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File No. CT-2024-007

OTTAWA, ONT.

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COMPETITION TRIBUNAL

IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34 (the “Act”);

AND IN THE MATTER OF an application by [Goshen Professional Care Inc.] for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75 and 79 of the Act;

AND IN THE MATTER OF an application by [Goshen Professional Care Inc.] for an order pursuant to sections 75 and 79 of the Act;

BETWEEN:

GOSHEN PROFESSIONAL CARE INC.

Applicant

– and –

THE SASKATCHEWAN HEALTH AUTHORITY and THE MINISTRY OF HEALTH

Respondents

APPLICATION FOR LEAVE
(Pursuant to section 103.1 of the Competition Act)

APPLICANT’S MEMORANDUM OF FACT AND LAW

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REQUESTED REMEDIES.

1. The Applicant, Goshen requests that:
 - a. Pursuant to Sections 78(1), 79(1), 79(2), and 79(3.1) of the *Competition Act*, that the Tribunal bars the proposed sale of the Applicant, Goshen Professional Care Inc.'s ("Goshen") assets, including Emmanuel Villa Personal Care Home, to the Saskatchewan Health Authority ("SHA");
 - b. Pursuant to Section 75(1) of the *Competition Act*, as long as the applicable market conditions and dynamics subsist, the Competition Tribunal orders the SHA to reinstate the Pilot Project, or in the alternative, to enter into a new agreement with Goshen to supply Goshen with public sector Long-term Care residents seeking residential care home services in Saskatchewan.

FACTS.

I. The Parties.

2. Goshen owns and operates Emmanuel Villa Personal Care Home ("Emmanuel Villa").¹ Emmanuel Villa is a private care home in Emerald Park, Saskatchewan, which is approximately 5km beyond Regina's eastern city limits on TransCanada Highway No. 1. For perspective, the eastern edge of Regina's city limits is approximately 15km from the Regina neighbourhood of Harbour Landing, which is within the Regina City limits. In other words, Emerald Park is much closer to Regina's densely populated and affluent Eastern neighbourhoods than these Eastern neighbourhoods are to many of Regina's other neighbourhoods. As elaborated in this submission, Emerald Park's proximity to the East end of Regina is relevant to this application.

¹ <https://www.emmanuelvilla.ca/>

3. Mrs. Adebunmi Onasanya is a Registered Nurse, and the Chief Executive Officer and Director of Goshen. Her husband and business partner, Dr. Lanre Onasanya, is an obstetrician and gynecologist in Regina. Dr. Onasanya is also a Director of Goshen. In 2017, after commissioning a feasibility study² which provided positive indicators for the market need for such a facility, Goshen began the construction of Emmanuel Villa, a high-end modern facility which was completed in February 2019. Before building Emmanuel Villa, Mrs. and Dr. Onasanya had significant experience in the care home industry, owning and continuing to operate two other private care homes in Regina.

4. The Respondent, the Saskatchewan Health Authority (the “SHA”), is the health authority for the whole of Saskatchewan. The SHA is the result of the amalgamation of Saskatchewan’s 12 previously independent regional health authorities in 2017. The SHA is entrusted by the Saskatchewan legislature, through *The Provincial Health Authority Act*, SS 2017, c P-30.3 and the *Facility Designation Regulations*, RRS c R-8.2 Reg 6, to own and operate long-term care homes on behalf of the people of Saskatchewan, and under the oversight of the Saskatchewan Minister of Health. According to its own statistics, the SHA directly operates 157 care homes with approximately 8,200 residents in the province of Saskatchewan.³ Beyond running its own care homes, the SHA also outsources the care of overflow residents from the public system to private care homes. As discussed further herein, the SHA entered into such an agreement with Goshen through a Pilot Project whose wrongful termination is a substantial aspect of Goshen’s application for leave under Section 103.1 of the *Competition Act*.

5. The SHA is an incorporated entity in Saskatchewan pursuant to the *Provincial Health Authority Act* (2017). Section 3-6 of the Act highlights several important factors regarding the composition of the SHA; 1) the SHA is a not-for-profit corporation, 2) it is a ‘public agency’ as defined under *The Financial Administration Act*, and 3) it has a board of directors which consists of “...not more than 10 members appointed by the Lieutenants Governor in Council”. At s.4(2) of *The Provincial Health Authority Administration Regulations*, RRS c P-30.3

² Affidavit of Mrs. Onasanya – Exhibit 30.

³ <https://www.saskhealthauthority.ca/your-health/conditions-diseases-services/long-term-care>

Reg 1⁴, the Legislature clarifies that board members are disqualified from service if they are: employees of the SHA, the ministry, are involved with a private health care organization, are a member of the legislature, judiciary or have been convicted of specific criminal code offences. The intention being that members of the SHA board of directors ought to have an ‘independent’ status in their position in leadership at the SHA.

6. Section 2.1 of the *Competition Act* clarifies the application of the Act to parties controlled by [His] Majesty stating that:

2.1 This Act is binding on and applies to an agent of Her Majesty in right of Canada or a province that is a corporation, in respect of commercial activities engaged in by the corporation in competition, whether actual or potential, with other persons to the extent that it would apply if the agent were not an agent of Her Majesty.

7. Section 2(4) of the *Competition Act* defines “control” as either: “a corporation is controlled by an entity or an individual other than [His] Majesty” and “a corporation is controlled by [His] Majesty in right of Canada or a province”. A corporation which is controlled by [His] Majesty for Canada, or a province is defined under the following rubric:

2(4)(b) a corporation is controlled by [His] Majesty in right of Canada or a province if:

(i) the corporation is controlled by [His] Majesty in the manner described in paragraph (a), or

(ii) in the case of a corporation without share capital, a majority of the directors of the corporation, other than ex officio directors, are appointed by

(A) the Governor in Council or the Lieutenant Governor in Council of the province, as the case may be, or

⁴ *The Provincial Health Authority Administration Regulations*, RRS c P-30.3 Reg 1, <https://canlii.ca/t/562nt>

(B) a Minister of the government of Canada or the province, as the case may be; ...⁵

8. Read together the above statutes indicate that the SHA falls within the scope of the *Competition Act* because the SHA's board of directors are all appointed by the Lieutenant Governor in Council of Saskatchewan and the SHA as a corporation engages in commercial activities which are in either actual or potential competition with private care home providers in Saskatchewan. Thus, in this context, the SHA is a commercial and competitive venture that is subject to the jurisdiction of the *Competition Act*, the scrutiny of the Competition Bureau, and the Competition Tribunal's determinations.
9. The Respondent, the Ministry of Health, is the Government of Saskatchewan ministry that is responsible for overseeing the delivery of health services and fulfilment of healthcare initiatives in the province. The Ministry of Health funds, largely oversees, delivers, and fulfills its mandate through the Saskatchewan Health Authority.⁶
10. The Respondent, MNP Debt. (Ltd.), is the Receiver that was appointed by the Court of the King's Bench of Saskatchewan to oversee the receivership of Goshen, which resulted from Goshen's inability to secure refinancing of its construction loan with Canadian Western Bank ("CWB") after the debt became due.
11. The Respondent, CWB, is a Canadian bank that is based in Edmonton, Alberta, and which is currently in the process of merging with the National Bank of Canada. CWB's loan to Goshen to finance the construction of Emmanuel Villa is the subject of the receivership proceedings that the SHA triggered through its wrongful conduct under the Pilot Project, and through which the SHA is now attempting to purchase Emmanuel Villa.

⁵ *Competition Act*, RSC 1985, c C-34, s 2, <https://canlii.ca/t/7vdy#sec2>

⁶ For example, see the Ministry's financial indemnity and oversight of the SHA, in the *Provincial Health Authority Act*. Minister's powers regarding the Saskatchewan Health Authority, sections 2-5 and 2-6 (Minister's power to order directives to the SHA), s. 2-7 (Provision of funding), s. 2-8 (Minister free to provide health services anywhere in SK notwithstanding SHA), s. 4-2 (Delegated authority), sections 4-3 and 4-4 (Minister's powers regarding the SHA); see also the *Regional Health Services Act*, s. 29-30 which imposes limitation and conditions on the SHA's ability to borrow money without Minister approval.

