assess such costs in a manner as directed by these reasons; and
- d. Costs bear interest at the rate of five percent (5%) per annum, not compounded, from the date of issue of this judgment.

[2] On April 18, 2011, counsel for Janssen filed a Revised Bill of Costs as Exhibit A to the Affidavit of Neil Belmore sworn April 18, 2011. It is this Revised Bill of Costs which is being assessed. For ease of reference, I will be referring to the Item numbers in the table of assessable services found in Tariff B of the *Federal Courts Rules* as well as the claim numbers referred to in the Revised Bill of Costs.

[3] The hearing of the assessment of costs was held on July 14, 2011. At the commencement of the hearing counsel confirmed that claims number 1, 3, 4, 5, 6, 7, 9, 18, 19, 20, 21, 26, 27, 28, 29, 31A, 34, 42, 43, 48, 49, 50 and 67 were not being contested by the Defendant. It was further confirmed that Janssen was withdrawing claim 2 (Item 2 of Tariff B), claim 40 (the disbursement for the CIPO Patent copies) and claim 66 (transportation expenses (tokens)). Further, during the hearing, counsel settled claim 45 (Taxis), claimed at \$2,999.34, for \$2,000.00, claim 47 (Parking), claimed at \$124.73, for \$108.75, claim 51 (Court Reporter), claimed at \$37,630.96, for \$32,198.14 and claim 57 (Travel: Meals), claimed at \$1,394.90, for \$400.00.

[4] It is noted that the issues addressed in this assessment were complicated by the fact that the Plaintiffs, Janssen and Daiichi, Licensee and Patentee respectively, were represented by different counsel on this proceeding.

[5] Several times throughout the hearing of the assessment, counsel for the Defendant submitted that the Plaintiff Daiichi had settled the issue of costs with the Defendant. The terms of that settlement were not in evidence in the submissions presented before me and therefore they have not been considered in reaching a decision in this assessment. On the other hand, the Costs Judgment contains provisions which necessitate a consideration of the fact that Daiichi and Janssen have been awarded costs both separately and jointly. Therefore, when necessary, I will consider which costs were awarded jointly or separately and their impact on the present assessment.

Fees

Item 6, Item 8 and Item 9

[6] Counsel for Janssen submitted that claims 8, 11 to 17 and 22 to 25 relate to the preparation and attendance at examinations for discovery of Daiichi corporate representatives and inventors (Items 8 and 9) and appearance on the Defendant's motion to compel Daiichi to provide written answers to outstanding questions from the examination for discovery of Daiichi's representatives and inventors (Item 6). Counsel submitted that one of the guiding principles referred to in the Costs Judgment is that both parties are entitled to recover costs for separate representation. Janssen contended that invention history is very important to validity, which was the central issue of this case and that it was entirely reasonable for counsel for Janssen, who was largely running the case, to be present at the examination for discovery of Daiichi's representatives. At paragraph 30 of its Written Submission, Janssen argues that the amounts claimed are in accordance with paragraph 32 of the Costs Judgment.

[7] In reply concerning claim 8, the Defendant submitted that the motion arose from the examination for discovery of the Daiichi witnesses. Counsel submitted that the motion was argued by counsel for Daiichi and that the claim by Janssen was outside the terms of the Costs Judgment.

At paragraph 14 of its Responding Submissions, the Defendant argues:

.... Daiichi was represented by independent counsel and its claim for costs has been settled. It was not necessary for Janssen's counsel to attend this motion and Teva should not be required to pay twice.

[8] The Defendant presented similar arguments for claims 11 to 17 and 22 to 25. At paragraph 16 of its Responding Submissions, the Defendant contends:

.... Justice Hughes did not award Janssen costs incurred while attending discoveries of Daiichi's witnesses. Paragraph 32 of the Costs Judgment awards the costs of one senior and one junior counsel to "the Plaintiffs"; it does not award each Plaintiff the costs of attending the examinations for discovery of the other Plaintiff. Daiichi has already claimed the costs of counsel's attendance at the discovery of its inventors.

Counsel for the Defendant continues by submitting that there was no reason for Janssen's counsel to attend, they did not participate and they could have informed themselves of what transpired simply by reading the transcripts. Then at the hearing of the assessment, the Defendant submitted that subparagraph 3 of paragraph 3 of the Costs Judgment, which provides that both plaintiffs are entitled to recover costs for separate representation, does not apply to discoveries. Counsel argued that at paragraph 32 of the Costs Judgment, the Court was careful to say that when it comes to discovery of witnesses, the parties are entitled to one senior and one junior counsel and no more.

Counsel contended that this statement did not allow for Daiichi and Janssen to claim for counsel on the discoveries of the other Plaintiff's representatives.

[9] Concerning claim 8, in their written rebuttal submissions, counsel for Janssen refers to *Merck & Co. v. Apotex*, 2006 FCA 324 to support the contention that despite raising overlapping issues, a patentee and licensee should not be required to share a single award of costs. Janssen further submits that the costs of the motion were in the cause and that, as Janssen was awarded costs of the proceeding, they are entitled to the costs of the motion. Concerning claims 11-17 and 22-22, Janssen submits that given the guiding principle found in subparagraph 3 of paragraph 3 of the Costs Judgment, paragraph 32 of the Costs Judgment entitles Janssen to recovery of the attendance of one senior and one junior counsel for both Daiichi and Janssen for the discovery of witnesses. Then by way of rebuttal at the hearing of the assessment, counsel for Janssen argued that he had no knowledge of the terms of the settlement between Daiichi and the Defendant and cannot confirm whether Daiichi submitted claims for the preparation and examination of its representatives. Counsel further contended that under the *Federal Courts Rules* Janssen was entitled to attend and ask questions of the co-plaintiff on discovery. Finally, counsel submitted that only one counsel was being claimed, not two.

Assessment

[10] Paragraph 32 of the Costs Judgment states:

The Plaintiffs are entitled to the attendance of one senior and one junior counsel at such discovery. In addition to the days actually spent on discovery, the Plaintiffs are entitled to one day preparation time for each day of discovery.

[11] Concerning claims 8, 11 to 17 and 22 to 25, counsel for the Defendant has not called the number of units or the number of hours claimed into question. Their submissions are limited to the contention that Janssen is not entitled to claim these amounts as the motion and discovery related to Daiichi and they would have already been claimed by Daiichi.

[12] At paragraph 3 in the Costs Judgment, the Court refers to five principles of law which guided the decision as to costs. They are:

- a. A successful party is usually entitled to receive costs, the scale of such costs are not intended to be punitive or extravagant, but is intended to be a compromise between compensating the successful party and not unduly burdening an unsuccessful party. (*A.B. Hassle v. Genpharm Inc.*, (2004), 34 C.P.R. (4th) 18 (F.C.) [*A.B. Hassle*]).
- b. Patent cases are not to be treated any differently than other types of cases in this Court. (*A.B. Hassle, supra*).
- c. Where a patentee and licensee are each plaintiffs, they are entitled to separate representation and to be compensated in costs accordingly. This concept is not strictly limited to a situation where separate representation has been ordered, but such limitation may be taken into account. (*Apotex Inc. v. Merck & Co. Inc.*, 2006 FCA 324 [*Apotex*]).
- d. Pre-trial Orders are not to be dealt with in dealing with costs after trial unless the pre-trial Order expressly says so. (*Apotex, supra*).
- e. The successful party's lack of success on certain issues may be considered (*Merck & Co. Inc. v. Apotex Inc.*, 2006 FC 631, aff'd 2006 FCA 324 [*Merck*]).

At sub-paragraph 3 the Court relies on *Apotex Inc. v. Merck & Co. Inc.* (*Apotex, supra*) in support of the finding that where a patentee and licensee are each plaintiffs, they are entitled to separate

representation and to be compensated in costs accordingly. As Daiichi is the Patentee and Janssen is the licensee, I am bound by this legal principle. However, the Defendant has argued that the provisions of paragraph 32 of the Costs Judgment create a situation where claims 8, 11-17 and 22-25 may be distinguished from this principle.

[13] Concerning claim 8 for attendance at the Defendant's motion to compel Daiichi representatives and inventors to provide written answers to outstanding questions from the examination for discovery, at paragraph 13 of the Costs Judgment, the Court states: "the disposition of costs made on all pre-trial Orders is unaffected". This is in keeping with the fourth principle of law as outlined in paragraph 3 of the Costs Judgment, above. Counsel for Janssen submitted that the Court ordered costs in the cause in its disposition of this motion and that Janssen was awarded costs of the proceeding, therefore they are entitled to costs of the motion. Having reviewed the court record, it is clear that counsel for Janssen was present at the hearing of the motion. Also, having reviewed the Order of April 26, 2006, I can find nothing that specifies the Court intended to limit the award of costs in the cause to Daiichi. Further, the award is precisely the award requested by counsel for the Defendant in the consented to draft order provided to the Court on April 21, 2006. Finally, in keeping with the legal principles set out in paragraph 12, above, I find that the Court's award of costs in the cause for the motion entitles Janssen, a Plaintiff present at the motion who was ultimately awarded costs in the Costs Judgment, to costs of the Defendant's motion to compel Daiichi to provide written answers to outstanding questions. Therefore, Claim 8 is allowed as presented.

[14] Concerning claims 11-17 and 22-25, the Defendant's principal argument is that the general guideline found at subparagraph 3 of paragraph 3 of the Costs Judgment is modified by the specific principle found at paragraph 32 of the Costs Judgment. I do not agree. Paragraph 32 reads:

The Plaintiffs are entitled to the attendance of one senior and one junior counsel at such discovery. In addition to the days actually spent on discovery, the Plaintiffs are entitled to one day preparation time for each day of discovery. (Emphasis added)

Items 8 and 9 of the Table in Tariff B read:

8. Preparation for examination, including examinations for discovery, on affidavits, and in aid of execution
9. Attending on examinations, per hour.

It is noted that Item 9 does not allow for the attendance of more than one counsel at examinations for discovery. Given this, it is reasonable to find that the Court wanted to ensure that the Plaintiffs obtained costs for attendance on examinations at a level greater than is permitted by the Tariff and that the Court did not intend to limit the costs awarded. Further, the Court's award of costs states:

The Plaintiffs are entitled to costs at the upper end of Column IV of the Tariff and to reasonable disbursements as set out in these Reasons. (Emphasis added)

[15] Given the legal principle included at subparagraph 3 of paragraph 3 of the Costs Judgment, it is reasonable to interpret this paragraph to mean that each plaintiff is entitled to costs. Further, the highlighted phrase is worded exactly the same as paragraph 32 which reads:

The Plaintiffs are entitled to the attendance of one senior and one junior counsel at such discovery. In addition to the days actually

spent on discovery, the Plaintiffs are entitled to one day preparation time for each day of discovery. (Emphasis added)

In contrast to this, concerning Notices to Admit, the wording at paragraph 35 of the Costs Judgment states:

One set of costs only are allowed to the Plaintiffs. (Emphasis added)

Given the Court's wording of these paragraphs, I find that the Court was clear when there was an intention to award one set of costs. If the Court had worded paragraph 32 using language similar to that of paragraph 35, the Defendant's argument would have been more compelling. As the Court did not specifically indicate that "one set of costs only" was being awarded for the examination for discovery of the Daiichi representatives, I find that both Janssen and Daiichi are entitled to costs for preparation and attendance at the discovery of the Daiichi representatives. Therefore, claims 11-17 and 22-25 are allowed as presented.

Item 7

[16] Concerning claim 10, discovery of documents, including listing, affidavit and inspection (Item 7), counsel for Janssen submitted that the Defendant did not object to the claim for the Affidavit of Documents (claim 9) but objected to the claim for the Supplementary Affidavit of Documents (claim 10). Counsel for Janssen submitted that if one was allowed the second should be allowed as counsel was dealing with thousands of documents and it was not unreasonable that there be a Supplementary Affidavit of Documents.

[17] In response, counsel for the Defendant submitted that Item 7 in Tariff B captures all the work related to an affidavit of documents and allows for one recovery only. In support of this contention counsel referred to *Dewji & Gheciu Consultants Inc. v. A&A Consultants & Felicia Bilc*, [1999] F.C.J. No. 1263 [*Dewji*].

Assessment

[18] In reaching a conclusion concerning claim 10, I find the circumstances in *Dewji* very helpful. Paragraphs 3 and 4 of *Dewji* read:

3 The defendants present two claims for fees under item 7 of the Tariff. Counsel for the plaintiffs took the position that this item can only be claimed once. In reply, counsel for the defendants explained that the filing of a second affidavit of documents followed a change of plaintiffs' counsel who presented a second, completely new, affidavit.

4 I interpret the Tariff to suggest that it is the aggregate event of discovery that is intended to be reimbursed rather than each event in that process. This approach is consistent with the view taken in other assessments in this Court. I am persuaded by counsel's argument, however, that the defendants were put to an unusual amount of work for discovery. I have therefore decided to allow the defendants' second claim of 5 units for discovery, but under Tariff item 27 for "(s)uch other services as may be allowed by the assessment officer or ordered by the Court" rather than under item 7.

[19] I agree with the assessment officer when he concludes that it is the aggregate event of discovery that is intended to be reimbursed rather than each event in that process. However, in *Dewji* the assessment officer allowed for a subsequent claim for discovery under Item 27 for "(s)uch other services as may be allowed by the assessment officer or ordered by the Court". I find that the circumstances before me do not warrant a similar approach. In *Dewji* the Defendant

was faced with a completely new affidavit of documents filed by the Plaintiff's new counsel. Counsel for Janssen has presented no similar extenuating circumstances. Counsel contends that the claim is reasonable due to the volume of documents. I do not think this is sufficient to warrant deviating from the norm, that Item 7 is intended to reimburse for the aggregate of the discovery process. Further, in keeping with the legal principle found at subparagraph 2 of paragraph 3 of the Costs Judgment, that patent cases are not to be treated any differently than other types of cases, the enormous volume of documents produced should not be considered an exceptional circumstance warranting the use of Item 27. Therefore, claim 10 is not allowed for the Supplementary Affidavit of Documents.

Item 12

[20] Concerning claim 30, notice to admit facts or admission of facts, notice for production at hearing or trial or reply thereto (Item 12), Janssen has submitted that paragraph 35 of the Costs Judgment refers to "Notices to Admit" and that Janssen is entitled to recover for the four Notices to Admit served on the Defendant.

[21] Counsel for the Defendant submitted that paragraph 35 of the Costs Judgment provided for one set of costs for the Plaintiffs. Counsel further contended that although there were four Notices to Admit filed, two of the Notices were required to correct clerical errors in previously served Notices to Admit. Counsel submitted that it is recognised that, pursuant to paragraph 35 of the Costs Judgment, Janssen is only claiming one half of the costs for the four separate Notices. Counsel argued that by claiming for the amendments Janssen is effectively claiming four sets of costs.

Finally, at paragraph 19 of its Responding Submissions, the Defendant argues that Janssen should not be awarded costs for the additional two Notices required to correct errors.

Assessment

[22] Under the heading “Notices to Admit”, paragraph 35 of the Costs Judgment reads: “One set of costs only are allowed to the Plaintiffs”. I am in agreement with the Defendant that the effect of paragraph 35 is that the Court awarded only one set of costs for the Notices to Admit, to be shared by the Plaintiffs Daiichi and Janssen.

[23] It has been previously decided that an assessment officer may allow more than one claim for Notices to Admit (*Aird v. Country Park Village Properties (Mainland) Ltd.*, 2005 FC 1170 at para. 29 - 31). In keeping with this finding, I find that the reference to Notices to Admit in paragraph 35 of the Costs Judgment also provides for the recovery of costs for more than one Notice. From the Defendant’s submissions I find that counsel does not object to the first two Notices to Admit served. Without having reached a decision concerning the Notices to Admit served on August 15, 2006 and September 1, 2006, I find that the costs for the first two Notices to Admit may be allowed.

[24] Concerning the Notices to Admit served on August 15, 2006 and September 1, 2006, the Defendant has argued that the service of a Notice to Admit, which was necessitated due to a clerical error, should not generate costs. I have been presented with no case law to support the Defendant’s position. Moreover, I can find no case law on point. However, I think it is clear that if the issue before me related to the costs of amending a pleading under Item 3, no costs would be allowed for a

clerical error as an amendment must be “necessitated by a new or amended originating document, pleading, notice or affidavit of another party”. Therefore, given the unique nature of the issue before me and in the context of a party-and-party assessment, I find that if it is determined that the service of a Notice to Admit was necessitated due to a clerical error, costs should not be allowed.

[25] The Affidavit of Brad Jenkins sworn May 26, 2011, filed in response to the Bill of Costs, has two letters dated August 15, 2006 and September 1, 2006 attached as Exhibits A and B respectively. Having reviewed Exhibit A, it appears that a Supplemental Request to Admit was being served to correct an incorrect Japanese Document Production number referred to in the Notice to admit served July 26, 2006. I find correcting an incorrect production number to be in the nature of a clerical error. Therefore no costs are allowed for this Notice.