II. Context: Particulars and chronology of Goshen and SHA pilot project.

12. Goshen began the construction of Emmanuel Villa in 2017. Emmanuel Villa was built on a four-wing design, with each wing capable of housing 20 residents for a total of 80 residents. Emmanuel Villa is a high-end facility. It boasts a hair salon, movie theatre, restaurant, and rich programming for its residents. Emmanuel Villa is also built on approximately 5 acres of lush grounds abutting a private golf course on one side, and providing expansive outdoor spaces with tranquil prairie views, but within easy reach of Regina.
13. In 2014, Goshen had previously commissioned a market analysis report⁷ from the University of Regina through its accountant, Mr. Leon Lapointe. This report provided Goshen with the confidence that Emmanuel Villa would be a successful venture and that the care home market was (as it still is) an expanding market.⁸ Based on this market research and their extensive experience owning and operating other care homes in Regina, Goshen formulated a plan to fill the future Emmanuel Villa care home with private residents. This occurred before CWB approved the loan to fund the home's construction.
14. During the construction of Emmanuel Villa in the summer of 2018, Goshen became aware of an advertisement by the SHA for a pilot project whereby long-term care residents would be housed in private personal care homes with available beds.⁹ Goshen submitted an application for the pilot project to the SHA. Following an initial discussion, Emmanuel Villa was pre-approved for the pilot project to house 40 long term care residents from the public system through the SHA. It is Goshen's understanding that other personal care homes in the Saskatchewan market were also selected to provide long-term care beds for SHA residents.
15. The construction of Emmanuel Villa finished on or around February of 2019. Goshen approached the Saskatchewan Ministry of Health to secure a licence to use the entirety of the building as a personal care home. During this process, the Ministry of Health's representatives toured the facility. The Ministry approved Goshen for an initial licence for 20 residents who

⁷ Affidavit of Mrs. Onasanya - Exhibit 1

⁸ Affidavit of Mrs. Onasanya – Exhibit(s) 11, 31, and 33-35

⁹ Affidavit of Mrs. Onasanya – Exhibit 2

were to be housed in the first wing of Emmanuel Villa. This initial number was selected because the operation of the home would require a staged opening process whereby the staffing would expand as more residents were brought in. The initial operating licence that the Ministry granted reflected Goshen's plan to ensure that the appropriate number of staff and quality of service was fully in place for the first batch of initial residents for the home.

16. In January 2020, Goshen entered into an Accountability Agreement with the SHA regarding the Pilot Project.¹⁰ The aim of the project was for the SHA to provide Emmanuel Villa with care home residents from the public 'long-term care' system. The contract was for a two-year term. Under Section 6.2 of the Agreement, at the end of the term, both parties had the option to extend the contract on a year-by-year basis. The SHA agreed to provide 40 long-term care residents. Goshen applied for, and received, a licence for 60 overall residents from the Saskatchewan Ministry of Health. The rationale for Goshen's decision not to obtain a licence for 80 residents (full capacity) is because the additional SHA residents were from the public long-term care system and would require a higher minimum standard of care and prescribed facility upgrades from the outset, which Goshen wanted to ensure it could meet from the start.

17. Specifically, the SHA/Ministry's classification system for categorizing elderly and infirm persons, ranks from levels 1 to 4. Levels 3-4 constitute the upper tiers for residents with the greatest level of need and dependency.¹¹ This meant that Goshen had to be judicious with its resources at the outset to ensure they complied with the requirements imposed by the SHA and the regulatory scheme for long-term care homes. This included the updating of some of Emmanuel Villa's facilities, the acquisition of additional staff, and the procurement of specialized equipment to satisfy the standards the SHA insisted upon under the Accountability Agreement (Goshen acquired some of the equipment directly while the SHA provided others). It was Goshen's intention to expand its private resident capacity once it fully onboarded the SHA's 40 new long-term care residents who were all Level 3 or 4, and needed more enhanced care than Goshen's private residents. The plan to expand Emmanuel

¹⁰ Affidavit of Mrs. Onasanya, Exhibit 3.

¹¹ Affidavit of Mrs. Onasanya, Exhibit 3, Schedule 3.1

Villa to its full capacity of 80 was put on hiatus with the outbreak of the COVID-19 pandemic in early 2020.

18. Under the Accountability Agreement, the SHA's staff could attend Emmanuel Villa, engage in facility tours, interact with staff and residents, and have access to otherwise non-public information regarding Emmanuel Villa's financials, operating procedures, staffing matters, regulatory compliance, and overall business strategy.¹²

19. In December 2021, Goshen and the SHA agreed to extend the Accountability Agreement for another year¹³. However, midway into the renewal on June 16th, 2022, the SHA notified Goshen that the SHA would be terminating the Accountability Agreement pursuant to Article 6.3 and 6.5 of that agreement. This would result in the SHA removing its 40 residents from Emmanuel Villa within 180 days from when the SHA provided Goshen with the termination notice (see Exhibit 4 and 5 of the Affidavit). The resident relocation process significantly disrupted Goshen's business and caused significant anxiety amongst staff, residents, and their families and legal custodians. Goshen's management was compelled to downsize its staff levels. Despite their protestations, the SHA's residents were forced to leave Emmanuel Villa.

20. Furthermore, the SHA transferred most of its residents from Emmanuel Villa to Goshen's competitor, Brightwater Senior Living, in Regina, under a different accountability agreement. The new agreement with Brightwater arose pursuant to the Government of Saskatchewan's announcement of an additional 375 long term care beds for Regina, Goshen applied to be included in that new program. Neither the SHA nor Ministry of Health provided a rationale for why the SHA would terminate its Agreement with Goshen and render Goshen ineligible for the new pilot project outside of the purported and arbitrary determination that since Emerald Park is not located "in Regina".¹⁴

¹² Affidavit of Mrs. Onasanya, Exhibit 3, Articles 3, 9, 10, 12, 14 and Schedules 3.1, 3.3, 9.1(f), 9.1(n), 9.1(o), 10.2, and 14.1.

¹³ Affidavit of Mrs. Onasanya, Exhibit 6.

¹⁴ Affidavit of Mrs. Onasanya, Exhibit 9 and 10, Letter from SHA Executive Director for Continuing Care providing notice of Termination of the Agreement.

21. Neither the SHA nor the Ministry of Health defined what these geographical parameters meant. However, in a February 4, 2020, press release from the Ministry of Health¹⁵, referring to the pilot project the Ministry used the term “Regina area” to define the intended target for the project, and with specific reference to Emmanuel Villa.¹⁶ The press release further states that:

“Executive Director of the Community Care Branch of the Ministry of Health Brad Havervold said. “This community partnership will help ensure people continue to receive the level of care they need while staying close to home.” Emphasis Added.

22. Given the Minister’s words, it is apparent that the Ministry and SHA had selected Emmanuel Villa for the pilot project because it was in the “Regina area” and allowed its residents, who were presumably from Regina, to remain close to the city and their families. This demonstrates that the SHA’s subsequent decision to move its residents out of Emmanuel Villa on the purported basis that the care home was not “in Regina” was false. Despite the prevailing and growing demand for such care beds at that time and to date, the SHA has continued to withhold residents and care home contracts to Emmanuel Villa.

23. Also, the SHA’s justifications for refusing to include Goshen and Emmanuel Villa in the new pilot project based on geographical reasons makes no sense given the proximity of Emerald Park to Regina. Emerald Park is well within the Regina metropolitan area. Many people who live in Emerald Park also work have family and commute regularly to Regina for services and vice versa. With a population of approximately 1,500¹⁷, and given its proximity to Regina, Emerald Park is effectively a suburb of the Regina metropolitan area. The “Regina” boundary that the Ministry and SHA enforced is more cartographic than practical for the purposes of the movement of people and their access to services and housing across the metropolitan area. This includes access to care home services and the fact that 95% of Emmanuel Villa’s residents from the SHA and most of its private clients were not residents

¹⁵ <https://www.saskatchewan.ca/government/news-and-media/2020/february/04/100-community-long-term-care-beds-opening-in-regina-area>

¹⁶ Affidavit of Mrs. Onasanya – Exhibit 4

¹⁷ <https://www12.statcan.gc.ca/census-recensement/2021/dp-pd/prof/details/page.cfm?Lang=E&SearchText=Emerald%20No%2E%20277&DGUIDlist=2021A00054710031&GENDERlist=1,2,3&STATISTIClist=1&HEADERlist=0>

of Emerald Park when they assumed residency in the home. At least 95% previously lived in Regina, and most had family members and custodians who lived in Regina.

24. Further, the critical need for care home services in Saskatchewan is province-wide and not focused on Regina. Thus, there is no valid reason that the Saskatchewan government would grant Regina residents preferential treatment under the new pilot project while deliberately excluding other Saskatchewan residents, including Regina residents, simply because they are being housed in a facility immediately beyond the Regina city limits. It is apparent that based on the legal and formal definition of a “metropolitan area”,¹⁸ Emerald Park falls well within the confines of the Regina metropolitan area, making the SHA’s distinction, arbitrary, artificial, and designed to exclude Emmanuel Villa from the same catchment area in which Brightwater was eligible for the new pilot project.
25. Goshen’s loss of the 40 pilot project residents imposed a significant and unexpected financial and operational burden on Goshen’s residents. Goshen had confirmed with the SHA in January 2022 that the project would be continued for a full year only for SHA to terminate the agreement halfway through that year. The SHA and Goshen had, through their representatives, numerous discussions and meetings regarding ongoing oversight and regulatory compliance, at no time during these meetings had SHA given any indication that they wished to terminate the agreement, nor did they express any possibility of the project coming to a unilateral end. Goshen had incurred costs of approximately \$1 million to upgrade its facilities to satisfy the SHA’s standards¹⁹. Goshen would have never invested this substantial amount if the parties’ mutual expectation was that the SHA would only provide residents for only 2.5 years. Goshen would not only have saved this money but also made more by filling the facility with private non-SHA residents in the immediate and long-term.
26. As the SHA had supplied residents who occupied half of Emmanuel Villa’ capacity of 80 residents, the SHA’s wrongful termination of the project, the relatively sudden removal of such a substantial proportion of Goshen’s residents, and Goshen’s corresponding need to downsize its staff, devastated Goshen’s revenue. Furthermore, Goshen’s staff was thrown

¹⁸ <https://www150.statcan.gc.ca/n1/pub/92-195-x/2011001/geo/cma-rmr/def-eng.htm>.

¹⁹ In addition to approximately a \$4 million shortfall in paid contract rates.

into uncertainty about their jobs being terminated as the SHA removed its residents from Emmanuel Villa.

27. The sharp and sudden decline in Emmanuel Villa's residents and revenue was virtually impossible for Goshen to replace in a timely manner. Even though the SHA's notice period for terminating the Accountability Agreement was 180 days, this period was practically inadequate for Goshen to promptly replace the SHA's residents from the open market. Replacing the sudden loss of more than 50% of any multi-resident facility's existing capacity would be a monumental challenge for any landlord under any circumstance. Thus, the unique and more burdensome regulatory and logistical requirements for recruiting and onboarding private care home residents meant that the SHA's sudden withdrawal of its residents over a relatively short duration was particularly disruptive for Goshen and its residents.
28. For context, private care homes provide 24-hour care, which involves regulatory compliance and the provision of services that do not encumber regular landlords. On the regulatory front, private care homes must comply with Ministry of Health's inspection, operational standards, documentation, and reporting requirements regarding the entry and ongoing care of residents. On the service front, private care homes provide a range of services that regular landlords do not provide including food preparation, cleaning, grooming, medical care, entertainment, the recruitment and training of specialized staff, transportation, and support for residents' lifestyle and religious activities. All this means that private care homes charge higher "tenancy" fees that reflect this "whole life care" than the standard residential tenancy. The cost can be prohibitive for many potential residents, and those who can afford the cost must carefully consider, research, and review each facility before committing to it.
29. Given the cost, intensive nature of the care that private homes provide to vulnerable and high-needs residents, potential residents and their advocates must engage in greater deliberation, budgeting, and research before committing to such facilities compared to tenants seeking housing in the regular residential market. Residents are usually aware that their chosen care home will likely be the last home they live in. Making this important choice

within a highly regulated industry requires more time and consideration for the residents and their advocates.

30. Further, potential private care homes must also compete with public care homes, which in Saskatchewan, are statutorily limited to sub-market pricing under Section 9-5(1)(n) of the *Special-care Homes Rates Regulations*.²⁰ This market disadvantage places private homes at a relative disadvantage when it comes to filling beds despite the otherwise significant demand for such care in the market.
31. In light of all the above factors, the resident replacement process for private care homes is notably more protracted for any given resident. Also, staffing complements and staff-resident ratios of care homes is a highly regulated consideration that requires more extended recruitment and adjustment timelines than is the case for regular tenancies or short-term rentals. The balancing exercise that arises due to sudden changes on either side of this ratio is particularly burdensome and difficult for homes to adjust to at short notice. Hence, Goshen's "sudden" loss of more than 50% of such a home's operating capacity can impose a devastating blow for which 180 days is wholly inadequate to replace on the open market, (and after Goshen had invested in a much longer time horizon based on the SHA's representations). The SHA's decision to withdraw its residents with only 180 days' notice was especially devastating because Goshen's management and staff had to handle the sudden and substantial burden of facilitating the logistical and regulatory requirements for the safe and efficient transfer of the SHA's 40 residents to Goshen's competitor, Brightwater.
32. Further still, the sudden loss of such a significant proportion of a private care home's residents creates unwelcome uncertainty for prospective residents who may be considering the home. This uncertainty, especially after the sudden spike in the vacancy rate, can generate an unfortunate domino effect that could lead the remaining residents and their support persons to prematurely terminate their residencies if they believe that their private care home is unsustainable as a business, and that any vacancies at alternative homes will quickly fill up. This unvirtuous cycle of uncertainty can hobble, if not fatally damage, a

²⁰ *The Provincial Health Authority Act*, SS 2017, c P-30.3, <https://canlii.ca/t/55zg9> and *Special-care Homes Rates Regulations*, 2011, RRS c R-8.2 Reg 8, <https://canlii.ca/t/5535m>

private home's operation. To date, Goshen has been able to stave off total collapse in part due to its excellent management, the loyalty of its residents and staff, and through the financial support of its principals and their related businesses.

33. In sum, beyond the SHA's unwarranted termination of the Accountability Agreement, in the context of private care homes in Saskatchewan, the SHA's 180 days' notice for withdrawing more than 50% of Emmanuel Villa's after 2.5 years was wholly inadequate, deliberately punitive or callously indifferent to the unjust consequences, and as argued further below, amounted to an abuse of dominance and a refusal to deal. The SHA's actions severely and wrongfully damaged Goshen's business, revenue, operations, client relationships, and reputation.
34. To make things worse, on or around September 2022, Goshen faced an additional complication that practically rendered the SHA's 180-day notice even more unduly truncated and prejudicial. After the SHA terminated the Accountability Agreement, Canadian Western Bank expressed its concern regarding the loan/mortgage it had provided to Goshen. Following various unproductive discussions, CWB on January 19th, 2023, demanded that Goshen immediately repay its construction/mortgage loan which CWB had provided to assist in the construction of Emmanuel Villa. CWB's demand for the immediate repayment of more than \$12.5 million, which Goshen could not satisfy in full at such short notice, triggered Goshen's insolvency. This eventually led to the ongoing receivership proceedings through which the SHA, the party that triggered the receivership, has now emerged as the successful bidder to purchase virtually all of Goshen's assets, including Emmanuel Villa. If the SHA's bid succeeds, Goshen's business will effectively be extinguished, transforming from a small private entity that is integrated into the SHA/public system that dominates Saskatchewan's care home market.
35. At the same time, after the SHA terminated the Accountability Agreement with Goshen and was made aware that Goshen's assets were to be, the Saskatchewan Ministry of Health conducted an audit of Emmanuel Villa while the SHA's long-term care residents were still present. The Ministry of Health's audit identified no unresolved quality-of-care or regulatory issues with Emmanuel Villa.

36. Despite Goshen’s uncontested delivery of high-quality care, the Ministry of Health’s affirmation that Emmanuel Villa had no outstanding regulatory issues, and the SHA’s residents at Emmanuel Villa expressing their desire to remain under the Pilot Project, the SHA still refused to renew the agreement. The SHA then also refused to admit Goshen into the new pilot project for Regina. As previously stated, the SHA’s reason for not renewing the agreement was that Emmanuel Villa is located in Emerald Park, it did not qualify for the SHA’s new project for “Regina”. The SHA took this position even though it did not have readily available spaces to house all 375 desired long-term care beds in Regina at the time,²¹ and the emergent demand that has continued to grow in the Regina metropolitan area.
37. While the Accountability Agreement was in place, the SHA imposed the Ministry of Health’s long-term care home standards that Emmanuel Villa was required to meet to house the SHA’s 40 residents. Thus, the SHA was able to make various decisions regarding the following at Emmanuel Villa:
- a. The level of care;
 - b. The types of resident beds;
 - c. The type of equipment and furniture required;
 - d. The types of washing machines to be used;
 - e. The setup and layout of the rooms and common areas;
 - f. The qualifications and availability of all specialized staff; and,
 - g. Various other services which must be provided for the residents they were provided by the SHA:
 - a) management of diabetes (e.g., insulin injections, blood sugars);
 - b) oxygen use;
 - c) colostomy care;

²¹ <https://www.saskatchewan.ca/government/news-and-media/2022/june/30/request-for-proposal-released-for-long-term-care-services-in-regina>

- d) catheter care;
- e) application of anti-embolic stockings;
- f) tube feeding;
- g) PICC line care;
- h) physical restraints;
- i) blood pressure and pulse monitoring;
- j) enemas;
- k) care of skin ulcers/wound and compression wraps;
- l) care of Residents with dementia who have responsive behaviours;
- m) end of life care; and
- n) dementia care.²²

38. To this end, Goshen invested considerable time, effort, and expense to adhere to all the SHA's demands under the Accountability Agreement. The resultant costs were exacerbated by the COVID-19 pandemic which resulted in Goshen's need to implement significant and additional measures and renovations to protect the Emmanuel Villa's residents from becoming infected or quarantining them if they became exposed. It is therefore notable that during the entire COVID-19 pandemic, Emmanuel Villa was among the few care homes in Saskatchewan that did not have a single COVID-19 infection during the pandemic. Nevertheless, by the time the SHA terminated the Accountability Agreement, the SHA owed Goshen approximately \$5,249,278.00, in unpaid residents' fees and expenses that Goshen had accrued to meet the SHA's requirements under the Agreement. Goshen only invested this significant sum under both parties' expectation that given the ongoing and increasing demand for the private absorption of public, SHA residents, the Agreement would renew into the indefinite future.