[26] Having reviewed Exhibit B, it appears that, further to a conversation with counsel for the Defendant, a Revised Request to Admit was served replacing the phrase “about October” with the phrase “mid-October”. In the second paragraph of this letter it appears that this change may have enabled the Defendant to immediately admit the facts contained in the Request. Without further evidence to the contrary, I do not find this change to be an amendment due to a clerical error. I find that the service of this Notice amounts to a new request for a different fact (“about October” is not the same as “mid-October”) that was brought about as a result of discussions between the parties with the intent of facilitating an admission of fact in order to isolate issues truly in dispute. Therefore, I allow the cost for the Notice to Admit served on September 1, 2006.

[27] In summary, I allow for the costs of three Notices to Admit. In keeping with the provision of paragraph 35, that one set of cost only is allowed to the Plaintiffs, I find that Janssen is entitled to 50 percent of the costs allowable. Therefore, claim 30 (Item 12) is allowed for three Notices to Admit for a total of 6 units.

Item 13

[28] Under claim 31, the Defendant has consented to the claim for Item 13(a) of Tariff B: preparation for trial or hearing whether or not the trial or hearing proceeds. However, in its Response Submission, the Defendant contends that the Costs Judgment only awards Janssen the costs of senior counsel's preparation of Dr. Kahn and Dr. Enstrom and that any claim by Janssen for further preparation of additional witnesses cannot be allowed as the costs of further preparation of additional witnesses were not awarded in the Costs Judgment. Counsel argued that as preparation time was awarded per day, the costs of preparing Dr. Kahn and Dr. Enstrom should be calculated according to Item 13(b), the only Tariff Item which addresses daily preparation costs. Counsel submitted that calculated on this basis, Janssen is entitled to, at most, \$1,560.00 for the two days of preparation.

[29] In the alternative, counsel submits that if claim 31 is allowed for general preparation under Items 13(b) and 13(c), Janssen's claim for the preparation of Dr. Kahn and Dr. Enstrom under Item 13 (d) should not be allowed. At paragraph 22 of its Responding Submissions the Defendant argues:

“Tariff Item 13(d)” does not exist. Janssen's claim actually appears to be based on paragraph 42 of the Costs Judgment which states the

“One day for one senior counsel for preparation of each [fact witness] is allowed”. Paragraph 42 prevents Janssen from claiming the cost of junior counsel when preparing fact witnesses and allows only one senior counsel’s time. This limitation reflects the fact that less work is involved in preparing a fact witness than an expert witness. Paragraph 42 does not entitle Janssen to an additional amount above and beyond the amounts awarded for preparation under the *Tariff*.

[30] At the hearing of the assessment, counsel for the Defendant submitted that paragraphs 37 and 38 of the Costs Judgment, providing for the Plaintiff to recover for two senior and two junior counsel, relate only to claim 32 (Item 14(a) and 14(b) of Tariff B) and should not be applied to claim 31 for preparation for hearing under Item 13 (a) and (b) of Tariff B.

[31] By way of rebuttal Janssen submits that paragraphs 37 and 38 of the Costs Judgment may be applied to both claims 31 and 32. Janssen argues that the costs for one senior and one junior counsel have properly been claimed under claim 31. Counsel for Janssen continues by arguing that paragraphs 41 and 42 of the Costs Judgment award the costs for the preparation of Dr. Kahn and Dr. Enstrom in addition to the costs for preparation under Items 13 (a) and 13(b). Further, counsel argues that the Defendant’s interpretation of paragraph 42 of the Costs Judgment cannot be correct as that would limit Janssen to the preparation of Dr. Kahn and Dr. Enstrom and not provide for any other preparation after the first day of the trial.

Assessment

[32] Under claim 31, Janssen has claimed for the preparation for trial or hearing, whether or not the trial or hearing proceeds (Item 13 (a)), preparation for trial, per day in Court after the first day

(Item 13 (b)), second counsel, where Court directs (Item 13 (c)) and one day for senior counsel for preparation of each of Dr. Kahn and Dr. Enstrom (Item 13 (d)).

[33] It is noted that paragraph 42 of the Costs Judgment awards one day for one senior counsel for preparation of each of Dr. Khan and Dr. Enstrom.

[34] In reaching a determination concerning claim 31, I am faced with two preliminary issues. First, I must decide whether paragraph 42 of the Costs Judgment precludes me from allowing costs for preparation for trial, per day in Court after the first day under Item 13(b) of Tariff B. Counsel for the Defendant has submitted that the effect of paragraph 42 is that I should allow only two days for preparation under Item 13(b), one each for Dr. Kahn and Dr. Enstrom. I do not agree with this argument. At paragraph 50 of the Costs Judgment, the Court states:

The assessment officer is to proceed to assess fees and disbursements as set out in the Tariff, at the upper end of Column IV, consistent with the instructions and guidelines as set out in these Reasons. Unless otherwise allowed in these Reasons, no fee or disbursement(s) beyond that set out in the applicable Tariff is to be allowed. Disbursements allowable, but not otherwise discussed in these Reasons, are to be proven and allowed only to the extent that they were reasonably incurred for the purposes of this action and are at a level no greater than those charged in arms length commercial transactions.(emphasis added)

[35] From the above I find that even though the Cost Judgment contains instructions which limit the amount Janssen is allowed to claim to those set out in the applicable Tariff, the intent of paragraph 50 is to provide for the possibility of fees or disbursements beyond that set out in the applicable Tariff. The corollary being that, unless allowed in the Costs Judgment, I am restricted to

those fees and disbursements set out in the applicable Tariff. Following this reasoning, I find that paragraph 42 of the Costs Judgment provides for costs for the preparation of Dr. Kahn and Dr. Enstrom above and beyond that which I am able to allow under Item 13(b) of Tariff B.

[36] Having reached this determination, and without reaching a decision concerning the preparation of Dr. Kahn and Dr. Enstrom, and after reviewing the abstract of hearing, I find that Janssen's claim of \$10,920.00 under Item 13(b) of Tariff B, which was not specifically addressed at hearing, is reasonable given the provisions of the Costs Judgment, and is allowed as presented.

[37] The second preliminary issue relates to the validity of Janssen's claims under Item 13(c) and 13(d). Under claim 31, Janssen has submitted claims under Items 13(a), 13(b), 13(c) and 13(d). Counsel for Janssen has submitted that these claims have properly been submitted. I do not agree. Items 13(c) and 13(d) do not form part of Tariff B. Although I find that the Costs Judgment provides for costs beyond the Tariff, I do not find that it permits me to allow costs under Items which do not properly form part of Tariff B. On the other hand, I will assess the claims presented under 13(c) and 13(d) to determine whether they are otherwise allowable.

[38] Concerning Item 13(c), Janssen has claimed for "second counsel, where the Court directs, 50% of the amount calculated under paragraph (b)". It appears that counsel has borrowed this wording from Item 14(b) of Tariff B. Further, counsel has submitted that this claim is pursuant to paragraphs 37 and 38 of the Costs Judgment.

[39] I do not agree with this argument. Paragraphs 37 and 38 state:

[37] The Plaintiffs, collectively, had two senior and four junior counsel gowned. The defendant had one senior and three junior counsel gowned.

[38] I allow the Plaintiffs collectively, to recover the fees for the two senior and two junior counsel.

[40] These paragraphs are found under the heading Trial. I find that the reference to counsel being gowned refers to counsel in Court. Further, these paragraphs do not include any specific provision for preparation. Therefore, I find that the Costs Judgment does not provide for second counsel for the preparation for hearing. This being the situation, I must follow the provisions of Tariff B. Under Item 13, there is provision for preparation for trial or hearing and preparation for trial per day in Court after the first day but there is not provision for second counsel, and, as mentioned earlier, there is no Item 13(c). Consequently, I find that Janssen's claim under Item 13(c) falls outside the provisions of Tariff B and the Costs Judgment and is not allowed.

[41] Concerning Item 13(d), Janssen has claimed for "one day for senior counsel for preparation of each of these witnesses (Dr. Kahn and Dr. Enstrom)". Although, as mentioned above, Item 13(d) does not form part of Tariff B, the claim for Dr. Kahn and Dr. Enstrom is clearly pursuant to the provisions of paragraph 42 of the Costs Judgment. Having found in paragraph 45 of these reasons that the costs for the preparation of Dr. Kahn and Dr. Enstrom are above and beyond the costs allowable under Item 13(b), and Item 13(d) not being a viable option as it is outside the provisions of Tariff B, I am faced with the question of how to assess the costs claimed. For this I am in

agreement with counsel for the Plaintiff who submitted that the costs associated with the preparation of Dr. Kahn and Dr. Enstrom should be calculated according to Tariff Item 13(b), the only Tariff Item which addresses daily preparation costs. Therefore, in keeping with paragraph 42 of the Costs Judgment, and in the circumstances of this particular file, I allow Item 13(b) at 6 units per day for 2 days for the preparation of Dr. Kahn and Dr. Enstrom. This is above and beyond the amount allowed under Item 13(b) in paragraph 46 above.

Item 14

[42] Concerning claim 32 (counsel time per hour in court for a trial or hearing (Items 14(a) and 14(b)), counsel for the Defendant submitted at the hearing of the assessment that the only issue was lunch breaks. At paragraph 24 of its Responding Submissions the Defendant submits that lunch recesses should be deducted from the amount claimed as Item 14 is awarded “per hour in court”. In support of this position counsel referred to *Aventis Pharma Inc. v Apotex*, 2009 FC 51 (*Aventis*) at paragraphs 33 and 37. Counsel further submitted that the amount claimed should be reduced by \$11,700.00 (\$7,800.00 for senior counsel and \$3,900.00 for junior counsel).

[43] At paragraph 25 of its Rebuttal Submissions, Janssen contends that lunches are not breaks during trials and counsel typically spend lunches and recesses preparing. At the hearing of the assessment counsel submitted that Janssen had set up a preparation room complete with computers, printers and a white board. Counsel for Janssen submitted that it is common knowledge that recesses are typically spent preparing for the hearing.

Assessment

[44] In keeping with *Aventis (supra)*, it has been held on many occasions that the time for lunch breaks should be factored out of any calculation for counsel time per hour in Court (see: *Estensen Estate v. Canada (Attorney General)*, 2009 FC 152 (*Estensen*), *Aventis Pharma Inc v. Apotex Inc*, 2008 FC 988, *Mercury Launch & Tug LTD v. Texada Quarrying Ltd*, 2009 FC 331, *Astra Zeneca AB v. Apotex Inc*, 2009 FC 822). However, in none of these cases was I able to find an indication that counsel presented evidence of a “preparation room” having been set up to facilitate work during recesses.

[45] In considering this evidence, I turned to paragraph 16 in *Aventis (supra)* where counsel contended that fee Item 13 already addresses any element of preparation in breaks and paragraph 15 in *Estensen (supra)* where it was held that costs for brief recesses when counsel must remain in or close to the courtroom should be allowable as part of fee Item 14. Taking these factors into account and considering the case law in which it has been held that the time for lunch breaks should be factored out of any calculation for counsel time per hour in Court, I find that, further to Janssen’s contention that lunch recesses are typically spent preparing for the hearing, such work falls within the parameters of Item 13(b) (preparation for trial, per day in Court after the first day). Therefore, the time claimed for lunch breaks may not be allowed. Further, having confirmed that the average lunch break during the trial was one hour, I find the deduction submitted by the Defendant at paragraph 53 above to be reasonable.

[46] Having reached a decision concerning Items 14(a) and 14(b), there is one final issue to be addressed. At paragraph 39 of the Costs Judgment, the Court referred to the unnecessary objections raised by the Plaintiffs to the evidence of Dr. Gerster and awarded the Defendant fees for one senior and one junior counsel for one trial day, to be set off against the costs otherwise assessed in favour of Janssen. At the hearing of the assessment, counsel agreed that, if it was found that lunch breaks could not be included in the claims under Items 14(a) and 14(b), the Gerster set off would be a total of \$5,085.60. For the reasons outlined above and taking into account the Gerster set off, Items 14(a) and 14 (b) are allowed for a sum total of \$71,198.40.

Item 15

[47] Concerning claim 33, at the hearing of the assessment Janssen submitted that, in keeping with the costs judgment, counsel were claiming 9 units under Item 15 (preparation and filing of written argument, where requested or permitted by the Court), for three days for one senior and one junior counsel.

[48] At paragraph 26 of the Defendant's Responding Submissions, it is submitted:

The Costs Judgment grants the Plaintiffs "the fees of two senior and two junior counsel for three days for preparation of memoranda of argument". Janssen has calculated its entitlement under Tariff Item No. 15. Tariff Item No. 15 is not a *per diem* amount but, rather, a global amount for the preparation of all memoranda. As the judgment awards a *per diem* amount, the amount awarded should not exceed the 6 units per day allowed for preparation in Tariff Item No. 13(b), the only Tariff Item in which preparation is calculated on a *per diem* basis.

[49] At the hearing, counsel for the Defendant contended that paragraph 47 of the Costs Judgment is problematic because it does not accord with Tariff B and it makes more sense to use Item 13 (b), which provides for a per diem allowance.

[50] At paragraph 27 of their Rebuttal Submissions, counsel for Janssen submits that the Costs Judgment makes no mention of Item 13(b) and that the 9 units claimed is based on the number of units listed at the upper end of Column IV in Tariff Item 15, as instructed by the Court.

Assessment

[51] Paragraph 47 of the Costs Judgment states:

Plaintiffs are entitled to the fees of two senior and two junior counsel for three days for preparation of memoranda of argument used at trial including submissions as to costs.

[52] Under claim 33, Janssen has submitted three claims under Item 15. I will address the claims for senior counsel first.

[53] Counsel for the Defendant has argued that Item 15 provides for a global amount for the preparation of all memoranda. Item 15 reads: "Preparation and filing of written argument, where requested or permitted by the Court". Contrary to the submissions of the Defendant, I find nothing in the wording of Item 15 which indicates that only one claim may be allowed. In fact at paragraph 34 of *Aird (supra)*, it was held that more than one claim may be allowed under Item 15. Further, paragraph 47 of the Costs Judgment states; "Plaintiffs are entitled to the fees of two senior and two

junior counsel for three days for preparation of memoranda of argument used at trial including submissions as to costs”.

[54] Rule 400(5) and (6) provides the Court with broad discretionary powers concerning directions and the award of costs. It is clear that these rules provide the Court with the discretion to make an award outside the parameters of Tariff B and, the Court having done so, provides an Assessment Officer with the authority to allow the costs pursuant to the award of costs, even if the costs do not fit within Tariff B. However, I do not think that is the situation here. I find that paragraph 47 of the Costs Judgment may be reconciled with the provisions of Item 15.

[55] Even though the award of costs for three days for one senior and one junior counsel caused the Defendant some concern, I do not agree with counsel’s submissions. In addition to the Court’s jurisdiction to provide directions as conferred by Rule 400 (5) and (6), it is noted that the Court uses the plural “memoranda” of argument, indicating an intent to allow costs for more than one memorandum. Having reviewed the record of the proceeding, it was noted that the parties submitted Opening Statements, Closing Statements and Submissions as to Costs. All of these submissions were filed on different dates; hence, they presumably were prepared on different dates. Therefore, paragraph 47 may be reconciled with the Tariff by allowing Item 15 three times for the preparation and filing of Janssen’s Opening Statement, Closing Statement and Submissions as to Costs which were filed on September 5, 2006, October 2, 2006 and October 27, 2006 respectively. Therefore, for senior counsel, Item 15 is allowed as presented at 3 claims of 9 units each.

[56] Having regard to junior counsel, although counsel for the Defendant made no submission concerning the claim for junior counsel, I am faced with determining whether the amount claimed by Janssen is reasonable. Counsel has claimed 50% of the amount claimed for senior counsel. Presumably this is in keeping with the methodology used under Item 14 (b) for second counsel at trial where the Court directs. Although I understand the approach taken, due to the difference in the range of units, I am uncomfortable utilizing a provision from Item 14 when making an allowance under Item 15.

[57] In *Eli Lilly and Co. v. Novopharm Ltd*, 2009 FC 797, the Assessment Officer was faced with a similar circumstance. In that matter the Court awarded for second counsel throughout. At paragraph 24 it was held that second counsel was allowed under Item 15 at the low end of the column in Tariff B. I find this approach to be consistent with the provisions of paragraph 47 of the Costs Judgment. Therefore, as the range of units for Item 15 under Column IV is 4 to 9, three claims for junior counsel are allowed under Item 15 at 4 units each.

Disbursements

Photocopying

[58] Janssen has submitted two claims for photocopying. The first claim (claim 35) is for photocopies produced in house by the law office. This claim is for \$55,206.22. The second claim (claim 36) is for photocopies produced by an external service provider. This claim is for \$79,748.79.

[59] Concerning disbursements for photocopies, at paragraph 34 of their Costs Submissions, counsel for Janssen submits that Janssen was charged \$0.25 per page for photocopies by a firm contracted to provide in house photocopying services and that the charges relating to the production of legal authorities had been deducted from the claim pursuant to paragraph 18 of the Costs Judgment. Then, at paragraph 35 of its Costs Submissions, Janssen produces a list of the documents required to carry out the required steps in this action and photocopied in order to provide copies to counsel, experts, law clerks, the Court and file copies.