39. Specifically, Goshen incurred these expenses based on both parties' understanding that Goshen was spending the funds to provide for the long-term extension of the Pilot Project (see Exhibit 10 of the Affidavit). Despite the wording of the Accountability Agreement which highlighted a two-year expiration period, both the SHA and Goshen operated on the working understanding that the renewal of the project as set forth in Section 6.2 was a guarantee, given

²² Affidavit of Mrs. Onasanya, Exhibit 4, Schedule 3.1.

the ongoing and growing need for long-term care beds in the province. Goshen had a reasonable, if not decisive, basis for making this investment based on the SHA's representations.

40. Had the SHA not unilaterally terminated the agreement and continued to provide long-term care residents to Emmanuel Villa, Goshen would have been able to operate at a profit and prevent CWB from calling in its loan based on the SHA's sudden and unjustified termination of the Agreement.²³ As it stands, the Accountability Agreement was a net-negative for Goshen's business. Subject to the receivership proceedings, Goshen maintains an unresolved legal claim for the SHA-related expenses, and the SHA's failure to fully compensate Goshen as agreed under the textual and extratextual contexts of the Agreement.
41. On September 26th, 2023, Goshen sent a letter to SHA regarding the breakdown in the relationship between the SHA and Goshen because of the SHA's unilateral, premature, and unwarranted termination of the Accountability Agreement. In this letter, Goshen highlighted the issues affecting Goshen's staff, the residents, and the outstanding monies that the SHA owed Goshen²⁴.
42. Between June 17th, 2024, and July 9th, 2024, Goshen continued to engage the SHA regarding Goshen's outstanding monetary claim arising from the operation and termination of the Accountability Agreement. During these exchanges, the SHA acknowledged that Goshen did not consider the matter resolved and agreed to provide a response. On July 9th, 2024, the SHA responded stating that as Goshen was in receivership, counsel for SHA had reached out to the Receiver and been informed that any claim against SHA could only be filed if Goshen was given permission by the Receiver. The SHA informed Goshen that the SHA would wait until the Receiver's lawyer contacted the SHA regarding Goshen's assertion of the SHA's indebtedness.²⁵ However, the SHA never expressly, and unequivocally denied owing Goshen the disputed funds, nor denied the ongoing dispute about the SHA's

²³ Affidavit of Mrs. Onasanya, Exhibit 19, Email from CWB regarding SHA's termination of pilot project.

²⁴ Affidavit of Mrs. Onasanya, Exhibit 17.

²⁵ Affidavit of Mrs. Onasanya, Exhibit 18.

demands and corresponding accrual of financial indebtedness to Goshen arising from the Accountability Agreement.

III. Chronology of Goshen's receivership proceedings with CWB.

43. After the SHA's termination of the Pilot Project with Goshen, CWB immediately raised its concerns that Emmanuel Villa's reduced resident numbers amounted to a material development under the parties' loan agreement. CWB's initial demands to Goshen rested upon the wrongful assertion that the termination of the pilot project amounted to a breach of the provisions of the loan.²⁶ Despite this initial argument, the loan's natural maturity date arrived prior to a formal hearing on the merits and CWB elected not to negotiate with Goshen and recalled the entirety of the loan's outstanding amounts. CWB encouraged Goshen to sell its business to satisfy the loan and ultimately brought receivership proceedings against Goshen on May 24th, 2023.
44. In July 2023, Goshen commissioned Colliers International Realty Advisors Inc. ("Colliers") to perform an appraisal of Emmanuel Villa Care Home and its underlying business. The appraisal of the business pegged the then-current market value for Emmanuel Villa at \$20,070,000.00, based on the home's full capacity with each of the home's 80 rooms being valued at \$250,000.00.²⁷
45. Upon CWB's application, the Saskatchewan Court of the King's Bench appointed MNP Ltd. as the Interim Receiver over Goshen's business on August 2, 2023. When the Interim Receiver was appointed, Goshen's legal counsel informed the Receiver that Goshen had an outstanding claim of approximately \$5 million against SHA. The Receiver, through its designated representative, Mr. Eric Sirrs, verbally encouraged Goshen to pursue this amount because any success on that front would help reduce Goshen's indebtedness to CWB, and assist Goshen's refinancing efforts.

²⁶ Affidavit of Mrs. Onasanya, Exhibit 19, Email from CWB regarding SHA's termination of pilot project.

²⁷ Affidavit of Mrs. Onasanya, Exhibit 20

46. In February 2024, Goshen submitted an application to the Saskatchewan Ministry of Health to renew Goshen's operating licence for 40 residents at Emmanuel Villa. At that time, Goshen only had a licence to accept 20 residents. Goshen's CEO, Mrs. Onasanya, attached a cheque for \$440.00. Of this sum, \$400.00 was for the occupancy expansion while \$40.00 was to cover a training course that the Ministry was to provide to one of Goshen's managers. The Ministry declined to cash the cheque. When Goshen's CEO, Mrs. Onasanya, reached out by phone to the Ministry of Health regarding the requested increase to Emmanuel Villa's licensed capacity, the Ministry stated that since the cheque was for the combined purpose of expanding the license (\$400.00) and paying for a training course (\$40.00), they could not accept the payment. The Ministry was prepared to accept payment for the latter purpose but not the former. Through a representative the Ministry verbally asked Mrs. Onasanya for Goshen to pay for the training course but did not provide a written rejection for the license expansion denial.
47. While the Ministry was declining to increase Goshen's licenced capacity, and Goshen was seeking refinancing of CWB's loan, many prospective lenders repeatedly stated that Emmanuel Villa would need a higher occupancy before they would approve any refinancing. However, promptly securing more residents was virtually impossible given the Ministry's refusal to increase Emmanuel Villa's licenced capacity, the suddenness and scale of Emmanuel Villa's loss of residents, the process and time-intensive nature of filling such a substantial vacancy, and market uncertainty around the future of the care home (given the insolvency).
48. Since the start of July 2024, Goshen has experienced a surge in interest from the families and custodians of potential residents who wish to place their family members or wards in Emmanuel Villa. However, Goshen has not accepted these potential residents because Goshen signed an undertaking, at the Receiver's request, that it would not add residents without seeking the Receiver's permission.²⁸ This condition prevailed under the receivership before the undertaking but was later reduced to a signed agreement. The Receiver subsequently refused any such requests from Goshen.

²⁸ Affidavit of Mrs. Onasanya, Exhibit 21

49. On August 9th, 2024, Goshen’s legal counsel emailed Mr. Sirrs, the Receiver’s designate, to inform him about this surge in interest and requesting the Receiver’s approval to allow Goshen to accept more residents. Additionally, Goshen’s legal counsel provided a copy of a ‘Letter of Offer’ from Sherwood International Ltd. for a refinancing loan to satisfy CWB’s demand for repayment, which triggered the receivership proceeding.²⁹ Goshen’s legal counsel noted how the potential lender had expressed reservations about Emmanuel Villa’s low residency rate, and its impact on the potential refinancing.
50. Between August 12-14, 2024, Goshen’s legal counsel had ongoing correspondence with the Receiver, again requesting that the prohibition to admit new residents into Emmanuel Villa be lifted as it was impeding the refinancing process. The Receiver repeatedly refused to lift the prohibition.³⁰
51. Goshen’s legal counsel sent the Receiver a follow up email raising specific questions and concerns about the Receiver’s refusal to reverse its decision barring Goshen from accepting new residents at Emmanuel Villa, specifically whether it was the Ministry of Health or the Receiver that was denying the request to add more residents.³¹
52. On August 14th, 2024, Mr. Travis Kusch, counsel to the Receiver, sent Goshen’s legal counsel a follow-up email which stated that the inquiries regarding additional residents had been “asked and answered” and that they would not be “answering this question for a fourth time”.³²
53. At the same time, Goshen through its legal counsel, had ongoing communications with the Ministry of Health, seeking:
- a. confirmation of whether the Ministry had informed the Receiver not to admit new residents or to deny a licence capacity expansion, and

²⁹ Affidavit of Mrs. Onasanya, Exhibit 22.

³⁰ Affidavit of Mrs. Onasanya, Exhibits 23-25.