[60] At the hearing of the assessment, counsel for Janssen contended that paragraph 16 of the Costs Judgment awarded the lesser of the actual charge or \$0.25 per page. Although counsel was not entirely clear on the breakdown of the actual charge it was submitted that the actual cost of in-house photocopying was \$0.25 per page i.e.: \$0.15 per page for management fees, paper and toner and \$0.10 per page for photocopier leases and maintenance. However, later in the hearing of the assessment counsel indicated that the management fee paid was on a per diem basis and was not dependant on the number of photocopies made and that the cost of photocopying, minus the management fee was \$0.15 per page.

[61] Counsel for Janssen submitted that *Diversified Products Corp. v. Tye-Sil Corp.*, [1990] F.C.J. No. 1056, referred to at paragraph 16 of the Costs Judgment, was concerned with the actual cost of photocopies and that the amounts claimed in Janssen's Bill of Costs were the actual costs and that no profit was being made. Counsel further contended that the Affidavits of Documents alone produced a requirement for 270,000 copies or \$67,500 in photocopying. It was submitted that

Janssen produced 60,000 pages of documents which were photocopied twice and Daiichi produced 150,000 pages of documents which Janssen photocopied once. Counsel submitted that, in addition to these, there were discovery transcripts, expert reports, trial exhibits, a trial record of over 3600 pages and Janssen's submissions to Health Canada to gain initial marketing approval which contained over 50,000 pages.

[62] At paragraph 29 of its Responding Submissions, the Defendant submits:

With respect to the number of copies made Janssen has offered no meaningful evidence that all the copies it made were reasonably necessary to advance the litigation. The Belmore and Rinne Affidavits, upon which Janssen relies, list only the types of documents copied and the type of people whom copies may have been provided. This list does not establish that Janssen needed to copy these documents.

Counsel continues by arguing that neither the Belmore nor the Rinne Affidavits state how many copies of each document were produced and do not establish that the claims are reasonable or necessary. The Defendant also submits that Janssen itself admits that 10,000 of the 13,000 documents produced by the Plaintiffs were Daiichi's documents. Further, at paragraph 33 of its Responding submissions, the Defendant submits that Janssen's claim for photocopies is the equivalent of a stack of paper 36 storeys high weighing almost 10,000 pounds.

[63] At the hearing of the assessment, counsel for the Defendant submitted that there was a paucity of evidence justifying the necessity of the photocopies claimed and that the Affidavit of Belmore was no more than a bald assertion of the reasonableness of the photocopy expenditure. In

support of this, counsel referred to *Country Curtains Inc. v. Country Curtain and Gift Shoppe*, [1997] F.C.J. No. 1031 and *Abbott Laboratories Limited v. Canada (Health)*, 2009 FC 399. Counsel for the Defendant further argued that Janssen claimed \$0.25 per page for internal copying and as little as \$0.12 per page for photocopying by an external service. Counsel contended that if a photocopy company is able to make a profit at \$0.12 per page then Janssen should be allowed no more than \$0.10 per page for internal photocopying. In support of this, counsel referred to *Morphy v. Canada (Attorney General)*, 2009 FC 190, at paragraph 16, which held that a law firm charging \$0.40 per page is likely making a profit on its photocopy equipment. Further, counsel contended that if Janssen was able to produce photocopies less expensively by using an external provider, then they should have used an external provider for all photocopies. Finally, counsel for the Defendant submitted that the claim for photocopies was grossly excessive, that of the 10,000 documents submitted from the US litigation, 7,000 were Daiichi documents and that the Plaintiffs together put only 100 exhibits in at trial. Counsel concluded by submitting that the total claim for internal and external photocopies should be reduced by 75% to \$25,457.82.

[64] At paragraph 32 of its Rebuttal Submissions, Janssen submits that the Defendant has submitted no evidence of the profitability of external photocopy service providers and that their profitability is not at issue. Then at paragraph 33 of their Rebuttal Submissions, counsel for Janssen argued that Janssen has produced extensive receipts for photocopies and the prices charged by the providers were not challenged on cross-examination. Referring to the decision in *WCC Containers Sales Ltd. v. Haul-All Equipment Ltd.*, 2003 FC 962 at paragraph 42, counsel for Janssen submits:

...Justice Kelen has held that where evidence was not cross-examined or contradicted, the Court will draw the natural inference that the responding party did not cross-examine because it did not want the deponent to expand upon and buttress facts unfavourable to the respondent. The Court must presume that such evidence would adversely affect Teva's case.

To further support the contention that when a party does not cross-examine on a statement, or produce evidence to refute it, the statement should be accepted, counsel for Janssen refers to *PricewaterhouseCoopers LLP v. Canada (Minister of Heritage)*, 2001 FCT 1040 at paragraph 14. Then at paragraph 36 of their Rebuttal Submissions, counsel for Janssen argues that expenses for photocopies produced by an external service providers should be allowed as claimed. In support of this, counsel referred to *Hyundai Auto Canada v. Cross Canada Auto Body Supply (West) Ltd.*, 2008 FCA 250 at paragraph 6. Further, at the hearing of the assessment, counsel for Janssen referred to *M.K. Plastics Corp. v. Plasticair Inc.*, 2007 FC 1029, to support the contention that the fees and disbursements actually incurred by a party should be taken into consideration on an assessment of costs. Finally, counsel for Janssen contended that to use an external service provider for every photocopy is just not practical as you cannot run out for each document you have to copy solely because you are only incurring a \$0.17 per page cost.

Assessment

[65] Under the heading "Photocopying and Electronic Copies", concerning photocopies, paragraphs 16 and 18 of the Costs Judgment state:

[16] Photocopying is allowed, where indicated in these reasons, at the lesser of the actual charge or \$0.25 per page. I am mindful that law firms may have set up in-house copy centres, possibly as separate entities. In this regard, the comments of this Court in

Diversified Products Corp. v. Tye-Sil Corp, [1990] F.C.J. No. 1056 (QL) are appropriate in stating that the sum of \$0.25 per page is not simply an amount that can be charged without more. When an in-house service is used, the assessment officer must be advised as to the actual costs. The Court said:

With respect, I cannot agree with the reasoning of the Taxing Officer. The item of photocopies is an allowable disbursement only if it is essential to the conduct of the action. Therefore, this is intended to reimburse a party for the actual out-of-pocket cost of the photocopy. The \$.25 charge by the office of Plaintiffs' counsel is an arbitrary charge and does not reflect the actual cost of the photocopy. A law office is not in the business of making a profit on its photocopy equipment. It must charge the actual cost and the party claiming such disbursements has the burden to satisfy the Taxing Officer as to the actual cost of the essential photocopies.

[18] Nothing is allowed for copies of legal authorities provided at trial as this was excessive as commented upon at trial. Up to eight copies of other documents, if made, and actually provided at trial or on discovery are allowed.

[66] Although both the Affidavit of Mira Rinne and the Affidavit of Neil Belmore provide a listing of which documents were photocopied and counsel have confirmed that photocopies of authorities have been removed from the claim, I can find no evidence concerning how many copies of each document were produced. Also, further to paragraph 18 of the Costs Judgment above, I can find no evidence outlining which documents were actually provided at trial or on discovery. Although I have been able to confirm which trial exhibits were filed by Janssen, the fact that the Costs Judgment specifically stipulates that only copies made and actually provided at trial or on discovery are allowed and the fact that counsel has not provided said information leads me to question whether expanding Janssen's submissions concerning photocopies may have buttressed facts unfavourable to Janssen's position.

[67] In *Nature's Path Foods Inc. v. Country Fresh Enterprises Inc.*, 2007 FC 116 it was held:

The less that evidence is available, the more that the assessing party is bound up in the assessment officer's discretion, the exercise of which should be conservative, with a view to a sense of austerity which should pervade costs, to preclude prejudice to the payer of costs. However, real expenditures are needed to advance litigation; a result of zero dollars at assessment would be absurd.

[68] It has been held that indemnification of disbursements is not a function of hindsight but whether, in the circumstances existing at the time a litigant's solicitor made the decision to incur the expenditure, it represented prudent and reasonable representation (see: *Dableh v. Ontario Hydro* [1994] F.C.J. No. 1810 (*Dableh*)). Although *Dableh* was addressing the issue of expert witnesses, I find the reasoning to be sound for many disbursements, including photocopies. In light of the finding in *Dableh*, I agree with counsel for Janssen that circumstances could arise when it would not be reasonable or necessary to send a document to an external service provider for photocopying. I further agree that, in light of *Dableh*, the amount actually expended is a factor which may be taken into consideration.

[69] Concerning the contention that the amount paid to an external service provider should be allowed as claimed, I am not in agreement with counsel for Janssen. In *Hyundai (supra)* it was held that disbursements that are substantiated by affidavit were allowed as claimed. I find that I am not able to allow amounts paid to an external service provider unless they are substantiated, and that includes a determination as to whether the photocopies were reasonable and necessary and, in this proceeding, whether they were actually provided at trial or on discovery.

[70] Counsel for the Defendant has raised the issue of a law firm profiting from photocopies. In support of this they referred *Morphy (supra)*. The issue of law firms profiting from photocopies emanates from *Diversified (supra)*. In *Diversified* the Court states: “A law office is not in the business of making a profit on its photocopy equipment. It must charge the actual cost...” In *Morphy* the elevated charge for photocopies was such that it led to the conclusion that the law firm was likely making a profit from its photocopy equipment. In the present case, it was submitted that counsel for Janssen did not make a profit from photocopying. Defendant’s counsel point to external providers as evidence that Janssen’s counsel were making a profit. I do not find that the argument concerning an external service provider being profitable refutes Janssen’s submission, as it compares two different types of business with two different revenue generating operations. On the other hand, I find that Janssen’s counsel was imprecise concerning the breakdown of the charges for photocopying. This confusion makes it very difficult to determine the actual cost for photocopying. However, it does not preclude the possibility that the actual cost per copy is \$0.25. Taking all of this into account, I find that, in the circumstances of this file, \$0.25 per page is a reasonable amount for internal photocopying.

[71] As indicated at paragraph 82 above, paragraph 18 of the Costs Judgment states:

Nothing is allowed for copies of legal authorities provided at trial as this was excessive as commented upon at trial. Up to eight copies of other documents, if made, and actually provided at trial or on discovery are allowed.

[72] This is where counsel for Janssen runs into difficulty. Counsel for Janssen has submitted that Daiichi produced 10,000 documents totalling 150,000 pages. As these were Daiichi's documents, I find that it is reasonable to conclude that these documents would have been provided at trial or discovery by Daiichi. Consequently, I find that Daiichi would be entitled to claim for the photocopying of these documents, not Janssen. Even though counsel for Janssen has submitted that only one copy is being claimed, to decide otherwise could have required the Defendant to reimburse the Plaintiffs for up to 16 copies, up to eight copies for each Plaintiff and this would have been beyond the parameters of the Costs Judgment which allows for up to 8 copies in total. As counsel for Janssen has submitted that these copies were made at \$0.25 per page, the initial reduction for internal photocopies of Daiichi documents is \$37,500.00.

[73] Although counsel for the Defendant made similar submissions concerning the documents from the U.S. litigation, I presume that these documents comprise part of the total documents produced by Janssen, therefore I will not be treating them separately.

[74] Also included in the list of documents found at paragraph 3 to the Affidavit of Neil Belmore are Teva's expert reports and Teva's Abbreviated New Drug Submission comprising over 2,500 pages. Once again, these are not documents which Janssen would have provided at trial or on discovery. Having determined that Teva's expert reports comprised in excess of 3,400 pages and in keeping with the provisions of the Costs Judgment, internal photocopies will be reduced by a further \$1,490.00.

[75] For the above reasons I allow \$16,216.22 under claim 35 for internal photocopies.

[76] Concerning Janssen's claim for photocopies produced by an external service provider, having found at paragraph 86 of these reasons that payments to external photocopy services must be substantiated and having determined that counsel for Janssen has provided no evidence concerning how many copies of each document were produced and no evidence outlining which documents were actually provided at trial or on discovery, I must exercise my discretion conservatively, with a sense of austerity, recognizing that real expenditures are needed to advance litigation.

[77] Counsel for the Defendant has submitted that Janssen's claim for photocopies provided by an external service provider should be reduced by 75%. I find that this is unreasonable given the complexity and volume of work required to advance this litigation.

[78] Having reviewed tab 37 to the Affidavit of Mira Rinne, it is apparent that the majority of the invoices claimed are for expenditures in 2006. Given that Janssen was awarded costs for motions to compel answers April 19, 2006 and that the trial commenced on September 5, 2006, I find that it is reasonable to conclude that these expenditures relate to documentation required for the motions and trial since examinations for discovery appear to have occurred in 2005. The exception being \$2,363.09 for those copies invoiced after October 4, 2006, the last day of the trial, which, pursuant to the Costs Judgment, are not allowed. Further, having removed the \$2,363.09 and having reviewed the expert reports submitted by Janssen, the trial exhibits and the motion materials filed, I must determine whether the disbursements claimed are reasonable.

[79] Upon reviewing the invoices for photocopies produced externally, it is noted that the amount charged for photocopying was between \$0.09 and \$0.17 per page. This is well within the amount allowed by the Costs Judgment. It is also noted some of the invoices contained charges for scanning of documents and Quick Capture CDs. As scanning is being claimed under claim 38 and there was no evidence presented that this disbursement is different than the disbursement claimed under scanning of documents, any amount for scanning is removed from the claim for photocopies. Further, given that the documents have been photocopied and scanned, I find that Quick Capture CDs are a premium and therefore not a reasonable and necessary expenditure in a party-and-party assessment. Consequentially, the amount claimed for Quick Capture CDs is removed from the amount allowed.

[80] It was further noted that the invoices included expenditures for colour copies. The cost of these copies was at least \$0.85 per page. This far exceeds the amount allowable under the Costs Judgment. It is recognized that there are circumstances when colour copies are necessary for a full capture of the image. Therefore, I find it reasonable to allow disbursements for colour copies. However, in keeping with the Costs Judgment, the claim for colour copies was reduced to an amount approximating \$0.25 per page.

[81] Finally, it was noted that the invoices contained charges for binding, covers, Cerlox coils and tabs. In keeping with my decision at paragraph 33 of *Carr v. Canada*, 2009 FC 1196, given that these items were provided by an external service provider and provide immeasurable assistance

to the Court who would otherwise be required to work with loose documentation the charges for binding, covers, Cerlox coils and tabs included in the invoices for external photocopies are allowed.

[82] For the above reasons, claim 36 for external photocopies is allowed at \$63,040.00.

Summation

[83] Janssen has claimed \$26,311.52 for Summation, a litigation tool used to code documents for research and organization. Counsel for Janssen submits that it is essential in litigation of this type as counsel is able to navigate the numerous productions electronically. Janssen contends that it is because of tools like Summation that counsel were able to move the case along to conclusion in a two year period. Counsel for Janssen argues that, although there is no case law allowing the disbursement for Summation on assessment, the coding services related to Summation were contracted out for this proceeding and as the disbursement is not for software, it are not overhead.

[84] In response, counsel for the Defendant submits that that the Court has stated that Summation costs are overhead and not recoverable. In support of this argument counsel refers to *Sanofi-Aventis Canada Inc. v. Apotex Inc.*, 2009 FC 1138. Further, at paragraph 38 of its Responding Submissions the Defendant contends:

If costs of Summation are, in principle, recoverable, Janssen's submissions cannot be reconciled with its position on photocopying. Janssen states that the use of Summation was necessary to provide counsel with ready access to the many documents produced in this proceeding. Having claimed the costs of multiple paper copies of these documents, Janssen cannot reasonably argue electronic copies were also necessary. If summation was a necessary expense,

Janssen's copying claim should be further reduced, as use could have been made of the electronic copies.

[85] By way of rebuttal Janssen submits that Summation is an expense that would not have been incurred in the day-to-day operation of a law firm. At paragraph 38 of its Rebuttal Submissions

Janssen contends:

...The trial record was roughly 10,000 pages. Searching through 10,000 pages for documents, keywords and phrases during a trial is next to impossible without having the documents in searchable, electronic form at one's fingertips. Summation is a critical tool which allows counsel to access information quickly in order to respond to questions from the Court and conduct witness examinations....

Assessment

[86] Although I agree with counsel for the Defendant concerning the difficulty in reconciling Summation with the volume of photocopies, I do not find that this alone is sufficient to disallow Janssen's claim for Summation.

[87] Counsel for Janssen submitted the Reasons for Judgment and Judgment as to Costs in *Adir and Servier Canada Inc. v. Apotex*, 2008 FC 1070. In that decision, the Court held that the parties agreed to the use of Summation at trial and the unsuccessful party did not object to reasonable disbursements relating to the cost of Summation technology. Counter to this, counsel for the Defendant submitted the Reasons for Judgment on Costs in *Sanofi (supra)*. In that decision the Court held that Summation is part of the normal overhead costs of litigation. It is also to be noted that the Court did not indicate that it was part of the overhead of a law office.

[88] In a letter dated August 3, 2006 counsel for Daiichi informed the Court that Janssen requires Real Time transcript diskettes compatible with Summation. The letter in no way implies that Daiichi required Summation nor does it suggest that the Defendant required Summation. As I have not been presented with evidence to the contrary and no evidence that the parties agreed to the use of Summation, I conclude that prior to the commencement of the trial Daiichi and the Defendant did not use Summation software for research and organization. Further, as the Defendant is disputing the claim for Summation, I conclude that there is no agreement to reasonable disbursements. That being the case, I find that the present case may be distinguished from *Adir (supra)*.

[89] Further, if not all parties were using Summation prior to trial, I find Janssen's argument to the effect that Summation aided in moving the case along to be overstated. One would think that litigation would proceed at the pace of the slowest party, not the party with the newest technology.

[90] Taking the above factors into consideration, I find that Summation may have been a useful tool that aided counsel but, in the circumstances before me in this proceeding, I do not consider it to be reasonable and necessary in a party-and-party assessment. Therefore, in keeping with the Court's findings in *Sanofi (supra)*, Janssen's claim for Summation is not allowed.

Scanning of Documents

[91] Janssen has claimed \$3,682.50 for scanning of documents. At the hearing of the assessment, counsel for Janssen submitted that this amount should be reduced by \$70.00 as scanning done post trial had been included in the claim.

[92] Counsel for Janssen submits that scanning is a critical tool during preparation in document-heavy litigation. It was argued that there is a limit to the number of bound volumes one is able to carry when travelling for hearings or discoveries. Counsel contended that having electronic copies is not a luxury but a reasonable and necessary part of document-heavy litigation.

[93] In response, counsel for the Defendant contends that Janssen has charged the same amount for scanning as for photocopying. Counsel argues that the cost of scanning cannot be greater than the cost of photocopying as there is no toner or paper required. Counsel argues that no recoverable cost should be allowed but that if scanning is allowed the claim should be reduced by 75%. At the hearing of the assessment, counsel submitted that, when considering the reasonableness of the claim, it needs to be noted that Janssen's own evidence is that the U.S. productions were received from U.S. counsel in electronic form.

Assessment

[94] Paragraph 17 of the Costs Judgement allows electronic copies at the lesser of normal rates charged by commercial services or the actual expense.

[95] Having reviewed the invoices found at tab 37 to the Affidavit of Mira Rinne, it is apparent that the commercial rate for scanning was \$0.17 per copy.

[96] Concerning the U.S. documents, tab 39 to the Affidavit of Mira Rinne provides a list of scanning events. Given the number of documents scanned, it would appear that the U.S. documents were not included in the claim for scanning. This is consistent with the submission that they were already in electronic format.

[97] Considering the above factors, and in keeping with the provisions of the Costs Judgment, I find the claim for electronic scanning of documents to be reasonable and allow scanning at the rate charged by a commercial service for a total of \$2,450.00.

Binding

[98] Janssen has claimed \$9,582.05 for binding (claim 39). At the hearing of the assessment, counsel for Janssen submitted that \$400.35 should be deducted for binding completed after the trial.

[99] Counsel for Janssen submitted that binding was not overhead because they are non-reusable items used for filings with the Court. In support, counsel referred to *Kremikovtzi Trade v. Phoenix Bulk Carriers Ltd.*, 2009 FC 182 and *Halford v. Seed Hawk Inc.*, 2006 FC 422.

[100] In response counsel for the Defendant submitted that binding is not an allowable expense. In support, counsel referred to *Morphy (supra)* and *Minde v. Erminskin Cree Nation*, 2009 FCA 128. Counsel argued that in the cases submitted by Janssen the amounts in question are a few dollars, not a global claim of in excess of \$9,000.00. Counsel further argued that in *Kremikovtzi (supra)* there is no indication that the amounts claimed were disputed by opposing counsel. Finally counsel

contended that the amount claimed was inordinate and there is no basis in the evidence to support that quantity of Cerlox binding coils. In support counsel referred to *Richard Condo v. AGC*, 2006 FCA 286 at paragraph 9.

[101] In rebuttal, counsel for Janssen referred to *Merck & Co Inc v. Apotex Inc.*, 2007 FC 312 at paragraph 30 to contend that faced with scant but uncontradicted evidence that real expenditures have been made, an assessment officer should not make a finding of zero dollars. Counsel submitted that the amount claimed is explained by the number of documents involved in the proceeding and that the claim was for materials only, there was no labour claimed. However, upon further investigation counsel was not able to confirm that the disbursement did not include labour.

Assessment

[102] Having reviewed the case law presented, the one commonality is that the amounts claimed are reasonably minor. In fact in *Halford (supra)*, the case most closely resembling this one in terms of total amount claimed for fees and disbursements, the claim for binding was \$5.89. In the other decision, *Kremikovtzi (supra)*, internal binding charges were claimed at somewhat less than \$100.00. Further, although the small amount claimed for binding in *Halford (supra)* was contested as being overhead, in *Kremikovtzi (supra)* there is no indication that the amount claimed for binding was in dispute.

[103] I find that the amount claimed in the present case distinguishes this claim from those in the other proceedings. Although I have found in previous decisions that internal binding is overhead

(*Bujnowski v. Canada*, 2010 FCA 49), I find that this claim for binding and the jurisprudence provided leads me to revisit this issue and not simply disallow it as overhead. On the other hand, I am not able to allow it simply because claims for binding have been allowed in the past. I will therefore reach a determination concerning a reasonable and necessary amount to allow for internal binding, based on the circumstances of this file.

[104] I have been able to find no evidence confirming whether or not the charge for binding included a charge for labour. A review of tab 40 together with tab 36, found under Exhibit A to the Affidavit of Mira Rinne, indicates a strong correlation between the photocopies made internally and the binding performed internally. As no evidence has been provided to the contrary, having determined that internal photocopies for the Daiichi documents and Teva experts could not be allowed, I find that it is not reasonable to allow for the binding of said documents. Reducing binding by a percentage similar to the reduction in internal photocopying reduces the amount for binding to \$2,875.00.

[105] Counsel for Janssen has submitted that the binding is non-reusable as it was used for filings with the Court. Having reviewed the sixteen pages of entries located under tab 40 of Exhibit A to the Affidavit of Mira Rinne, I was able to correlate fifteen dates for binding events with filings in the Federal Court. Given that the vast majority of the binding events had no correlation with filing dates, it raises a question as to what portion of the internal binding was intended for the Court's use.

[106] Having allowed external binding charges for binding, covers, Cerlox coils and tabs because they provide immeasurable assistance to the Court, I do not find that it is reasonable or necessary to allow for internal binding when there is no correlation between the binding and Court filings.

[107] Although this is difficult to calculate, given the lack of evidence to the contrary, I find that my approach should be conservative, with a view to a sense of austerity. For this reason I will further reduce the amount and allow \$550.00 for binding related to the filing of documents with the Court.

Meeting Expenses

[108] Concerning Janssen's claim for meeting expenses (claim 41), at the hearing of the assessment counsel deducted \$387.39 from the claim, for the rental of a meeting room in Toronto, reducing the total claim to \$5,913.51. Counsel submitted that the amounts claimed were reasonable and necessary for counsel to meet with witnesses and counsel for Daiichi. Counsel further submitted that expenses for meeting rooms were only claimed where a room was needed and that where possible, counsel met with witnesses at their office or at the office of U.S. counsel.

[109] In response, counsel for the Defendant argued that the costs judgment allowed for out-of-town living expenses; therefore, any expenses incurred in Toronto, the location of Janssen's counsel, are non-recoverable. In support, counsel referred to *Canada (Attorney General) v. Sam Lévy et Associés Inc*, 2008 FC 980 (*Sam Lévy*) at paragraph 13 and *Bayer AG v. Novopharm Ltd*, 2009 FC 1230 at paragraph 76. Counsel further submitted that expenses for the Hyatt Harborside in

Boston are non-recoverable as the evidence provided was a prospectus and there is no evidence that the expense was actually incurred. Counsel also contended that there was no evidence provided that the meeting rooms at the witnesses facilities were inadequate forcing Janssen to utilize rented facilities. Counsel questioned whether rented facilities were actually required since Janssen's counsel has admitted that some meetings were held in the witness's office or at the office of U.S. counsel. Counsel argued that Janssen could have met at the witness's place of employment which would have rendered these expenses unnecessary. Finally, at paragraph 45 of its Responding Submissions, counsel for the Defendant submits that the only meeting expenses which might possibly be recoverable are the charges for the Holiday Inn Select in Boston and the Inn at Lambertville Station in New Jersey.

[110] By way of rebuttal, counsel for Janssen submitted that the Defendant has misconstrued the Costs Judgment. Counsel argued that paragraph 14 of the Costs Judgment deals with travel and out-of-town living expenses only. Counsel further contended that the meeting involved large groups of people making it impractical to convene a meeting at a witness's place of employment.

Assessment

[111] Having reviewed the invoices provided, I have confirmed that the calculation of meeting expenses appears to be incorrect. The amount claimed should have been \$6,264.09. Reducing that amount by \$387.39 provides for a claim of \$5,876.70. Further, it was noted that the amount of \$288.75 U.S., for the Holiday Inn Select in Boston, was also included. However, at page 231 of Volume 1 of the Costs Submission of Janssen, the amount of \$327.74 CAN had already been

claimed for the same Holiday Inn Select invoice. Therefore, the amount claimed should be reduced by a further \$327.74.

[112] Paragraph 14 of the Costs Judgment states:

Any travel and out of town living expense that are allowed to be recovered are to be at a modest level. Travel shall be allowed at economy class rates. Accommodation shall be allowed at moderate but comfortable single room rates. No alcohol, movies or entertainment expenses may be recovered.

[113] Having reviewed the Costs Judgment, I can find nothing specifically addressing meeting expenses. I agree with counsel for Janssen that to equate meeting expenses with travel and out of town living expenses would misconstrue paragraph 14 of the Costs Judgment. However, I do not consider it a stretch that a party could incur hospitality expenses (i.e. lunches, coffee, water etc) whether or not counsel is actually travelling. Further, counsel for Janssen having admitted that rental facilities were only used when necessary; I consider it hindsight to suggest that counsel could have conducted meetings all with witnesses at the witness's place of business.

[114] Counsel for Janssen having deducted the expense for the rental of a meeting room in Toronto from the claim, I find the expenses for catering to be reasonable and the timing to be in reasonable proximity to the trial and discoveries.

[115] Concerning the claim for the Hyatt Harborside in Boston, counsel for the Defendant has submitted that the amount claimed cannot be allowed as there is no evidence that the amount was

actually paid. However, at page 231 of Volume 1 of the Costs Submissions of Janssen, there is a visa invoice confirming payment of \$1,302.38, the amount claimed by Janssen.

[116] Further, I find that the amounts claimed for the Holiday Inn Select in Boston and the Inn at Lambertville Station in New Jersey are reasonable and the timing to be in reasonable proximity to the trial.

[117] For the above reasons I allow Meeting expenses (claim 41) at \$5,548.96.

Meals

[118] Under claim 44 Janssen has submitted \$4,656.77 for meals. At the hearing of the assessment, counsel removed a claim for Barbarian's Steakhouse and reduced a claim for Bymark thereby reducing the amount claimed to \$2,526.97.

[119] Counsel for Janssen submitted that the charges for meals related to preparation of witnesses before and during the proceeding and during discoveries. Counsel argued that the amounts claimed are modest and reasonable.

[120] In response, counsel for the Defendant submitted that, pursuant to paragraph 14 of the Costs Judgment, meals eaten in Toronto are not recoverable. In support, counsel also referred to the decision in *Sam Lévy (supra)*. Counsel contended that if the meals in Toronto are allowed they should be reduced to a reasonable level and any claims for alcohol must be removed. Counsel

further argued that submitting a credit card statement is not sufficient evidence to prove that the meals were reasonable and necessary.

[121] In rebuttal, counsel for Janssen submitted that the Defendant's argument is not supported by the Costs Judgment as paragraph 14 does not state that only out of town living expenses are allowed. Counsel also contended that the claims were for meetings and that any charges for alcohol had been removed. It was further submitted that for the claims which do not itemize whether alcohol was involved a reduction of 20 percent is reasonable.

Assessment

[122] Paragraph 14 of the Costs Judgment states:

Any travel and out of town living expense that are allowed to be recovered are to be at a modest level. Travel should be allowed at economy class rates. Accommodation shall be allowed at modest but comfortable single room rates. No alcohol, movies or entertainment expenses may be recovered.

[123] Having reviewed the receipts found at tab 46 to the Affidavit of Mira Rinne it was noted that there were receipts for the Hyatt Harborside in the amounts of \$87.71 and \$933.73. It appears that these are for the same time period as the claim for meeting expenses for which costs have already been allowed. As I have not been provided with any evidence that this is not a duplicate claim for the same expenses, the amounts claimed are not allowed.

[124] The last sentence of paragraph 14 in the Costs Judgment states that no alcohol, movies or entertainment expenses may be recovered. Although entertainment was mentioned in the context of

travel, I am of the opinion that the restriction is equally applicable to expenses incurred while not on travel status. Although I am cognizant that counsel for Janssen has submitted that the meals were for the purpose of meeting with witnesses, the restriction found at paragraph 14 of the Costs Judgment has led me to question whether a portion of the meal expenses claimed may be considered entertainment.

[125] Having considered this point, I do not think entertainment is limited to movies, music and live theatre. On the contrary, I do not think it is a stretch to include dinner as a form of entertainment. On the other hand, I am also aware that witnesses, who are on travel status themselves, must eat. Further, I agree with counsel for the Defendant that the decision in *Sam Lévy (supra)* has held that meals for counsel who are not on travel status should not be reimbursed (see also *Hershkovitz v. Tyco Safety Products Canada Ltd*, 2010 FC 292 at paragraph 53). Finally, in keeping with the provision that expenses must be modest and having reduced the claims which do not itemize whether alcohol was involved by a factor of 20 percent, taking all of the above mentioned factors into consideration, claim 44 for meals is allowed at \$485.00.

Courier Charges

[126] Janssen has claimed \$5,670.62 for courier charges (claim 46). At the hearing of the assessment, counsel submitted that the claim was being reduced to \$5,275.55 as some of the charges claimed occurred after the conclusion of the trial.

[127] Counsel for Janssen submitted that courier charges were incurred when documents were sent to expert witnesses and when documents were sent in advance of meetings and discoveries. It was argued that all of the expenditures fall within the time frame of this proceeding.

[128] In response, counsel for the Defendant argues that Janssen has not provided evidence that the costs were reasonably incurred. Counsel submitted that Janssen was arguing that they couriered boxes ahead for meetings but that Janssen also justified electronic documents by arguing that sending boxes to meetings would not be required: Janssen cannot have it both ways. They also contended that most of the courier charges were incurred between Janssen and its co-plaintiff Daiichi and that only \$275.00 in charges were incurred sending documents to the Defendant. Further, not all courier charges were to witnesses, some were to counsel in the United States. Finally, counsel argues that courier charges should be reduced by 75 percent.

[129] By way of rebuttal, Janssen submitted that in a proceeding with co-plaintiffs it is perfectly reasonable that documents would be sent between counsel. Counsel further contended that even though many documents were electronic, one cannot eliminate all paper documents especially important documents which need to be reviewed. Counsel argued that it was necessary to send and receive documents to counsel in the United States as they were advising Janssen concerning the litigation. Finally counsel argued that a reduction of 75 percent is not reasonable in a case of this magnitude.

Assessment

[130] Tab 48 to the Affidavit of Mira Rinne contains a 7 page of disbursement summary concerning courier charges. Counsel submits that documents were being sent for the preparation of witnesses and for meetings. However, given the magnitude of the disbursement, I find that there is a requirement for some particularization to prove the necessity of \$5,275.55 in courier charges. This is not to say that I concur with the Defendant, as I find that a reduction of 75 percent is unreasonable. However, given the amount of the claim for scanning, justified to reduce the need to transport paper copies of documents, I find the charge for couriers excessive. On the other hand I find it reasonable that Janssen would incur courier charges for deliveries to counsel for Teva and Daiichi and to the expert witnesses and the Court. Therefore, having reviewed the disbursement summary for courier charges with a view to austerity, I conservatively allow \$2,500.00 under claim 46 for courier.

Translation

[131] Janssen has claimed \$1,229.31 under claim 52 for the translation of an article authored by Brockman and Musso. Counsel for Janssen submitted that the article was not introduced at trial but was part of the case and was something that, at the time appeared to be relevant, even though ultimately it was not used. The debate at this stage is whether in hindsight the translation of something that was not used should be allowed.

[132] Counsel for the Defendant submitted that the article was not entered into trial and there is no evidence that it was reasonable to translate the document. Counsel argued that we do not know what the article is about, what it is related to or why it was thought to be important.

Assessment

[133] Although I agree with counsel for Janssen that one must not approach the assessment of cost from a position of hindsight (*Dableh, supra*), I find that the evidence required to justify the translation of the article in question has not been provided. The mention of the authors' names without providing the title of the article or a synopsis of the articles content does not constitute evidence that the translation was reasonable and necessary. Consequently, the claim 52 is not allowed.