³¹ Affidavit of Mrs. Onasanya, Exhibit 26.

³² Affidavit of Mrs. Onasanya, Exhibit 28.

- b. a direct and formal decision from the Ministry (as a regulator) regarding Goshen's request to extend the licence and to take in additional residents.

The Ministry, through its Director of Licensing, Ms. Dawn Skalicky-Souliere, informed Goshen that despite having received the detailed correspondence, the Ministry would be "... awaiting the outcome of the applications currently before the Court".

54. Given this response, Goshen still has no definitive position from the Ministry or the Receiver for why Goshen cannot accept additional residents to Emmanuel Villa, and who is responsible for that decision. Neither the Receiver nor the Ministry will take responsibility for the decision, with each pointing to the other or the court proceedings for why the prohibition should remain in place. In the meanwhile, Emmanuel Villa's low and restricted residency rate has remained a constant factor discouraging potential lenders from refinancing the loan. If unresolved, the resident capacity issue will terminally frustrate the refinancing and ensure that the SHA succeeds in buying Goshen's business and terminating it as a going concern in the market for care home services.

IV. Chronology around the Receiver's Sale Process.

55. The stated goal of CWB in pursuing the appointment of a Receiver for Goshen was for that court-appointed receiver to be given the judicial mandate to market and sell Emmanuel Villa in order to satisfy Goshen's creditors. In Justice Bergbusch's decision of January 10th, 2024, he determined that the Receivership Order prepared by MNP would be issued by the Court. The order contained the provision that any sale of Goshen's property above \$150,000.00 would require judicial approval. In addition to this, Justice Bergbusch's decision at paragraph 30 stated that Goshen would be allowed to continue to seek refinancing and attract new residents.
56. MNP, as a court-appointed receiver, could determine the nature of the sales process they elected to pursue. This freedom of action in the sales process is tempered by the fact that the relevant stakeholders including the insolvent party may apply to the Court if they object to any

aspect of the process. Furthermore, the receiver would still need to satisfy the *Soundair* test³³ and other applicable legal requirements for the Court to order a judicially approved sale. While Goshen was not aware of it at the time, it subsequently learned that in the Receiver's Report to the Court, MNP had initiated a confidential bidding process in which it curated, selected, and invited an exclusive list of potential bidders to bid for Goshen's business in a blind bidding process. The Receiver provided 19 hand-picked potential buyers with an information package about Emmanuel Villa, and instructions on how to request further disclosure and how to submit a bid. Of the 19 parties, only 3 signed disclosure agreements with only 2 parties electing to take a site tour of Emmanuel Villa. In the end, MNP only received one offer, which was from the SHA which MNP accepted on June 6th, 2024.³⁴

57. On June 14th, 2024, Goshen's directors, its legal representatives, and the Receiver, engaged in a teleconference during which the Receiver informed Goshen that the SHA had made an offer to purchase Goshen's business under the receivership process. The Receiver informed Goshen that the Receiver had accepted the offer, would be signing a formal purchase agreement with the SHA, and would proceed with seeking the Court's approval for the sale. At no point before this teleconference did the Receiver advise Goshen about the particulars of the sale process, including who the other bidders in the process were, what amounts they were bidding, and what underlying assumptions the Receiver had relied on and communicated to the potential bidders.

58. During and immediately after the teleconference, the Receiver did not provide Goshen with any documentation or further particulars about the SHA's bid and the Receiver's acceptance of that bid until July 11th, 2024. This was when the Receiver served Goshen with the Receiver's Notice of Application for the Court of King's Bench of Saskatchewan to approve the proposed sale.

³³*Royal Bank of Canada v. Soundair Corporation*, [1991] OJ No 1137 (ONCA). [The Court] "... should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; it should consider the interests of all parties; it should consider the efficacy and integrity of the process by which offers are obtained; and it should consider whether there has been unfairness in the working out of the process."

³⁴ Affidavit of Mrs. Onasanya, Exhibit 42

59. Between August 1, 2024-August 13, 2024, Goshen’s legal counsel corresponded with the Receiver and the Receiver’s legal counsel, requesting records and responses regarding the sale process and the agreement with the SHA. Overall, the Receiver’s counsel refused to provide most of the requested information and records and only provided responses to a sub-set of Goshen’s questions.³⁵
60. On August 26, 2024, the Saskatchewan King’s Bench heard the Receiver’s application for the proposed sale to the SHA, through the Court’s approval of the Sales and Vesting Offer (“SAVO”)³⁶. Goshen opposed the proposed sale on several grounds, including issues of conflict of interest, reasonable apprehension of bias, and concerns that the proposed sale was inconsistent with the *Competition Act*. Goshen also filed Mrs. Bunmi Onasanya’s affidavit with the Court confirming that Goshen had separately initiated the process of filing for leave to contest the proposed sale to the Competition Tribunal. The presiding judge, Justice Peter Bergbusch reserved his decision, which is still pending.

THE ISSUES.

61. The issues in this leave application are:
- a) Do the SHA’s actions amount to Refusal to Deal (section 75)?
 - b) Do the SHA’s actions amount to Abuse of a Dominant Position (section 79)?
 - c) Does the proposed sale of Emmanuel Villa to the SHA undermine the interests of a competitive market?

³⁵ Affidavit of Mrs. Onasanya, Exhibit 37-39.

³⁶ Affidavit of Mrs. Onasanya, Exhibit 42.

SUBMISSIONS.

I. Test for Leave Under Section 103.1 of the *Competition Act*.

62. Section 103.1 of the *Competition Act* grants private parties the ability to apply to the Competition Tribunal seeking leave to pursue an application under sections 75, 76, 77, and 79 of the Act. Goshen's leave application requires the applicant to discharge the following test set forth in section 103.1(7):

Granting leave

(7) The Tribunal may grant leave to make an application under section 75, 77 or 79 if it has reason to believe that the applicant is directly and substantially affected in the applicant's business by any practice referred to in one of those sections that could be subject to an order under that section.

63. The test for granting leave is not intended to be prohibitive or insurmountable. It merely requires the applicant to establish a case on a balance of probabilities. This test was broken down into two parts by the Competition Tribunal in *National Capital News Canada v. Milliken*, 2002 CACT 41, in which the Tribunal stated that:

[8] In order to exercise its discretion to grant leave, the Tribunal must therefore be satisfied that it has reason to believe that: (1) the applicant is directly and substantially affected in the applicant's business by any practice referred to in section 75 or 77 of the Act; and (2) the alleged practice could be subject to an order under that section.³⁷

...

[14] Accordingly, on the basis of the plain meaning of the wording used in subsection 103.1(7) of the Act and the jurisprudence referred to above, I conclude that the appropriate standard under subsection 103.1(7) is whether the leave application is supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order.

64. Goshen thus need only provide sufficiently credible evidence to show that there is a possibility that the impugned conduct had a direct and substantial effect on their business and set forth why such conduct could be subject to an order described in the relevant

³⁷ *National Capital News Canada v. Milliken*, 2002 CACT 41 (CanLII), at para 8, <https://canlii.ca/t/1hrn2#par8>

section of the *Competition Act*. Goshen submits that this Memorandum, supported by the Affidavit of Mrs. Onasanya, satisfies the requirement for leave. Regarding the particular elements of the test for leave, Goshen makes the following submissions.

Goshen's business may/has been directly affected by a reviewable practice conducted by the SHA.

65. Goshen was previously involved in a pilot project for the provision of long-term care for residents provided by the SHA, whose unilateral termination of the associated Agreement led to direct and severe financial, operational, reputational, and competitive consequences for Goshen. The sudden and precipitous drop in Emmanuel Villa's capacity, coupled with the outstanding payments that the SHA owed Goshen, forced Goshen into insolvency. Had the SHA not unjustly and suddenly terminated the pilot project contrary to both parties' initial commitments and expectations, Goshen would not have faced CWB calling in its loan, which triggered the insolvency process and the possibility of a judicially ordered sale.

Goshen's business may/has been substantially affected by a reviewable practice conducted by the SHA.

66. At para 45 of *Audatex Canada, ULC v. CarProof Corporation*, 2015 CACT 28 (CanLII), the Tribunal clarified meaning of the 'substantial' requirement:

For the "substantial" component, terms such as "important" are acceptable synonyms to considering whether there has been a "substantial" impact, which is ultimately assessed by reviewing the circumstances at issue³⁸

67. In this case Goshen is facing the possibility of the judicial sale of all its relevant assets to the SHA, the very party which precipitated the receivership process through its wrongful and unjustified termination of the Accountability Agreement, and the SHA's anti-competitive (particularly its refusal to deal and abuse of its dominant position). The sudden and precipitous drop in Goshen's residency rate, revenue, profitability, and pending elimination

³⁸ *Audatex Canada, ULC v. CarProof Corporation*, 2015 CACT 28 (CanLII), at para 45, <https://canlii.ca/t/gnm22#par45>

as a participant and competitor in the market for the care of the elderly and infirm in Saskatchewan are both “substantial” and “important for the purposes of Section 103.1 of the *Competition Act*.”

Goshen was affected by reviewable practices carried out by the SHA, and which could be subject to an order from the Tribunal.

68. As will be shown, the SHA’s conduct qualifies as an abuse of a dominant position and a refusal to deal. The SHA’s unlawful and wrongful termination of the Accountability Agreement with Goshen, and Goshen’s subsequent effort to acquire Goshen’s care home, Emmanuel Villa, constitute reviewable practices that could be the subject of orders by the Tribunal, specifically, as Goshen requests in the remedy section of this memorandum of law.

II. The purpose of the *Competition Act* is to maintain and encourage competition in markets including services for caring for the elderly and infirm.

69. The “Purpose of the Act” under section 1.1 of the *Competition Act* provides that:

The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

70. Given the above, it is apparent that the concerns underlying competition law issues are systemic and extend beyond the immediate interests or motivations of the parties who may advance challenges under the *Competition Act*. It is in the best interest of any given market, that parties who seek to dominate that market and undermine smaller businesses’ ability to

participate and compete must be held accountable under the *Act*. The matter at hand concerns the market for the care of the elderly and infirm in Saskatchewan, and how the SHA's actions against Goshen and efforts to purchase Goshen's assets is inconsistent with the purpose of the *Competition Act*.

III. The “product” on this case is each elder care contract, and the “geographic market” is the Province of Saskatchewan.

71. In the matter at hand, the “product” in question is each contract for the care of the elderly and infirm who resort to public and private care homes. This product definition is consistent with several similar examples where applications brought by both the Commissioner and individuals involved a “product” that was a comparable service. Examples of such products include services in the energy appliance market³⁹, the private security services market⁴⁰, advertising services⁴¹, waste management services⁴², and internet/domain services⁴³.
72. The geographic market in this case is the Province of Saskatchewan. With the amalgamation of the previously twelve separate health regions into one unified provincial health authority (the Saskatchewan Health Authority) on December 4, 2017, the SHA became the overwhelmingly dominant player in the market for residential care home services to the elderly and infirm throughout Saskatchewan.
73. Thus, the defined product is that of the elder care contracts to provide individuals with live-in beds and services, and the geographic market region is that of the province of Saskatchewan.

³⁹ The Commissioner of Competition v. Enbridge Services Inc. CT-2001-008 (Competition Tribunal, 2002) at paras 26-32, <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/464531/index.do>

⁴⁰ Luigi Coretti v. Bureau de la Sécurité privée and Garda World Security Corporation et al - CT-2019-001 (Competition Tribunal, 2019) at <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/465271/index.do?q=2019-001>

⁴¹ Director of Investigation and Research v Tele-Direct (Publications) Inc. - CT-1994-003 (Competition Tribunal, 1997) at <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/464942/index.do>

⁴² The Commissioner of Competition v Canadian Waste Services Holdings Inc.- CT-2000-002 (Competition Tribunal, 2001) at paras 38-48, <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/464689/index.do>

⁴³ Brandon Gray Internet Services v. CIRA - CT-2011-001 (Competition Tribunal, 2011) at <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463498/index.do>

IV. Saskatchewan’s market for the care for the elderly and infirm is split between private (Personal Care Homes) and public (Long-term Care Homes).

74. As noted previously, the Ministry of Health for Saskatchewan is tasked with the regulation and administration of both the private and public service providers for the residential care of the elderly and infirm in the province. Long-term care homes look after persons who are seeking care through the public sector queue-based system. The SHA exclusively runs these public care homes and are empowered to provide residents with the full ambit of care from levels 1-4 as defined by the Ministry of Health.⁴⁴ Private sector personal care homes such as Goshen look after persons, who through their independent financial means, pay for a place within a care home. However, at their core, both the public and private streams of care homes provide residential care services to the elderly and infirm in Saskatchewan, with the public system actively contracting out its private sector counterparts to assist the SHA with the care of residents from the public system.⁴⁵

75. Specifically, the SHA, including through its ability to enter into pilot projects like the one it entered with Goshen, directly operates care homes while also impacting its private sector co-participants’ market participation through its ability and discretion to award residential care contracts to private sector players. Such contracts with personal care homes directly impact private sector providers’ competitive relationship with each other (when the SHA selects some private sector players to award resident contracts over others).

76. Further, the public-to-private contracting model also means that private sector players, such as Goshen, must meet and maintain the standards applicable to the public Long-Term Care homes (Levels 3-4)⁴⁶, including staff complements, equipment standards, and other structural requirements. In such cases, the SHA expects the private care home to finance all or most of any modifications and upgrades that the private care home must make to meet the SHA’s standards. Thus, Goshen’s ability to meet Saskatchewan’s Long-term Care standards, which the Ministry of Health and SHA insisted on Goshen meeting during the Accountability

⁴⁴ Affidavit of Mrs. Onasanya – Exhibit 4.

⁴⁵ Affidavit of Mrs. Onasanya, - Exhibits 2,4,8,11, and 31.

⁴⁶ Affidavit of Mrs. Onasanya, - Exhibit 3.

Agreement, meant that Goshen was, and remains, capable of continuing to house elderly and infirm residents of all levels of need. Effectively, Goshen, through Emmanuel Villa Care Home and the modifications it made to accommodate Level 3-4 residents, is in the same market for the same customers as the SHA/Ministry of Health.

V. The SHA (public system) holds a dominant position and exercises significant control over the market for the care of the elderly and infirm in Saskatchewan.

77. The public system's (SHA) dominance over the care of the elderly and infirm in Saskatchewan is evident from the SHA's direct operation of 157 long-term care homes in Saskatchewan⁴⁷, and through the SHA's sub-contracting relationships with some of the privately-owned personal care homes in Saskatchewan to address the unmet and growing demand in the province⁴⁸. Effectively, the SHA owns and controls approximately 61% of the care beds in Saskatchewan.⁴⁹ The SHA exerts significant oversight and contractual/financial influence over all private sector suppliers of residential care services through the SHA's supply of Long Term Care overflow residents from the public system to the private system through the SHA's accountability agreements and contracts with private sector providers. These facts affirm the SHA's dominant position in the market for the care for the elderly and infirm residents of Saskatchewan.

78. Further, the Ministry of Health, in its licensing capacity for private care homes, substantially controls these private homes' ability to operate. In this case, the Ministry of Health has significantly hindered Goshen's ability to operate in the market by disallowing Goshen's request to increase the licenced resident capacity of Emmanuel Villa beyond the currently licensed 20 residents.⁵⁰ The Ministry of Health has ignored Goshen's application to expand Emmanuel Villa's licensed capacity.⁵¹ This cap has significantly hindered Goshen's ability to

⁴⁷ Affidavit of Mrs. Onasanya, Exhibit 30

⁴⁸ Affidavit of Mrs. Onasanya, Exhibit 2, 4, 8, 11, and 31.

⁴⁹ This percentage is based upon the StatsCanada Census findings regarding Collective Dwellings in 2022 (See Exhibit 33 of the Affidavit of Mrs. Onasanya) Goshen has no reason to believe that this percentage has decreased since then, rather it is likely to have increased.

⁵⁰ Affidavit of Mrs. Onasanya, Exhibit 22-24, and 26-28.

⁵¹ Affidavit of Mrs. Onasanya, Exhibit 25

obtain refinancing. In addition, the Ministry and the Receiver have been evasive in providing their respective rationales for preventing Goshen from accepting more residents into the Emmanuel Villa. As previously stated, this has hampered Goshen's ability to convince potential lenders to refinance the business and generate an operating profit to facilitate the sustainable repayment of any lender's loan installments, and to prevent the sale to the SHA.⁵²

VI. Through its steady acquisitions of private care homes, the Government of Saskatchewan, through the SHA, has demonstrated its intention to expand its market share and influence over the care for the elderly and infirm in Saskatchewan.

79. Over the past several years, the Government of Saskatchewan, in its manifestations as the Ministry of Health and the SHA, have demonstrated their intention to expand their market share for the care of the elderly and infirm in Saskatchewan by gradually buying out private care homes. The Saskatchewan government, through the SHA, has also increased both its market share and influence over that market by accelerating its strategy of entering into contracts to outsource the care of residents in the public sector stream to private sector care homes such as Emmanuel Villa.

80. The Affidavit of Mrs. Bunmi Onasanya, specifically Exhibits 2, 4, 8, 11, 31, 34, 35 provide examples of the SHA implementing the Government of Saskatchewan's policy objective of fulfilling public (subsidized) demand for long-term care beds through both the public and private sectors homes. These exhibits further highlight that the Government of Saskatchewan, through the Ministry of Health and the SHA, is not only open to using such public-private partnerships (pilot projects and contracts) to secure additional care beds to meet growing demand, but has demonstrated its intention to continue its acquisitions and conversions of private personal care homes for public use.