Publications and Articles

[134] Concerning the claim 53 for publications and articles, at the hearing of the assessment, counsel for Janssen submitted that the amount should be reduced to \$5,469.71 as some of the publications did not relate to this litigation and some others were obtained after the trial. Counsel submitted that these were articles that were not in Janssen's possession and there was a requirement to obtain them electronically from the Canadian Institute of Scientific and Technical Information. Counsel for Janssen contended that all of the articles claimed are case specific as they relate to enantiomers.

[135] Counsel for the Defendant argued that it is virtually impossible, on the evidence provided, to go through these articles and identify what they relate to. The fact that someone ordered the articles does not satisfy the onus to prove that they were reasonable and necessary. Counsel argued that it appears the articles were ordered after the expert reports were prepared, creating a surge of documents in the month before trial and that the Defendant should not be required to pay for any article that Janssen deems may have been important at trial. Counsel argued that Janssen would have had many of these articles from the prior PM(NOC) proceeding and that some of these articles may have been available free of charge. Finally counsel for the Defendant argued that Janssen must justify the expense.

[136] In rebuttal counsel for Janssen submitted, it would have been negligent to rely on materials from a prior proceeding. At the hearing of the assessment, counsel referred to the article “Do Single Enantiomers Have Something Special to Offer?” on page 463 of the Affidavit of Mira Rinne. Counsel submitted that at page 53 of the Judgment, the Court referred to this article in the context of the cross-examination of Dr. Caldwell. Counsel argued that although this is just one article it indicates how critical this type of article can be in a case of this type.

Assessment

[137] As previously mentioned, costs cannot be assessed from a position of hindsight. Counsel for Janssen has presented evidence that at least one of the articles purchased was important to the trial. Contrary to the submissions of the Defendant, one cannot say that they only needed to purchase some of the articles as this may have resulted in not obtaining that one critical article. I find that

counsel for Janssen has presented evidence that the electronic articles were reasonable and necessary. Therefore, I allow claim 53 at \$5,469.71.

Travel Expenses - Telephone

[138] Under claim 54, Janssen has submitted \$342.47 for telephone calls made from Mexico while counsel was on vacation. Counsel for Janssen submitted that his co-counsel was keeping in touch concerning this particular file. It was further submitted that paragraph 14 of the Costs Judgments provides for travel expenses at a modest level and that it is unreasonable to require counsel to record each call to be compensated for them in costs.

[139] In reply, counsel for the Defendant submitted that Janssen does not explain these expenses and that there is no evidence as to what these calls relate to. Janssen has not proven that these charges are reasonable and necessary.

Assessment

[140] Although I am certain that there are circumstances when, of necessity, counsel is required to interrupt vacation time to “keep in touch” concerning a proceeding, I agree with counsel for the Defendant that Janssen has provided no justification to prove that these calls were necessary. Further, contrary to the submissions of Janssen, I find that paragraph 14 of the Costs Judgment does not provide for modest expenses for counsel’s vacation. Therefore, claim 54 is not allowed.

Travel

[141] Janssen has submitted \$25,091.82 for travel (airfare and accommodation) under claims 55 and 56. Counsel for Janssen contended that the Costs Judgment allows for one trip for two counsel, however, the Bill of Costs claims two trips for one counsel. Counsel argued that this amounted to the same dollar value. Counsel further submitted that the airfare to Tokyo should be 50 percent of the amount claimed as the ticket was not economy class. Counsel further contended that the travel expenses to Ottawa were not contested.

[142] Counsel for the Defendant submitted that paragraph 22 of the Costs Judgment provides one trip to Japan for no more than two counsel. Counsel contended that this does not mean that each Plaintiff is entitled to one trip for two counsel, it suggests that the Plaintiffs together are entitled to claim one trip for two counsel. Referring to the Affidavit of Brad Jenkins sworn May 26, 2011, counsel argued that Daiichi has already claimed one trip for two counsel and that matter has been settled. It was submitted that as Janssen did not cross-examine Mr. Jenkins, his evidence remains uncontroverted. Counsel argued that Janssen's counsel were entitled to attend in Japan and should have attended, but the Costs Judgment does not entitle them to be reimbursed for those trips. Finally, counsel submitted that the cost of economy airfare is not necessarily one half of a first-class airfare.

[143] By way of rebuttal, counsel for Janssen submits that the Affidavit of Brad Jenkins refers to a trip to Japan. There is no evidence that Daiichi has settled for two counsel. Counsel further submits that the Defendant is ignoring paragraph 3 of the Costs Judgment which states that the patentee and

licensee are entitled to separate representation and to be compensated in costs accordingly. Counsel argued that whether Daiichi has been compensated is irrelevant to this assessment. Even if the Defendant has settled for two counsel for one trip with Daiichi, paragraph 3 of the Costs Judgment entitles Janssen to claim for at least one trip.

Assessment

[144] Once again, counsel for the Defendant has raised the issue of the settlement of the Costs with Daiichi. I agree with counsel for Janssen. The amount Daiichi settled its claim for is not a factor which affects the outcome of this assessment. To not allow Janssen's claim based on a settlement to which Janssen had no input would be prejudicial to Janssen's assessment. Had I been dealing with both assessments the outcome may have been different, however, I must base my decision on the facts found in the present assessment. On the other hand, I agree with counsel for the Defendant that both Plaintiffs are not entitled to one trip for two counsel. Further to my analysis of subparagraph 3 of paragraph 3 of the Costs Judgment as it relates to examinations for discovery, I find that paragraph 22 of the Costs Judgment provides that each plaintiff is entitled to no more than one trip to Japan for one counsel. Therefore, I allow one trip for one counsel to Japan. Further, I am satisfied that the cost of a full fare economy ticket is approximately 50 percent of the cost for a first class ticket. Therefore, I have reduced airfare accordingly. For these reasons and accepting that the expenses for the travel to Ottawa are not contested, claims 55 and 56 are allowed for a total of \$8,101.86.

Books

[145] Janssen has claimed \$1,175.27 for books. Counsel submitted that these books are specific to this case and would not be used again. These are not books you would find in a library and therefore they are not overhead.

[146] In reply, referring to paragraph 184 of *Halford (supra)* counsel for the Defendant submitted that books are overhead. Books, whether specific and narrow in focus may be used again. It was argued that the Physician's Handbook is the type of book used by patent lawyers who deal with pharmaceutical litigation. The Defendant should not be paying to stock the library of Janssen's counsel.

[147] By way of rebuttal, Janssen submitted that the dissertation of Dr. Ronald Collicott would not be something that would be used again. Counsel concedes that although the Physician's Handbook may be used again in other litigation, the others are specific to this proceeding.

Assessment

[148] I agree with counsel for the Defendant. I am not convinced that a book could be of a nature that the subject matter is so narrow in focus that it would render the book useless in any other proceeding but the present. On the other hand, it is noted that at the hearing of the assessment counsel for the Defendant conceded that the dissertation of Dr. Collicott may have to be treated differently. Given this, I think it was reasonable and necessary for Janssen to purchase a copy of the dissertation of Dr. Collicott, an expert witness in the present case. Therefore, claim 58 is allowed at \$189.89 for the purchase of Dr. Collicott's dissertation.

Computer Research

[149] After reducing the amount claimed to remove computer research conducted after the trial, Janssen has submitted a total claim of \$4,763.66 under claims 59, 60, 61 and 62. Counsel submitted that these charges were incurred for legal research concerning this proceeding. Counsel further argued that these research services have powerful search engines which allow a user to note up cases.

[150] In response counsel for the Defendant submitted that the evidence justifying these expenditures is sparse to non-existent and that an assessment should be with a sense of austerity. Although counsel conceded that computer searches are necessary, there is no evidence to justify that the searches claimed are reasonable and necessary.

[151] In rebuttal Janssen submitted that hundreds of searches were conducted and counsel should not have to incur greater costs to prove the costs claimed. In support, counsel referred to *Bayer AG v. Novopharm Ltd*, 2009 FC 1230, at paragraph 53.

Assessment

[152] Although I agree with counsel for Janssen that a party should not be required to spend a disproportionate amount of money to prove a disbursement, the Affidavit of Mira Rinne and Janssen's Written Submissions provide very little evidence to support hundreds of computer searches. I think that it is a well known fact that computer research is becoming more and more widely used. This being the situation, I am of the opinion that the burden of proving that computer

research is required has declined but that the requirement to provide evidence that the research is relevant is becoming more important. For these reasons I will allow computer research but I will conservatively allow for approximately one half of the searches claimed as the evidence of relevance was limited. Therefore, a lump sum of \$2,325.00 is allowed for all computer research.

Novo-Levofloxacin

[153] Claim 63, in the amount of \$415.30, is for samples of Novo-Levofloxacin. Counsel for Janssen submitted that these samples were for infringement analysis.

[154] Counsel for the Defendant argued that there was no need to purchase these samples. Janssen's experts did not refer to them and infringement was admitted before the trial. Counsel contended that if the samples were purchased to do analysis on them, they did not put the analysis into evidence.

[155] In rebuttal Janssen argued that the samples were purchased in 2005, a full year before the trial and prior to infringement being admitted. Although the evidence was not introduced the disbursement was prudent at the time of the purchase.

Assessment

[156] I am in agreement with counsel for Janssen. Until infringement was admitted, I find it was prudent to purchase samples of the Defendant's allegedly infringing product. Once infringement was admitted, one cannot look back with hindsight and determine that the disbursement was not

necessary. As the samples were purchased prior to the Defendant admitting infringement, claim 63 is allowed as presented.

ChemWindow

[157] Under claim 64, Janssen has claimed a disbursement to Bio-Rad Laboratories of \$1,300.32 for ChemWindow, a program that creates molecular drawings. Counsel submitted that ChemWindow was uniquely required for this proceeding and was used extensively. Counsel argued that ChemWindow is not a renewable resource as the licence agreement is for a limited time and the program cannot be used after the licence expires.

[158] Counsel for the Defendant argued that this program may be used as many times as necessary and that it should be considered as overhead. Counsel contended that this is standard chemistry drawing software.

Assessment

[159] I am in agreement with counsel for the Defendant. I find that the issue concerning software is similar to that concerning books. I am not convinced that the application of the software would be so specialized as to render it unusable in other pharmaceutical litigation. Concerning Janssen's submission that the licence was for a limited timeframe, I do not find this reason to allow the disbursement as, even within the defined period of time, counsel would have access to this software for use in other matters, should the need arise. Therefore, the disbursement to Bio-Rad Laboratories for ChemWindow software is not allowed.

External Hard Drives

[160] Concerning the disbursement of \$4,181.40 to NexInnovations for external hard drives, counsel for Janssen submitted that although the purchase of hard drives is difficult to argue, the document intensive nature of this litigation necessitated the use of external hard drives for documents handling while travelling. Counsel contended that the use of external hard drives is not a luxury and that although they may be used again they were purchased for this particular proceeding.

[161] Counsel for the Defendant argued that external hard drives are part of the equipment in any IT department, they are reusable and their purchase is overhead.

Assessment

[162] Throughout this assessment, counsel for Janssen has referred to the volume of documentation on several occasions. Each time the argument suggested that the volume of documentation in the proceeding necessitated expenditures for the scanning of documents or photocopying or courier. The same argument is presented here. The difference being that this expenditure is not for an item that is specific to this proceeding. In fact, counsel for Janssen has admitted that the hard drives may be used again. This is not to say that the expenditure was unnecessary. This was a large case with a great number of documents which proceeded at a rapid pace and I am sure that the use of technology was extremely useful to counsel. However, I agree with counsel for the Defendant that the purchase of a hard drive is overhead. I would not expect counsel to submit a claim for a computer or photocopier, both of which are technologies which have

proved extremely useful in litigation. I find hard drives to be of a similar nature, they are all office equipment. Therefore, the claim for payment to NexInnovations for external hard drives is not allowed.

Experts

[163] Paragraph 43 of the Costs Judgment reads:

I am concerned with what has been increasingly observed as mounting and often extravagant fees charged by expert witnesses. While a party is free to engage a person for expert services and pay whatever fee is negotiated, that fee should not become simply allowable on an assessment. Therefore, such fees should, for assessment purposes, be capped for days spent by the witness in attendance in Court, whether testifying or not, at the lesser of fees actually charged or those charged for daily service to the same client for senior counsel attending at trial. For preparation time the cap will be one half such senior counsel fee.

[164] At the hearing of the assessment, counsel for the Defendant submitted that counsel for Janssen has applied the capped rates appropriately and that, what is in dispute, are the hours claimed and, in some circumstances, the disbursements charged by the expert witness and claimed by Janssen.

[165] Paragraph 45 of the Costs Judgment allows the fees and disbursements of Ms. Anne Langley. At the hearing of the assessment and written submissions, counsel for the Defendant made no submissions concerning the costs claimed for the witness Anne Langley. Although not mentioned at the hearing of the assessment, I find that the Defendant's omission to make submissions is an indication that the amount claimed is unopposed. Therefore, the claim for the services of Ms. Langley is allowed as presented.

[166] Having regard to the claims for expert witnesses, it is noted that at paragraph 44 of the Costs Judgment, the Court states:

[44] Only fees and expenses of the following expert witnesses called by Plaintiffs at trial will be allowed:

Dr. Wentland

Dr. Klibanov (except no fees or disbursements are allowed for his evidence in Reply to Gerster)

Dr. Hooper

Dr. Zhanel

Dr. Rodricks

Dr. Myerson

Dr. Bartlett (except no fees or disbursements are allowed for his evidence in Reply to Gerster)

Dr. Partridge

[167] It is noted that, in addition to issues specific to the claims for each expert, counsel for the Defendant presented several overarching arguments concerning the costs for the experts. The first relates to the amount of time claimed for the preparation of the expert reports, the second relates to the amount of time spent in court during the trial of the proceeding, the third relates to travel expenses charged by experts and the fourth relates to the reduction of the fees and disbursements of Dr. Klibanov and Dr. Bartlett as a result of their evidence in reply to Dr. Gerster. Commencing with the set-off for Dr. Gerster, I will address these overarching issues prior to addressing the issues specific to each expert.

Gerster Set-off

[168] Counsel for the Defendant submitted that the fees and disbursements concerning the evidence in reply to the evidence of Dr. Gerster for Dr. Klibanov and Dr. Bartlett had not been deducted pursuant to paragraph 44 of the Costs Judgment.

[169] In rebuttal counsel for Janssen submitted that inadvertently those deductions had not been made. Counsel submitted that for Dr. Klibanov \$1,625 should be deducted for preparation and that for Dr. Bartlett \$2,600 should be deducted for preparation and testimony.

[170] At the hearing of the assessment, counsel for the Defendant submitted that the amounts suggested by Janssen for the “Gerster Reduction” seemed to be arbitrary and, considering the number of hours spent preparing generally, the amounts seemed minimal.

Assessment

[171] I am in agreement with counsel for the Defendant, absent evidence proving the amount of time spent preparing for testimony concerning Dr. Gerster, I find the amounts suggested by Janssen to be disproportionately low. Janssen has claimed 78.5 hours charged by Dr. Klibanov for preparation immediately prior to the trial. As this time would have been spent preparing for testimony, cross examination and rebuttal, I find that the Gerster set-off would have a significant impact on the amount allowed. Therefore, given that only preparation is being deducted for Dr. Klibanov, I find that a conservative deduction of \$3,250.00 is reasonable. Similarly, Dr. Bartlett charged for 36.5 hours preparation immediately prior to the trial. Given that preparation and one

hour for testimony is being deducted, I will deduct \$3,575.00 for his preparation and testimony counter to Dr. Gerster.

Preparation of the experts reports

[172] With reference to paragraphs 29 and 30 of the Costs Judgment, counsel for the Defendant has submitted that, to ensure that Janssen is not compensated for duplicative work, the Court has stated that the onus is on Janssen to demonstrate that work and expenses were incurred expressly for these Canadian proceedings. The Defendant argued that Janssen has utterly failed to comply with the Costs Judgment. Counsel contended that Dr. Klibanov, Dr. Rodricks, Dr. Wentland, Dr. Zhanel, Allan S. Myerson and John J. Partridge have all utilized significant portions of affidavits and reports previously filed in a related Patent Medicine (Notice of Compliance) (PM(NOC)) matter and in American litigation related to Levofloxacin. As the argument for each expert was similar, I will not reiterate the Defendant's submissions in its entirety. However, it is instructive to refer to a sample of the Defendant's submissions concerning this point. At paragraph 73 of its Responding Submission, the Defendant contends:

Prior to being retained for this proceeding, Dr. Klibanov previously served as a witness in both the related PM(NOC) proceeding and in an American proceeding involving the corresponding United States Patent and many of the same issues. There is clear duplication between these proceedings. Half of Dr. Klibanov's report in this proceeding was reproduced substantially verbatim from the affidavit he swore in the earlier PM(NOC) proceeding involving the same parties and also duplicates a substantial portion of his report in the American proceeding. Furthermore, almost 20% of the added paragraphs in Dr. Klibanov's report articulate legal test and list documents provide by Janssen and were almost certainly drafted by counsel. As it appears that approximately 55 hours were charged for preparing his report, this time is excessive and unreasonable in the circumstances.