81. The Government of Saskatchewan and Ministry of Health's efforts to provide residential care services to public sector clients should not unduly undermine the private market for such services and unfairly prejudice companies like Goshen by arbitrarily declaring these

⁵² Affidavit of Mrs. Onasanya, Exhibit 19.

private homes' 'ineligible' for government programs that are meant to satisfy the growing market demand that the combined private and public care homes have not met. It is notable that after the SHA transferred its residents away from Emmanuel Villa, leaving a total of more than 65 empty beds at the facility, the SHA still had a substantial and ongoing waitlist for residents in the public system who required care home spaces.

82. To date, despite the prevailing and pressing need for care home spaces in Saskatchewan's public system⁵³, and the SHA/Ministry of Health's documented intentions to meet this demand through contracts with private sector players, the SHA and Ministry have avoided relieving this demand by redirecting of its outstanding demand in the Regina area to Emmanuel Villa's 60 currently empty rooms. Emmanuel Villa remains willing, prepared, and equipped to host these public sector residents. However, despite actively welcoming and encouraging the private sector provision of care home coverage of public residents, the SHA and Ministry of Health have persistently, and inexplicably, refused to direct any of this urgent and persistent market demand to Goshen. Instead, both the SHA and/or the Ministry have apparently joined forces to ensure that Emmanuel Villa is sold to the SHA, effectively becomes a public institution, reduces the number of private sector competitors in the market, and that the sale occurs at a significantly discounted price to the true market value of Goshen's business.

VII. The SHA's conduct violated Section 79 of the *Competition Act* - Abuse of a Dominant Position.

83. Section 79 of the *Competition Act* prohibits the abuse of a dominant market position. Such abuse is found where:

...one or more persons substantially or completely control a class or species of business throughout Canada or any area of Canada, [the Tribunal] may make an order prohibiting the person or persons from engaging in a practice or conduct if it finds that the person or persons have engaged in or are engaging in

- (a) a practice of anti-competitive acts; or
- (b) conduct;

⁵³ Affidavit of Mrs. Onasanya, Exhibit 11 and 31.

- (i) that had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the person or persons have a plausible competitive interest, and
- (ii) the effect is not a result of superior competitive performance.⁵⁴

84. The SHA as funded, endorsed, and complemented by the regulatory authority of the Saskatchewan Ministry of Health, hold a dominant position for the care of the elderly and infirm in Saskatchewan. These public entities' direct and indirect implementation of the Accountability Agreement and subsequently of the receivership sale process, amount to an abuse of dominance as contemplated under sections 79 of the *Competition Act*. The SHA, as directed, endorsed, instructed, and supported by the Ministry of Health, leveraged its dominant position to induce Goshen into the Accountability Agreement, or in the alternative, wrongfully withdrew from that Agreement, understanding that the implications would put Goshen in the untenable position of replacing the resultant vacancies within a financially impractical period to forestall the ongoing receivership proceedings.
85. Thus, if granted leave, Goshen intends to persuade the Competition Tribunal to make an order declaring that the SHA abused its dominance in wrongfully terminating their Accountability Agreement and subsequently seeking to profit from that misconduct by buying Goshen's business at a fire sale price in the receivership proceedings. Not only has the SHA's conduct amounted to an abuse of dominance, but the sale would also reduce the number of private sector players in the applicable market, and substantially lessen or prevent the public-private competition for the care of Saskatchewan's elderly and infirm (as contemplated under section 79(b)(i) and section 1.1 of the *Competition Act*).
86. The SHA's (public) dominance over the care for the elderly and infirm in Saskatchewan is not the result of superior competitive performance (section 79(b)(ii)).⁵⁵ Instead, it is the result of the Government of Saskatchewan, through the Ministry of Health and SHA's overwhelming and statutorily imposed market power, and ability to create and maintain a

⁵⁴ *Competition Act*, RSC 1985, c C-34, s 79, <https://canlii.ca/t/7vdy#sec79>.

⁵⁵ *Competition Act*, RSC 1985, c C-34, s 78, <https://canlii.ca/t/7vdy#sec78>.

publicly subsidized waiting list for the care of elderly and infirm residents through public resources.

87. Furthermore, now that the SHA has put forward a presumptively winning bid to buy Emmanuel Villa, which is currently before the Court for judicial approval, it is clear that the SHA is now attempting to benefit from the very anti-competitive behavior that the SHA triggered through the receivership proceedings. Specifically, the SHA is using a judicial receivership to assert permanent control over the very private care home (Emmanuel Villa) that the SHA wrongfully forced into insolvency. In essence, the SHA abused its dominant position by using its vast resources and influence in the market to financially cripple Goshen, its competitor, to place Goshen in the unfortunate position of being compelled to sell its assets in a process that will result in the SHA being the sole beneficiary of Goshen's sale through the SHA's SAVO application.
88. Further, through the Saskatchewan Ministry of Health, which directly oversees the SHA, in particular through the Minister's authority under Sections 2-5, 2-6, and 4-11 of the *Provincial Health Authority Act*,⁵⁶ it is apparent that the SHA is implementing the mandate of the Ministry and the Minister's instructions with respect to the proposed sale. The Minister's interest in the sale of Goshen's assets to the SHA (public system) is reflected in his intervention regarding the purchase and post-sale status of Emmanuel Villa. Specifically, on July 31st, 2024, the Minister confirmed that if the sale goes through, Emmanuel Villa's current residents would not be evicted as the Ministry and Receiver had initially indicated.⁵⁷ At the same time, the Minister has also actively regulated private care homes, including Emmanuel Villa. This arrangement creates a power disparity and unevenness of bargaining power between Goshen and the SHA/Ministry, which private competitors in this space, including Goshen, would not have over each other.

⁵⁶ *The Provincial Health Authority Act*, SS 2017, c P-30.3, <https://canlii.ca/t/55zg9>

See for example, Sections 2-5 and 2-6 Minister's powers regarding the Saskatchewan Health Authority, and Minister's power to order directives to the SHA, Section 2-7 (Provision of funding), Section 2-8 (Minister free to provide health services anywhere in SK notwithstanding SHA), Section 4-2 (Delegated authority); Section 4-3 and 4-4 (The SHA's ability to purchase property is limited to the approval of the Minister if it exceeds the limits set forth in s.5 of The Provincial Health Authority Administration Regulations), Sections 4-11 (Minister's powers regarding the SHA).

⁵⁷ Affidavit of Mrs. Onasanya, Exhibit 40, Letter from Ministry confirming a grandfathering of residents if SHA purchases Emmanuel Villa.

89. For these reasons, Goshen intends to demonstrate that the Competition Tribunal ought to issue an order in favour of the Applicant and grant an order preventing the judicial sale of Goshen's assets to the SHA by the Receiver.

VIII. The SHA violated Section 75 of the *Competition Act* - Refusal to Deal.

90. The SHA's termination of the pilot project amounted to a "refusal to deal" as contemplated under Section 75 of the *Competition Act*. The Tribunal is empowered to make orders requiring a party (supplier) to accept another party as a customer within a specified period and on the terms that the Tribunal considers appropriate. However, to make this order the Tribunal must first be satisfied that the following criteria are met:

- a. a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;
- b. the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;
- c. the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product;
- d. the product is in ample supply; and
- e. the refusal to deal is having or is likely to have an adverse effect on competition in a market.⁵⁸

⁵⁸ *Competition Act*, RSC 1985, c C-34, s 75, <https://canlii.ca/t/7vdy#sec75>.

a) *Goshen's business has been substantially affected due to its inability to obtain adequate supplies of contracts for the provision of long-term care from the SHA.*

91. The SHA's sudden, wrongful, bad faith termination of the Accountability Agreement with Goshen substantially affected Goshen's ability to obtain adequate supplies of care home contracts (particularly before CWB triggered the receivership, and after CWB and the Receiver denied Goshen the ability to replace its diminished capacity).⁵⁹ Notwithstanding the contract, the SHA made representations to Goshen, which induced Goshen to rely on the unbroken renewal of the project for at least a full year between January 29, 2022, to January 28, 2023, but also into the indefinite future given the SHA's representations and the chronic demand for long-term care beds across Saskatchewan.⁶⁰

92. The SHA's cancellation of the agreement resulted in a significant financial downturn and other disruptions for Goshen's business. In addition, once those residents had been removed, the SHA refused to provide Goshen with any replacement agreements or resident contracts for the long-term care of the elderly and infirm in Saskatchewan. Despite Goshen's willingness to take on such contracts at the usual trade terms, the SHA has refused to deal with Goshen and Emmanuel Villa going forward.

b) *Goshen is unable to acquire supplies of patient's contracts for long-term care because there is an insufficient competition among suppliers in the market.*

93. Goshen is being deprived of the ability to take in new residents for two reasons, both of which relate to the SHA's refusal to deal with Goshen.