Then again at paragraph 82 of its Responding Submissions, the Defendant submits:

Janssen's claim for Dr. Rodricks' fees is unreasonable and should be significantly reduced. Janssen claims a staggering 229.5 hours of preparation were needed. This is particularly hard to justify considering that his report incorporates almost his entire expert report in the U.S. proceedings. Indeed, almost half of the paragraphs in Dr. Rodricks' report were transcribed verbatim from his earlier report. It is inconceivable that so much preparation time was needed given the extent of this duplication.

[173] The Defendant makes similar submissions for Dr. Wentland, Dr. Zhanel and Allan S.

Myerson. Concerning John J. Partridge, counsel for the Defendant submits that all but three paragraphs of his report were duplicated verbatim from his report in an earlier proceeding involving Apotex.

[174] Concerning all of the above experts, counsel for the Defendant argues that the amounts claimed by Janssen should be reduced by 75 percent.

[175] By way of rebuttal, Janssen argues that the Defendant has submitted a distorted view of the amount of time spent by the experts on the preparation of affidavits. At paragraph 65 of its Rebuttal Submissions, Janssen submits:

... As shown below, expert report preparation in this proceeding was a preliminary, typically small portion of the experts overall involvement in this case. Subsequent steps included advising and conferring with counsel, reviewing Teva's expert reports, preparing reply reports, attending at trial, and being deposed at trial, as set out in the experts' invoices. Teva's allegation that an expert's work was unnecessary because he or she had sworn a similar affidavit in an earlier proceeding should be dismissed once that particular, small amount of work is put in the context of the totality of the expert's work.

Then at paragraph 75, Janssen contends:

Teva focuses on Dr. Klibanov's expert report. Dr. Klibanov's expert report was dated June 20, 2006. As his invoice dated August 1, 2006 was for a total of 28.75 hours from March to

July 2006 (which includes more than just preparation of his initial report), Teva's claim that Dr. Klibanov spent 55 hours on his report is not credible.

And again at paragraph 77, Janssen submits:

Dr. Klibanov's invoices include a Reply Report and a Supplemental Reply Report, neither of which have been alleged by Teva to be duplicative of any earlier work. It also includes reviewing documents including Novopharm's rebuttal reports, preparation for trial, and conferring with counsel during trial, as stated in his invoices.

Then at paragraph 83, Janssen submits:

As with Janssen's other experts, Teva focuses on Dr. Rodricks' expert report. Dr. Rodricks' expert report was prepared on June 26, 2006. His invoice up to the end of June totalled \$9,476.07CDN out of a total amount claimed of \$75,338.00.

[176] Janssen makes similar rebuttal submissions for Dr. Wentland, Dr. Zhanel, Allan S. Myerson and John J. Partridge.

Assessment

[177] Paragraphs 29 and 30 of the Costs Judgment state:

[29] The plaintiffs may only recover for work done and expenses incurred for the Canadian proceeding and not for work or expenses already incurred for the prior United States proceedings.

[30] The assessment officer is to be guided by the above statement, the onus shall be on the Plaintiffs to demonstrate that work and expenses were incurred expressly for these Canadian proceedings.

[178] In summary, counsel for the Defendant argues that the amounts claimed for experts should be significantly reduced as their reports are substantially the same as reports previously filed in a PM(NOC) application and in American litigation. Although Janssen does not dispute the

Defendant's contention, counter to this, counsel argues that the amount of time spent preparing the affidavits was only a fraction of the total amount of time claimed.

[179] Having reviewed the reports, I have confirmed that there are a number of portions of the expert affidavits which one could argue are substantially the same as those previously filed. On the other hand, there are significant differences between the reports. For example, the Affidavit of Dr. Rodricks provides much more elaboration than his previous report. Further, even though there are portions in common, I do not think that it is unreasonable to allow an expert time to review, revise, expand or confirm what was previously written.

[180] Having reviewed the invoices of the individual experts, I find that the amounts spent drafting and revising their affidavits more closely resembles the amount submitted by Janssen than the amounts submitted by the Defendant. Further, I find that the amount of time spent, although different in each case, is not unreasonable given the necessity of preparing a fresh affidavit for this proceeding. For the above reasons I find that the expenses incurred for the preparation of the Affidavits of Dr. Klibanov, Dr. Rodricks, Dr. Wentland, Dr. Zhanel, Allan S. Myerson and John J. Partridge were incurred for the Canadian proceeding. Further, as counsel for the Defendant made no submissions concerning the preparation of rebuttal affidavits and preparation prior to trial, I find that the total amounts claimed for the time spent in preparation of the experts reports and rebuttal reports are reasonable.

Amount of time in court

[181] The Defendant argued that the amount of time witnesses spent attending at trial was disproportionately long when compared with the amount of time spent testifying.

[182] Concerning Dr. Klibanov, at paragraph 75 of their Responding Submissions, counsel for the Defendant submits:

For time spent at trial, Janssen claims 20 hours of Dr. Klibanov's time. Janssen states that this is an estimate, as Dr. Klibanov's invoices do not distinguish between time spent preparing and time spent at the hearing. Transcripts indicate that Dr. Klibanov spent only 6 hours in the witness box. Janssen's estimates appear to be greatly inflated.

Then concerning Dr. Wentland, the Defendant contends:

...Janssen also claims fees and disbursements for Dr. Wentland's trip to Toronto to observe the Caldwell cross-examination at trial. Dr. Wentland's attendance at the cross-examination was not necessary. Dr. Wentland did not give further evidence at trial following Dr. Caldwell's cross-examination and appears to have attended "just in case" his assistance was needed. This is an unnecessary expense....

And in relation to the attendance of Mr. Partridge, counsel for the Defendant argues:

Janssen claims for 16 hours Mr. Partridge spent at the hearing, though the record shows that he was on the stand for no more than two hours and likely less than one hour. The rest of the time spent at trial cannot be considered necessary.

Finally, the Defendant makes similar submissions concerning Dr. Hooper. At paragraph 99 of their Responding Submissions, counsel argues:

Janssen claims 22 hours spent by Dr. Hooper attending the trial. The transcript shows that Dr. Hooper testified for only 5 hours. The rest of the time spent attending the hearing was not necessary.

[183] In rebuttal, counsel for Janssen argues that the Costs Judgment is clear that expert disbursements are allowable for "days spent by the witness in attendance in Court, whether

testifying or not”. In support of the argument that Janssen is entitled to the costs of the entire time the experts spent in Court, counsel also referred to *Rothmans, Benson & Hedges Inc. v. Imperial Tobacco Ltd* (1993), 50 C.P.R. (3d) 59, which held:

As to the expert witnesses.... there is no doubt that their attendance at the proceedings was essential to the proper conduct of this action. It is not reasonable to limit the expert's fees and expenses to the days in which he or she testified. In this respect I concur with Mr. Justice Dubé in *Amfac v. Irving Pulp & Paper* (unreported, T-166-80, December 9, 1985) when he stated at page 6:

. . . in complex patent matters such as this one, an expert is expected to do more than merely defend his affidavit. His presence may be necessary throughout the other party's case so as to be in a position to apply his expertise to the facts of the case as presented by the other side. He may also be called upon to rebut the opinions of other experts who took the stand before him.

Counsel also relied upon *Adir v. Apotex Inc.*, 2008 FC 1070 at paragraphs 20 and 21, and *Merck & Co. v. Apotex Inc.*, 2002 FCT 1037 at paragraph 16 in support of this point.

[184] Concerning Mr. Partridge, at paragraph 91 of its Rebuttal Submissions, Janssen submits:

Teva's hindsight approach is evident in its comments on Mr. Partridge's assistance at the hearing. Janssen was not able to predict when or how long Mr. Partridge would be on the stand for. In any event, as stated above, and as Justice Hughes held, the case law is clear that a party is entitled to recover for expert assistance before and during trial.

[185] Counsel for Janssen makes a similar argument concerning Dr. Hooper at paragraph 98 of their Rebuttal submissions.

Assessment

[186] It seems prudent to reiterate the finding in *Dableh (supra)* which held:

The test or threshold, for indemnification of disbursements such as these, is not a function of hindsight but whether, in the circumstances existing at the time a litigant's solicitor made the

decision to incur the expenditure, it represented prudent and reasonable representation of the client both in terms of leading and responding to Rule 482 expert evidence and of filling the void of technical expertise requisite to the solicitor's preparation and conduct.

[187] The position advocated by the Defendant appears to be firmly rooted in hindsight. I find the Defendant's submissions concerning the attendance of Dr. Wentland at the cross-examination of Dr. Caldwell to be firmly rooted of the hindsight approach and I find that it was both reasonable and necessary for Janssen's counsel to have Dr. Wentland present in order to make a sound determination as to whether Dr. Wentland would be required to provide additional testimony. The fact that additional testimony was not required should not affect the reasonableness of the claim.

[188] Although Janssen's evidence concerning Dr. Klibanov could have provided further specification, I find that the Costs Judgment and case law support the contention that an expert is expected to do more than merely defend his affidavit. Given this expectation, I find it is reasonable and necessary for the experts to be in the Courtroom for the testimony of any expert witness presenting evidence adverse to their testimony so as to be in a position to apply their expertise to the opinions of the experts called by the other side. Having reviewed the claims for the experts I note that the number of hours claimed for attendance at the trial varies considerably but none of the claims are for periods of time that are unreasonable. Therefore, I find that the claims for time spent in attendance at the trial are reasonable for all experts.

Expert Travel

[189] Counsel for the Defendant has raised several concerns related to travel by expert witnesses. These concerns relate to claims for first class flights, claims for the time experts spent travelling and the cost of hotels.

[190] In support of the contention that it is unreasonable to allow expert travel time when the Court has not allowed counsel travel time under Item 24, counsel referred to *Bayer AG v. Novopharm Limited*, 2009 FC 1230 at paragraph 40.

[191] Counsel for Janssen submitted no argument that time for travel and first class airfare were allowable. It having been decided in *Bayer (supra)* that time witnesses spend traveling is not allowed in circumstances where the Court has not made a direction concerning Item 24 and the Costs Judgment having allowed for economy airfare, I am in agreement with the Defendant that claims for first class airfare and travel time may not be allowed.

[192] Concerning the claims submitted for Dr. Zhanel, Dr. Myerson and Dr. Bartlett, counsel for the Defendant submitted that the charges for hotel accommodation exceeded the “moderate but comfortable” accommodation allowed by the Costs Judgment.

[193] At the hearing of the assessment, counsel for Janssen submitted that the room rate charged on some invoices may be explained by the Toronto International Film Festival. Counsel argued that Dr. Bartlett submitted invoices for the same hotel in late September of 2006 and the room rate was

almost one half of the rate during the film festival. Counsel contended that Janssen did not choose the dates of the trial and had no control over the room rates charged.

[194] It is noted that the Toronto International Film Festival runs at the beginning of September every year and that in 2006 it ran from September 7 to September 16. Having reviewed the invoices of Dr. Zhanel, Dr. Myerson and Dr. Bartlett, I find that Janssen's submissions appear to explain the differences in room rate charged by the hotel. Further, as I find the rate of \$275.00 charged later in September to be moderate, I will allow hotel rates as claimed.

[195] In keeping with these findings I will assess the disputed claims of each expert to determine the impact of these findings.

Dr. Klibanov

[196] At paragraph 78 of its Responding Submissions, the Defendant submits:

Janssen claims \$350 per hour for time Dr. Klibanov spent travelling. It has been recognized that, where counsel has not been awarded travel time under Tariff Item 24, it is unreasonable to award travel time charged by experts. It would appear that Dr. Klibanov's later trips were also first class, as opposed to economy fares. As Dr. Klibanov appears to have made at least three trips from Boston to Toronto, a significant reduction is clearly warranted.

[197] Although counsel for Janssen presented no submissions concerning Dr. Klibanov's travel time, at the hearing of the assessment counsel submitted that Dr. Klibanov's first class travel has been reduced as he was coming to Toronto on unrelated business so he only charged one half of the fare.

[198] In response to this argument, counsel for the Defendant argued that Dr. Klibanov's fare should be reduced to economy rate and then reduced by half to account for the unrelated business.

[199] Janssen has submitted three invoices for Dr. Klibanov dated August 1, 2006, August 31, 2006 and October 2, 2006 respectively. Having reviewed the August 1, 2006 invoice and supporting documentation, it is clear that no airfare was claimed and there was no claim for travel time. Having regard to the invoice dated August 31, 2006, it is apparent that Dr. Klibanov charged a total of 23 hours in fees. Within the invoice, Dr. Klibanov specifies, "travelling to Toronto on August 29". A review of the airline ticket submitted, confirms that he travelled coach. Considering this, I will allow Dr. Klibanov's airfare and reduce the allowable hours billed to 18, to remove the time spent travelling to Toronto.

[200] Concerning the invoice dated October 2, 2006, Dr. Klibanov claims for 78.5 hours of preparation time and two flights. His charge for the first flight is \$1465.80 US. Although neither party provided concrete evidence as to whether or not this was a first class flight, I find the fact that the flight on the August 31, 2006 invoice was for \$296.24 is a strong indication that this ticket was not an economy fare. Similarly, the second flight, for which Dr. Klibanov claimed fifty percent due to unrelated business, cost \$1,742.80. Having regard to this, I find, absent evidence that these flights were not first class, that the fares should be reduced to economy levels. Therefore, given that the only evidence before me concerning the cost of an economy ticket between Boston and Toronto is the amount claimed on the August 31, 2006 invoice, I allow \$300.00 for the first flight claimed on

the October 2, 2006 invoice and \$150.00 for the second due to the fact it was also used for unrelated business. Further, Dr. Klibanov claims for “travelling to Toronto on two separate occasions”. Given this, I will reduce the allowable hours billed for preparation to 68.5 to remove the time spent travelling to Toronto on two separate occasions.

[201] At paragraph 78 of their Responding Submissions, counsel for the Defendant submits that Dr. Klibanov charged 78.5 hours for the period immediately prior to the hearing preparing for cross-examination. Counsel submits that this is excessive as Dr. Klibanov had previously testified in the PM(NOC) matter which covered many of the same subjects at issue in this proceeding.

[202] At paragraph 77 of its rebuttal, referred to at paragraph 194 above, counsel submits that Dr. Klibanov’s invoices include a Reply Report and a Supplemental Reply Report.

[203] Having reduced Dr. Klibanov’s allowable hours to remove travel time, I find that, subject to the Gerster set-off, the amount of 68.5 hours for preparation is reasonable given the necessity of drafting two reply reports.

Dr. Zhanel

[204] Concerning the travel of Dr. Zhanel, at paragraph 88 of their Responding Submissions, counsel for the Defendant argues:

Dr. Zhanel’s disbursements are also unreasonable. On 3 separate occasions, Dr. Zhanel flew first class from Winnipeg to Toronto – despite the fact that Janssen’s Bill of Costs shows the flight was barely 2 hours long. The need for these trips has not been substantiated. The first trip to Toronto was made after Dr. Zhanel’s evidence was already served but before the trial

had commenced. Janssen has not explained why this trip was necessary and why work done during this trip could not have been done by telephone or video conference, or in the days immediately preceding Dr. Zhanel's days in Court, given that he was in Toronto for approximately 24 hours.

[205] At paragraph 89 of its Rebuttal Submissions, Janssen contends that Dr. Zhanel's first class ticket has already been reduced to economy in the Bill of Costs. Further, at the hearing of the assessment counsel argued that the meetings with Dr. Zhanel were not something that could have been accomplished over the telephone. In support, counsel referred to *Bayer (supra)* at paragraph 66 which held that when meeting with witnesses the determination of the best method of proceeding must be made at the time without the benefit of hindsight.

[206] Concerning the issue as to whether Dr. Zhanel's trips were necessary, I follow *Dableh (supra)* and *Bayer (supra)* and find that one should not use of hindsight to determine whether a meeting with a witness could have taken place at a more convenient time or been conducted by teleconference. Having reviewed Dr. Zhanel's invoices and the Bill of Costs, it is clear that Janssen has reduced the amount claimed to account for the fact the Dr. Zhanel flew executive class between Winnipeg and Toronto. Therefore, Dr. Zhanel's travel expenses will not be reduced and are allowed as claimed.

Mr. Partridge

[207] Concerning the claim for Mr. Partridge, at paragraph 92 of their Responding Submissions, counsel for the Defendant contends:

Mr Partridge also appears to have billed \$3,000 per day for time spent in Toronto. Janssen claims this equals an 8 hour day but provides no evidence that 8 hours were actually

worked. This flat rate was likely meant to compensate Mr. Partridge for time spent travelling. Mr Partridge's August invoice also states that \$3,000 was billed for a visit to Bereskin & Parr – Daiichi's counsel, not Janssen's counsel. Janssen's claims in respect of Mr. Partridge are unreasonable.

[208] At paragraph 92 of its Rebuttal Submissions, Janssen submits:

Teva's allegation that Mr. Partridge was billing for time spent travelling is unclear, especially because Mr. Partridge's invoices spell, out tasks performed in excruciating detail. For example, Mr. Partridge invoiced a full day of work in August. He flew into Toronto on August 14, 2006, billed a day of work on August 15th, 2006 and flew out after 10:00 pm that day. If he was billing for travel, one would expect to have seen time billed for his travel on August 14th, 2006, yet no time was invoiced on that day.

[209] Concerning the Defendant's contention that Mr. Partridge met with Bereskin & Parr, counsel for Daiichi, a review of his August invoice, found at tab 74 of Janssen's Cost Submissions confirmed that the meeting was with counsel for both Daiichi and Janssen. Given that Mr. Partridge was meeting with counsel for Janssen as well as counsel for Daiichi, I find no reason that travel for this meeting should not be allowed. Further, concerning the Defendant's argument that Mr. Partridge was billing time for travel, having reviewed his invoices, I am in agreement with counsel for Janssen that the number of hours claimed is justifiable and there is no reason to speculate as to whether his claim "was likely meant to compensate Mr. Partridge for time spent travelling". Therefore, Mr. Partridge's travel expenses will not be reduced and are allowed as claimed.

Dr. Myerson

[210] At paragraph 95 of its Responding Submissions, the Defendant argues that Janssen claims for Dr. Myerson's travel time for three separate trips.

[211] Having reviewed Dr. Myerson's invoices, found at tab 71 of Janssen's Cost Submissions, in his invoice dated September 15, 2006 Dr. Myerson claims 57 hours for 5 days (August 24- 25, 2006, September 7, 2006 and September 12 – 12, 2006). Within those five days there are two round trips from Chicago to Toronto, the third trip having been cancelled. Further, on page 578 of the Costs Submissions it is noted that Dr. Myerson arrived in Toronto on August 24 at 6:23 PM. Therefore, I am in agreement with counsel for the Defendant, given that Dr. Myerson is charging in excess of 10 hours per day, I find that he charged for his travel time. Consequently, I reduce the amount of time billed for preparation on the September 15, 2006 invoice to 35 hours to account for the travel time for two trips between Chicago and Toronto.

Dr. Bartlett

[212] At paragraph 96 of its Responding Submissions, the Defendant argues that Janssen claims for four trips to Toronto by Dr. Bartlett. Further, at the hearing of the assessment, counsel referred to page 602 for Janssen's Costs Submissions as evidence that Dr. Bartlett flew executive first class. Counsel also contended that the problem with the claim for Dr. Bartlett is that his invoices are so lacking in detail that it is difficult to determine what he was doing for the time billed.

[213] At paragraph 95 of their Rebuttal Submissions, counsel for Janssen argues:

Teva has alleged that Dr. Bartlett was billing for travel time, yet his invoices do not support this allegation. A full day's work was billed on April 25th, 2006, a day on which Dr. Bartlett took an 8:30pm flight, easily allowing for a full day's work. No time was billed for travel on April 24, 2006, when he flew into Toronto.

[214] Janssen makes similar submissions for travel by Dr. Bartlett on August 22, 2006, September 26 and September 28, 2006. At the hearing of the assessment counsel for Janssen submitted that the first class flights for Dr. Bartlett have been reduced.

[215] With respect to Dr. Bartlett, having reviewed his invoices I am satisfied that his first class flights have been reduced in the Bill of Costs and that his air travel was in the evening, allowing him to bill for an entire day of work without including his travel time. Therefore, the amounts claimed for Dr. Bartlett's travel will not be reduced and are allowed as claimed.

Dr. Wentland

[216] At the hearing of the assessment, counsel for the Defendant argued that Dr. Wentland made three trips to Toronto from Albany and claimed for his time for each trip. More specifically, counsel submitted that on September 24, 2006 Dr. Wentland claimed 4.3 hours for travel alone.

[217] Concerning Dr. Wentland, at the hearing of the assessment, counsel for Janssen submitted that the 4.3 hours for travel from Albany to Toronto is travel time that may be removed from the Bill of Costs but that this does not mean that all other time when he was actually working should be reduced.

[218] Having reviewed the invoices of Dr. Wentland found at tab 70 of Janssen's Cost Submissions, I note that on August 24, 2006 Dr. Wentland charged 9.8 hours for travel to Toronto and meetings with the Janssen legal team. Upon reviewing his ticket, it was confirmed that he

arrived at 12:35 PM. Although possible, I find it highly unlikely that Dr. Wentland met with counsel for almost 10 hours if the meeting did not start until after 12:00 noon. Further, on September 4, 2006 Dr. Wentland charged 13.3 hours for travel and meetings. Although his flight arrived in Toronto at 8:35 AM leaving him the entire day to meet with counsel, I have great reservations that he met with counsel for over 13 hours. Counsel for Janssen having suggested that the 4.3 hours for travel on September 24, 2006 should be removed from the Bill of Costs, I will reduce Janssen's claim for hours billed for the preparation of Dr. Wentland to 115.2 to account for the travel time claimed.

Dr. Rodricks

[219] Concerning Dr. Rodricks, although the Defendant did not dispute his charges for travel, at paragraph 83 of their Responding Submissions, counsel for the Defendant submits:

Janssen also claims for fees paid to people assisting Dr. Rodricks, described in the invoices as Sr. Science Advisor 10 (45 Hours), Support (25.2 hours) and Sr. Associate 6B (60.1 hours). Justice Hughes' Costs Judgment states that only the fees and disbursements of the named individuals may be recovered. These additional amounts cannot be recovered.

[220] Then, at the hearing of the assessment, counsel for the defendant submitted that Janssen is claiming 229.5 hours for the work of Dr. Rodricks. Counsel argued that if one adds up Dr. Rodricks' time, it comes to 98.5 hours while the time spent by his science advisors and assistants is calculated at about 131 hours.

[221] At paragraph 85 of their Rebuttal Submissions, counsel for Janssen argue:

Amounts charged by Dr. Rodricks for support services are part of the total professional services provided by Dr. Rodricks, which were allowed by Justice Hughes.

[222] Then, at the hearing of the assessment, Janssen contended that Dr. Rodricks report was extensive and his assistants contributed to saving time. Rather than Dr. Rodricks doing the background work, counsel submitted that his junior associates did the work under his supervision. Counsel argued that it is semantics whether Dr. Rodricks did the work or whether his staff did the work as he relies on all of the work as the basis for his report.

[223] Having reviewed the invoices for Dr. Rodricks found at tab 76 of Janssen's Costs Submissions, it has been confirmed that Dr. Rodricks portion of the work claimed amounted to 98.5 hours.

[224] At paragraph 44 of the Costs Judgment, the Court states that only the fees and expenses of the following expert witnesses called by the Plaintiffs at trial will be allowed. Then at paragraph 46, the Court states "the fees and disbursements not mentioned above shall not be allowed".

[225] The Costs Judgment clearly provides for the time spent by Dr. Rodricks. On the other hand, there is nothing in the Costs Judgment which would permit me to allow the time spent by others assisting Dr. Rodrick. In *Abbott Laboratories LTD v. Canada (Minister of Health)*, 2009 FC 399, at paragraphs 31 and 32, and in *Imperial Oil Resources Ltd. v. Canada (Attorney General)*, 2011 FC 652, at paragraphs 42 and 43, it has been decided that the expenses incurred for people to assist the expert in preparing their report may not be allowed. I find that the decisions disallowing the time of

those who assist expert witnesses in their research is in keeping with the provisions of the Costs Judgment which specifies that only the fees and expenses of the experts will be allowed. Therefore, a total of 98.5 hours is allowed for Dr. Rodricks for preparation and attendance at the trial.

[226] I find all other fees and disbursements for expert witnesses claimed by Janssen to be reasonable and necessary in the circumstances of this particular file.

[227] For the above reasons, the amounts allowed for expert witnesses are:

Dr. Wentland - \$49,363.44
Dr. Myerson - \$29,199.73
Dr. Klibanov - \$49,481.35
Dr. Bartlett - \$51,959.54
Dr. Partridge - \$35,807.72
Dr. Rodricks - \$38,057.81
Dr. Zhanel - \$36,051.92
Dr. Hooper - \$19,657.29

Interest

[228] Concerning interest, the Defendant submits that it does not dispute that Janssen is entitled to interest at the rate of 5 percent, not compounded in accordance with paragraph 26 of the Costs Judgment. Counsel submits however that they have a concern about the fact that Janssen waited three and one half years before providing the Defendant with a draft Bill of Costs.

[229] Counsel for the Defendant refers to *Urbandale Realty Corp. v Canada*, 2008 FCA 167, *Fournier Pharma Inc v. Canada (Minister of Health)*, 2007 FC 433 and *White v. Chaumont* [2008] O.J. No. 1051 in support of the argument that the assessment officer should take into consideration

that Janssen delayed the assessment. Counsel concludes by submitting that Janssen should be limited to 2 years of interest, not 5 years as sought.

[230] In rebuttal counsel for Janssen submits that the Costs Judgment states that "... (i)f the Defendant wishes to minimize its exposure in this regard, it should promptly move to have costs assessed". Counsel continued by submitting that the Defendants made no effort to move the assessment along. Counsel further noted that the jurisprudence referred to by the Defendant could be distinguished as *Urbandale (supra)* was not addressing interest and *White (supra)* involved an 11 year delay where the Defendant had attempted to move the assessment along.

Assessment

[231] Paragraph 26 of the Costs Judgment is clear and unequivocal.

Costs bear interest from the date of the Reasons and Judgment (*CCH Canadian v. Law Society* (2004), 37 C.P.R. (4th) 323). The rate of interest is five percent (5%) not compounded, as established by the *Interest Act*, R.S. 1985, c. I-15, s.4;2001, c.4 s.91. If the Defendant wishes to minimize its exposure in this regard, it should promptly move to have costs assessed.

[232] With the exception of *Urbandale*, which did not address interest, the jurisprudence referred to by the Defendant was rendered by the Court. As I am not a member of the Court I do not have the same discretion when it comes to awards of costs and interest. As the Court's award of interest speaks for itself, I am without jurisdiction to limit the timeframe for which interest allowed. Therefore the Defendant's request that post judgment interest be limited to 2 years in not allowed.

G.S.T.

[233] The Defendant submits that Janssen has claimed for G.S.T. when G.S.T. has already been included in the amount claimed for given disbursements. At paragraph 125 of their Responding Submissions, the Defendant argues:

As Janssen bears the burden of establishing its right to recover G.S.T., its entitlement to recover G.S.T. should be assessed conservatively. In *Astrazeneca AB v. Apotex Inc.*, the Court awarded only approximately one third of the amount claimed for G.S.T. as a result of inadequate evidence and improper claims. A similar reduction is appropriate in this case. Janssen should be limited to G.S.T. on only one third of its taxed costs.

[234] By way of rebuttal Janssen submits that a 10 percent reduction in the amount of G.S.T. claimed is appropriate.

[235] Having reviewed the evidence of disbursements provided in the Affidavit of Mira Rinnie, I find that a 10 percent reduction in G.S.T. is not sufficient as several claims included G.S.T. and to allow a second claim would be duplicitous. On the other hand, a reduction of 66 percent, as suggested by the Defendant, is too severe. Therefore, under the circumstances of this file, in order to account for the G.S.T. already included in disbursements claimed, the G.S.T. claimed will be reduced by 25 percent on the taxed disbursements claimed by Janssen.

[236] For the above reasons, the Bill of Costs presented at \$852,423.52 is assessed and allowed for a total amount of \$619,158.30 plus post judgment interest from the date of Judgment. A Certificate of Assessment will be issued.

“Bruce Preston”
Assessment Officer

Toronto, Ontario
January 12, 2011

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2175-04

STYLE OF CAUSE: *JASSEN INC. and DAIICHI SANKYO COMPANY, LIMITED*
v. TEVA CANADA LIMITED

ASSESSMENT OF COSTS WITH PERSONAL APPEARANCE OF THE PARTIES

PLACE OF ASSESSMENT: TORONTO, ONTARIO

REASONS FOR ASSESSMENT OF COSTS: BRUCE PRESTON

DATED: JANUARY 12, 2012

APPEARANCES:

Neil Belmore
Greg Beach

FOR THE PLAINTIFF
(JANSSEN INC.)

David Aitken

FOR THE DEFENDANT

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FOR THE DEFENDANT

Federal Court



Cour fédérale

Date: 20200409

Docket: T-608-17

Citation: 2020 FC 505

Ottawa, Ontario, April 9, 2020

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

SEEDLINGS LIFE SCIENCE VENTURES, LLC

**Plaintiff/
Defendant by counterclaim**

and

PFIZER CANADA ULC

**Defendant/
Plaintiff by counterclaim**

ORDER REGARDING COSTS AND REASONS

[1] The Defendant, Pfizer Canada ULC [Pfizer], was successful on all issues in an action for patent infringement brought by Seedlings Life Science Ventures, LLC [Seedlings]. In this Court's decision issued on January 2, 2020, the issue of costs was reserved: *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 1. Pfizer now seeks costs in a lump sum amount, over and above the tariff amount, based on 40% of its legal fees plus disbursements. For

its part, Seedlings denies that costs on a lump sum basis are appropriate. It says that it should only be condemned to pay costs according to the Tariff set out in Schedule B to the *Federal Courts Rules*, SOR/98-106 [the *Rules*]. Furthermore, Seedlings submits that Pfizer's fees are unreasonable and that it has claimed disallowed or ineligible legal fees and disbursements. These are my reasons for awarding a lump sum of \$2,629,062.00, inclusive of disbursements, on the basis of 25% of Pfizer's reasonably incurred legal fees plus its reasonable disbursements.

I. Basic Principles

[2] Pursuant to rule 400(1), the Court has full discretionary power over the amount and allocation of costs. Nevertheless, "absent other considerations, the judge should award costs to the successful party against the losing party" (*Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119 at paragraph 7 [*Whalen*]).

[3] Tariffs are the default mechanism for assessing costs as they enable a degree of consistency between similar cases and help to ensure that the amount awarded does not depend on whether a party has retained expensive or inexpensive counsel (*Whalen* at paragraph 8, citing *Yeti Coolers, LLC v Howsue Holdings Inc*, 2019 FC 571 at paragraph 5). However, recent jurisprudence has recognized that the application of tariffs usually results in costs awards that are "significantly lower than the prevailing party's actual outlays:" *Whalen* at paragraph 9; *Nova Chemicals Corp v Dow Chemical Co*, 2017 FCA 25 at paragraph 13 [*Dow*]. While this is not the only consideration, it can justify departing from the Tariff in favour of a lump sum award.

[4] Lump sum awards are appropriate in “complex litigation conducted by sophisticated parties” (*Dow* at paragraph 13; see also *Sport Maska Inc v Bauer Hockey Ltd*, 2019 FCA 204 at paragraph 50 [*Sport Maska*]). In *Whalen*, I noted that awarding costs on an elevated scale may be appropriate in situations where parties have the means to pay them and where it is “apparent that it will better achieve the purposes of costs awards” – in particular, giving parties an incentive to litigate efficiently by internalizing the costs of conducting legal proceedings (*Whalen* at paragraphs 4 and 30).

[5] Awarding a lump sum relieves the Court from a “granular analysis” of fees and helps ensure that the costs hearing does not become an exercise in accounting (*Dow* at paragraph 11). This may “further the objective of the *Federal Courts Rules* of securing ‘the just, most expeditious and least expensive determination’ of proceedings” (*Dow* at paragraph 11, emphasis mine). Nevertheless, the quantum of a lump sum award should not be simply “plucked from thin air” and is usually based on a percentage of the party’s reasonably incurred legal fees (*Dow* at paragraphs 15–16). While a detailed accounting is to be avoided, the party seeking costs must provide enough information to satisfy the Court that the fees were reasonably incurred in the context of the litigation (*Dow* at paragraph 18).

[6] While lump sum awards tend to be between 25–50% of a party’s actual fees, there may be cases where a higher or lower percentage is warranted (*Dow* at paragraph 17). The court’s wide discretion to award costs is structured by the factors set out in rule 400(3), by case law, and by the objectives of costs awards (*Dow* at paragraph 19).

[7] A party seeking a costs award must also demonstrate that its disbursements were “justified expenditures in relation to the issues at trial” (*Dow* at paragraph 20).

II. Application

A. *Lump Sum Award*

[8] This is an appropriate case in which to award costs in a lump sum based on a percentage of Pfizer’s reasonable legal fees plus reasonable disbursements. Both parties in this proceeding are highly sophisticated. Seedlings was backed by a third party litigation funder, which was the subject of an application for this Court’s approval in *Seedlings Life Science Ventures, LLC v Pfizer Canada Inc*, 2017 FC 826. I have no doubt that Seedlings and its litigation funder have the ability to estimate their chances of success, to balance their expected gains and the costs consequences of losing and to make litigation choices accordingly. In other words, they are in a position to respond to the incentives that the costs regime aims to give to the parties.

B. *Reasonableness of Pfizer’s Legal Fees*

[9] I now turn to the reasonableness of Pfizer’s fees. Pfizer has provided evidence that it incurred legal fees in the amount of \$4.7 million. Seedlings, however, submits that these fees are excessive, both because Pfizer has claimed disallowed and ineligible fees, and because Pfizer has not provided justification for its high fees.

(1) Disallowed and Ineligible Costs

[10] First, Seedlings submits that Pfizer has claimed disallowed and ineligible costs, including costs with respect to motions for which costs have already been awarded (in excess of \$344,000), and fees for services rendered by students at law, law clerks and paralegals. Seedlings submits that these costs should be excluded from the base against which any percentage is applied, or that the applicable percentage should be further reduced.

[11] I agree with Seedlings that Pfizer cannot claim costs regarding motions that have already resulted in a costs award. As the Federal Court of Appeal wrote in *Exeter v Canada (Attorney General)*, 2013 FCA 134 at paragraph 14: “[a] judge’s decision whether or not to award costs on a motion cannot later be overridden by the judge deciding the underlying action or application.” I have reviewed the invoices of Pfizer’s counsel and I am satisfied that they include an amount of approximately \$344,000 in fees related to motions for which costs have already been awarded. Thus, I will reduce Pfizer’s legal fees by that amount.

[12] Seedlings cited a case that holds that a successful party is not entitled to claim costs for the services of articling students, law clerks or paralegals (*Apotex Inc v H Lundbeck A/S*, 2013 FC 1188 at paragraph 31, which, in turn, cites *Janssen-Ortho Inc v Novopharm Ltd*, 2006 FC 1333 at paragraph 25). In these cases, however, costs were assessed according to the Tariff. The Tariff does not make any provision for such cost items. In contrast, when a lump sum is awarded, the base amount is the actual fees paid by the party. These fees are not regulated by the Tariff, but by the agreement between the party and its solicitors. Ultimately, they are a reflection of

market forces. It is for that reason that we only award a percentage of these fees. Thus, it is not appropriate to disallow expenses related to articling students, law clerks and paralegals, as long as they were actually incurred by the party.

(2) Justification of Level of Fees

[13] Seedlings's second line of attack challenges the reasonableness of Pfizer's legal fees. That challenge is based on a comparison between the fees incurred by each party. Pfizer incurred legal fees that were three times those actually incurred by Seedlings. Pursuant to its litigation funding agreement, not all of Seedlings's counsel's fees were billed. Nonetheless, Pfizer's legal fees were more than twice the fees Seedlings would have incurred had its counsel billed all of its fees. Seedlings argues that Pfizer did not overcome its burden of proof to show that its fees were reasonable in the circumstances. It suggests that Pfizer's fees for this case ought to have been "well under \$3 million" (Seedlings's Submissions on Costs at paragraph 20).

[14] At the outset, I would like to note that we all wish legal services were more affordable. In deciding whether Pfizer's fees are reasonable, however, I am not called upon to approve the way in which the market sets lawyers' remuneration. I am simply assessing whether, given current market conditions, the amount of resources that Pfizer chose to devote to this case results from a defensible choice.

[15] In doing so, I must keep in mind that it is inherently difficult for a court to second-guess strategic litigation choices made by the parties. The court does not know each party's degree of tolerance of risk and may not have a full appreciation of the impact of its judgment on the

parties. And, of course, hindsight is always perfect. Indeed, it should not be for the losing party “to tell the winning party how they could have succeeded by doing or spending less.” *Hospira Healthcare Corporation v Kennedy Trust for Rheumatology Research*, 2018 FC 1067 at paragraph 24.

[16] I do not accept the basic premise of Seedling’s argument. There is no rule or expectation that the parties to a lawsuit should spend roughly equal amounts in legal fees. What is at stake may be different, or have a different value, for each party. Each party’s tolerance of risk may be different. The presence of a litigation funder may affect those parameters in a manner not known to the court.

[17] I am unable to conclude that Pfizer’s legal fees are unreasonable. One should keep in mind that Seedlings was suing Pfizer for an amount well in excess of \$100 million. Pfizer stood a lot to lose. Thus, Pfizer cannot be faulted for spending close to \$5 million in legal fees. While comparisons are inherently difficult, I also note that Pfizer’s fees are of the same order of magnitude as those incurred in other patent cases such as *Dow Chemical Company v Nova Chemicals Corporation*, 2017 FC 759, and *Apotex Inc v Shire LLC*, 2018 FC 1106 [*Shire*].

[18] However, Pfizer also seeks costs for its legal fees incurred in January 2020, after the judgment was issued, to be calculated “at the same rate” as its earlier legal fees. I decline to do so. As Pfizer has not provided evidence of its January fees, I have no basis upon which to calculate or estimate the costs it incurred during that month.

C. *Determination of an Appropriate Percentage*

[19] Based on the factors set out in rule 400(3), Pfizer seeks 40% of its actual fees plus disbursements, or in the alternative, 33% of its actual fees plus disbursements. Pfizer submits that this proceeding is most akin to *Dow*, in which the Court awarded 30% costs. However, Pfizer submits that the rule 400(3) factors—specifically, Seedlings’s failure to bifurcate and its refusal to elect damages as its remedy—justify a costs award of 40%. Pfizer submits that the percentages it requests are within the range awarded in recent cases: *Packers Plus Energy Services Inc v Essential Energy Services Ltd*, 2020 FC 68 (40%); *Loblaws Inc v Columbia Insurance Corporation*, 2019 FC 1434 [*Loblaws*] (25%); *Sport Maska* (33%); *Shire* (30%); *Nova Chemicals Corporation v The Dow Chemical Company*, 2016 FC 91, aff’d 2017 FCA 25 (30%); *Philip Morris Products SA v Marlboro Canada Ltd*, 2015 FCA 9 (33%); *H-D USA, LLC v Berrada*, 2015 FC 189 (33%); *Eli Lilly and Company v Apotex Inc*, 2011 FC 1143 (25%); and *Air Canada v Toronto Port Authority*, 2010 FC 1335 (50%).

[20] For its part, Seedlings argues that the cases cited by Pfizer fall outside the typical range and are distinguishable from the present case. Seedlings submits that *Dow* and *Shire* are not comparable to this proceeding. In *Dow*, the patent was more complex and there were 33 days of trial, over 180 days of “extensive and scientifically-complex testing” and written submissions at the end of the trial totalling over 700 pages. In *Shire*, there were discoveries of 8 inventors and 17 days of hearings.

[21] Instead, Seedling submits that the following cases are more analogous to the present case: 10% in *Bodum USA Inc v Trudeau Corp (1889) Inc*, 2013 FC 128; 20% in *Dimplex North America Ltd v CFM Corp*, 2006 FC 1403; and 12.5% in *ABB Technology AG v Hyundai Heavy Industries Co*, 2013 FC 1050 [*ABB Technology*]. Seedlings submits that *ABB Technology* is most akin to the present case in terms of the complexity of the technology at issue, the duration of the trial and the scope of discovery. In that case, the patents at issue were for gas-insulated switchgear assemblies, the trial took 9 days, and there was extensive document productions which required the Defendant's counsel to travel to Korea. Seedlings therefore proposes that if the Court awards increased costs, 10% of Pfizer's actual fees is the most appropriate measure.

[22] In my view, the proper method for setting a percentage of fee recovery is to start at the lower end of the range suggested by the Federal Court of Appeal in *Dow*, namely, 25%, and assess whether factors listed in rule 400(3) warrant a higher figure. In this regard, the cases cited by Seedlings, in which a lesser percentage was awarded, are less current than the cases cited by Pfizer. This Court recently rejected the argument that lump sum awards in the 25% to 50% range are only available in "exceptional circumstances" (*Loblaws* at paragraph 14). Rather, based on the Federal Court of Appeal's judgments in *Dow* and *Sport Maska*, it held that "the practice of awarding lump sum costs as a percentage of actual costs reasonably incurred is well established, particularly when dealing with sophisticated commercial parties, and such costs awards tend to range between 25% and 50% of actual legal fees, although there may be cases where a higher or lower percentage is warranted" (*Loblaws* at paragraph 15, emphasis mine).

[23] Caution must be exercised, however, when considering the complexity of the case. That complexity is already reflected in the legal fees that constitutes the base amount of the calculation. Increasing the percentage of recovery simply because the case is complex would result in disproportionate compensation for the most complex cases.

[24] In this case, I see no reason to depart from the 25% starting point. Neither party has demonstrated that a greater or lesser award is justified. Nor was the case overly complex: this was a 13-day trial and there were fewer than 11 days of discoveries.

[25] Pfizer cites Seedlings's failure to seek bifurcation and its refusal to elect damages as its remedy as reasons to make an award of 40% of its legal fees. While it is common for parties to seek bifurcation in intellectual property cases, they are not required to do so. Nor is it always the case that bifurcation will expedite a trial (*Bristol-Myers Squibb Co v Apotex Inc*, 2003 FCA 263, at paragraphs 9-10). Seedlings will already face the consequences of not bifurcating the trial and not electing damages, as the costs award will be based on an amount that includes the fees Pfizer spent defending the compensation aspects of the claim, with respect to both reasonable royalty and accounting of profits. Moreover, Seedlings will have to pay for the fees of the experts Pfizer retained to provide opinion evidence about compensation issues. It is not necessary to punish Seedlings further by raising the percentage of recovery.

[26] Based on the above factors, I would award Pfizer 25% of its reasonable legal fees. Subtracting the amounts related to motions, these fees amount to \$4,367,556, 25% of which is \$1,091,889.

D. *Reasonableness of Pfizer's Disbursements*

[27] Pfizer claims \$1,675,359 in disbursements, nearly \$1.5 million of which consists of experts' fees. Seedlings seeks to have the fees payable for two of Pfizer's experts, Mr. Sheehan and Dr. Meyer, reduced by 25% to account for their fees being higher than that of Pfizer's senior counsel and for items it argues are not eligible for reimbursement.

[28] Pfizer's experts' hourly rates—between \$981 and \$1015 per hour for Dr. Meyer and over \$1000 per hour for Mr. Sheehan, all expressed in Canadian currency—were higher than that of Pfizer's senior counsel, which was \$900 and decreased to \$855 during the course of the proceeding. It is appropriate to cap the hourly rate of expert witnesses at the hourly rate of senior counsel as this Court has done in other patent cases (*Eli Lilly Canada Inc v Apotex Inc*, 2015 FC 1165 at paragraph 18; see also *Teva Canada Innovation v Apotex Inc*, 2014 FC 1070 at paragraph 116, and *ABB Technology* at paragraph 10).

[29] Seedlings seeks to have Dr. Meyer's total amount claimed reduced because (1) she inappropriately charged for the attendance of one of her "senior consultants" at trial (amounting to approximately \$14,470), even though this consultant did not testify and did not provide any evidence; and (2) the Court rejected aspects of her evidence.

[30] Additionally, Seedlings seeks to have Mr. Sheehan's total amount claimed reduced to account for (1) the "significant" amount of time Mr. Sheehan spent observing parts of the trial

that were not relevant to his evidence (approximately two and a half days of trial); and (2) the aspects of his testimony that this Court did not accept.

[31] My rejection of certain aspects of Mr. Sheehan's and Dr. Meyer's testimony is not grounds to discount their fees. In my view, Seedlings has not shown that Pfizer's reliance on either expert was unreasonable or excessive. Again, litigation conduct should not be judged with the benefit of hindsight.

[32] In accordance with recent case law, however, I would discount Mr. Sheehan's and Dr. Meyer's hourly rates to bring them in line with that of Pfizer's senior counsel (roughly 10% less). I would reduce the fees Dr. Meyer charged for her assistant's attendance at trial as he did not testify. I would also reduce Mr. Sheehan's fees for those days he spent observing the trial that were not relevant to his evidence. Those reductions amount to \$138,186, which brings Pfizer's recoverable disbursements to \$1,537,173.

E. *Post-Judgment Interest*

[33] A successful party may claim post-judgment interest on costs. Section 36(4) of the *Federal Courts Act*, RSC 1985, c F-7, precludes the award of pre-judgment interest on costs awards. Nevertheless, section 37, which deals with post-judgment interest, contains no such prohibition. This reflects the fact that entitlement to costs derives from the judgment of the court, not from the underlying cause of action.

[34] In this context, Pfizer requests that post-judgment interest be calculated at a yearly rate of 5%. It invokes a number of judgments of this Court where similar awards were made, often with reference to sections 3 or 4 of the *Interest Act*, RSC 1985, c I-15 (see, for example, *Janssen-Ortho Inc v Novopharm Ltd*, 2006 FC 1234 at paragraph 136, aff'd 2007 FCA 217; *Eli Lilly Canada Inc v Apotex Inc*, 2015 FC 1165 at paragraph 24).

[35] It is useful to clarify the relationship between the *Federal Courts Act* and the *Interest Act* with respect to post-judgment interest. Where the cause of action arises in a single province, section 37(1) of the *Federal Courts Act* provides for the application of the laws of that province regarding interest. Where it is not possible to link the cause of action to a single province, section 37(2) provides that the judgment “bears interest at the rate that [the] court considers reasonable in the circumstances.” In this case, there is no doubt that Pfizer’s products were sold across Canada.

[36] Sections 3 and 4 of the *Interest Act* read as follows:

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| <p>3. Whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by the agreement or by law, the rate of interest shall be five per cent per annum.</p> | <p>3. Chaque fois que de l’intérêt est exigible par convention entre les parties ou en vertu de la loi, et qu’il n’est pas fixé de taux en vertu de cette convention ou par la loi, le taux de l’intérêt est de cinq pour cent par an.</p> |
| <p>4. Except as to mortgages on real property or hypothecs on immovables, whenever any interest is, by the terms of any written or printed contract, whether under seal or not, made payable at a rate or percentage per day, week,</p> | <p>4. Sauf à l’égard des hypothèques sur immeubles ou biens réels, lorsque, aux termes d’un contrat écrit ou imprimé, scellé ou non, quelque intérêt est payable à un taux ou pourcentage par jour, semaine ou mois, ou à un taux ou</p> |

month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of five per cent per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent.

pourcentage pour une période de moins d'un an, aucun intérêt supérieur au taux ou pourcentage de cinq pour cent par an n'est exigible, payable ou recouvrable sur une partie quelconque du principal, à moins que le contrat n'énonce expressément le taux d'intérêt ou pourcentage par an auquel équivaut cet autre taux ou pourcentage.

[37] Section 4 is not applicable to cases such as this one. The cause of action does not arise from a contract. Section 4 is aimed at capping contractual interest rates where the parties did not expressly state a yearly rate in the contract. The obvious purpose is to ensure that consumers or borrowers are properly informed, in a manner that is readily understandable, of the real interest rate provided by the contract.

[38] Section 3 is a broader provision. It provides for a default rate of interest where “no rate is fixed ... by law.” This provision, however, must be reconciled with section 37(2) of the *Federal Courts Act*. When confronted with two seemingly conflicting statutory provisions, one must attempt to give them meanings that dovetail and avoid an interpretation that would render one of them meaningless. When Parliament enacted the *Federal Courts Act*, it cannot have contemplated that the discretion it gave to judges of this Court to set a reasonable interest rate in the circumstances would be rendered nugatory by section 3 of the *Interest Act*. The better view is that section 37(2) is a process provided “by law” for setting the interest rate, thus displacing section 3 of the *Interest Act*. See, for example, *Kraft Canada Inc v Euro Excellence Inc*, 2004 FC 652 at paragraphs 70–71, [2004] 4 FCR 410; *Astrazeneca Canada Inc v. Apotex Inc*, 2011 FC

663 at paragraph 5 [*Astrazeneca*]; *Teva Canada Limited v. Janssen Inc*, 2018 FC 1175 at paragraph 61. Section 3 remains applicable in other circumstances.

[39] Therefore, the granting of post-judgment interest according to section 37(2) is a discretionary power. The exercise of that discretion must be guided by the compensatory nature of interest: *Bank of America Canada v Mutual Trust Co*, 2002 SCC 43 at paragraph 36, [2002] 2 SCR 601. The purpose is to put the party entitled to the payment of a sum of money in the same situation as if the money had been paid immediately when it became due. In setting a reasonable rate, the Court may have regard to commercial rates: *Astrazeneca*, at paragraph 5. It may also take into consideration the rate that would have resulted from the application of provincial interest law: *Apotex Inc v Merck Canada Inc*, 2012 FC 1418 at paragraph 10.

[40] Given current economic circumstances, a 5% interest rate would overcompensate Pfizer. I take notice of the fact that the Ontario post-judgment interest rate is currently set at 3.0%. Given recent decreases in rates of interest, I conclude that a 2.5% interest rate is reasonable.

III. Conclusion

[41] I would award costs in the amount of \$2,629,062, inclusive of disbursements, plus interest at a yearly rate of 2.5%.

ORDER in T-608-17

THIS COURT ORDERS that:

1. The plaintiff is condemned to pay costs in the amount of \$2,629,062 to the defendant, inclusive of taxes and disbursements.
2. The plaintiff is condemned to pay post-judgment interest calculated on a simple basis at a rate of 2.5% *per annum* from the date of this order.

"Sébastien Grammond"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-608-17

STYLE OF CAUSE: SEEDLINGS LIFE SCIENCE VENTURES, LLC v
PFIZER CANADA ULC

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: OCTOBER 21 – NOVEMBER 8, 2019

ORDER AND REASONS: GRAMMOND J.

DATED: APRIL 9, 2020

APPEARANCES:

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