94. Primarily, the SHA has a monopoly over the long-term care sector, and dominant position over market for the care of the elderly and infirm in Saskatchewan. The only route through which private care homes can access contracts for long-term care residents is through the SHA. Given the SHA's determination not to continue the Accountability Agreement with

⁵⁹ Affidavit of Mrs. Onasanya, Exhibits 21-28.

⁶⁰ Affidavit of Mrs. Onasanya, Exhibit 6.

Goshen, nor to allow Goshen to participate in any successor program amounted to a complete bar against Goshen from obtaining an adequate supply of long-term care contracts.

95. Secondly, through the direct actions of the Ministry of Health and the Receiver, and with the SHA's endorsement, Goshen is unable to obtain an adequate supply of personal care home residents because of the SHA, Ministry, and Receiver's determination not to allow Goshen to admit more residents to Emmanuel Villa.

c) Goshen is willing and able to meet usual trade terms of the SHA for the provision of Long-Term Care.

96. As part of the Accountability Agreement, the SHA required Goshen to upgrade its facilities to facilitate Goshen's care for the SHA's Level 3-4 residents. Goshen's preparedness to make such adjustments and willingness to continue the Accountability Agreement on terms the SHA dictated demonstrates that Goshen was willing to meet the usual trade terms of the supplier of the product (SHA). Goshen remains prepared to enter in a new accountability agreement with the SHA and will do so on the usual trade terms for such public-private partnerships.

d) The SHA has an ample supply of elderly and infirm persons seeking Long-Term Care residency spots across Saskatchewan, including in the Regina metropolitan area.

97. The lack of long-term care beds in Saskatchewan is a well-known fact which the Government of Saskatchewan has recognized on multiple occasions as a problem that needs to be addressed. The SHA continues to be the sole custodian of Saskatchewan's public waiting list and supplier of residents seeking residential care home services in the province. The entire purpose of the SHA's pilot program was, and still is, to alleviate that longstanding and growing pressure on the public long-term care system. The SHA selected Goshen for the pilot program because Goshen could assist in reducing the demand and associated wait times. There is no doubt that if the SHA were to enter into a new accountability agreement with Goshen, the SHA would be able to immediately fill Emmanuel Villa's empty beds with residents from the SHA's waiting list.

e) *The SHA's refusal to deal with Goshen will have an adverse effect on competition in Saskatchewan's care home market.*

98. The SHA's refusal to deal with Goshen has directly led to the ongoing insolvency proceedings which are currently responsible for the Receiver's efforts to seek the sale of Emmanuel Villa to the SHA. If the Receiver's SAVO Application is ultimately successful, Goshen will be forced out of the market for the care of the elderly and infirm in Saskatchewan. The market would be deprived of one its participants and competitors, resulting in a corresponding accrual of market power to the SHA which already boasts overwhelming resources and dominance over this market. The Government of Saskatchewan, and by necessary implication, the SHA's, demonstrated intent to methodically purchase private care homes⁶¹ and expand their operational and regulatory footprint in his market underscore the gradual erosion of competition in this market because of the SHA's growing dominance over the sector.

99. Additionally, if the SHA is provided the precedent of using pilot projects to directly and materially affect the financial health of private care homes it can leverage this dominant position in the future to ensure that the private sector can only compete in the manner the SHA allows.

IX. The Actions of the SHA satisfy the requirements for relief under refusal to deal.

100. When Goshen was informed of the termination of the Accountability Agreement on June 30th, 2023, the SHA then provided Goshen with vague and arbitrary reasons for removing the SHA's 40 residents from Emmanuel Villa and diverting them to competitor homes under different public-private agreements. As previously emphasized, even though there was, and continued to be, a substantial public waiting list for such care beds in Saskatchewan (see Affidavit paras 48-51, Exhibits 27 and 30), the SHA has avoided sending residents to Emmanuel Villa where the SHA was paying a fair market rate under the Accountability Agreement, and which continues to have ongoing vacancies despite the

⁶¹ Affidavit of Mrs. Onasanya, Exhibit 34 and 35.

province-wide need for such beds. Instead of alleviating the dire need for care beds by subcontracting residents on the public waitlist to Emmanuel Villa, which the SHA has continued to do with Goshen's other private sector competitors, the SHA waited for CWB to trigger the receivership proceedings before the SHA fortuitously positioned itself to purchase Goshen's business in the very receivership proceedings that the SHA triggered. The SHA's strategy has enabled Emmanuel Villa to acquire Goshen's business in one fell swoop, at a massive discount, and while eliminating any indebtedness that Goshen may have later established against the SHA in civil proceedings arising from the pilot project.

101. The SHA's conduct with respect to the pilot project (their refusal to deal) substantially compromised Goshen's business due to Goshen's sudden and practically irreplaceable loss of the 40 public (SHA) residents. The SHA/Ministry's abuse of their operational, financial, and regulatory dominance directly led to Goshen's resulting inability to secure adequate resident replacements in the relevant market, triggered the receivership, and amounted to the violation of subsections 75(a) and 75(b) of the *Competition Act*. The SHA's refusal to deal with Goshen continues to impose adverse effects on Goshen in particular, and in general, the competition for the care of the elderly and infirm in Saskatchewan (section 75(e)).

ORDER SOUGHT.

102. The Applicant seeks the Tribunal to grant Goshen the following relief:
- a. Pursuant to Sections 1.1, 78(1), 79(1), 79(2), and 79(3.1) of the *Competition Act*, that the Tribunal bars the proposed sale of the Applicant, Goshen Professional Care Inc.'s ("Goshen") assets, including Emmanuel Villa personal care home, to the Saskatchewan Health Authority ("SHA");
 - b. Pursuant to Sections 1.1 and 75(1) of the *Competition Act*, as long as the applicable market conditions and dynamics subsist, the Competition Tribunal orders that the

SHA reinstates the Accountability Agreement on the same terms, or in the alternative, enters into a new contractual agreement with Goshen to supply Goshen with public sector Long-term Care residents seeking residential care home services in Saskatchewan on at least the same terms as the prior Accountability Agreement.

- c. Any such further action that this Tribunal deems appropriate.

CONCLUSION.

103. The SHA and the Ministry of Health's actions, as previously outlined, amount to prohibited anti-competitive acts and violations of Section 75 and Sections 79 of the *Competition Act*. It is in the interest of the competitive market to prevent the SHA from further benefitting from their anti-competitive acts.

October 2nd, 2024

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Tavengwa Runyowa

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Runyowa Law Professional Corp.
Tavengwa Runyowa.

LIST OF AUTHORITIES.

TAB	De
1	<i>Competition Act</i> , RSC 1985, c C-34, sections 1.1, 75, 78-79. https://canlii.ca/t/56bxz
2	<i>The Provincial Health Authority Act</i> , SS 2017, c P-30.3, https://canlii.ca/t/55zg9
3	<i>The Provincial Health Authority Administration Regulations</i> , RRS c P-30.3 Reg 1, https://canlii.ca/t/562nt
4	<i>The Regional Health Services Act</i> , SS 2002, c R-8.2, https://canlii.ca/t/52w3m
5	<i>Allan Morgan and Sons Ltd. v. La-Z Boy Canada Ltd.</i> , 2004 <i>Comp. Trib.</i> 4, para 21, https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/464360/index.do
6	<i>Audatex Canada, ULC v. CarProof Corporation</i> , 2015 <i>CACT</i> 28 (<i>CanLII</i>), at para 45, https://canlii.ca/t/gnm22#par45
7	<i>Brandon Gray Internet Services v. CIRA - CT-2011-001 (Competition Tribunal, 2011)</i> at https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463498/index.do
8	<i>Director of Investigation and Research v Tele-Direct (Publications) Inc. - CT-1994-003 (Competition Tribunal, 1997)</i> at https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/464942/index.do
9	<i>Lukács v. Swoop Inc.</i> , 2019 <i>FCA</i> 145 (<i>CanLII</i>), at para 15 https://canlii.ca/t/j0ctw#par15
10	<i>Luigi Coretti v. Bureau de la Sécurité privée and Garda World Security Corporation et al - CT-2019-001 (Competition Tribunal, 2019)</i> at https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/465271/index.do?q=2019-001
11	<i>National Capital News Canada v. Canada (Speaker, House of Commons)</i> , [2002] <i>C.C.T.D.</i> No. 38 (<i>Competition Tribunal</i>), <i>affd</i> [2004] <i>F.C.J.</i> No. 83 (<i>C.A.</i>) (“ <i>National Capital News</i> ”), para 14. https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/464444/index.do
12	<i>National Capital News Canada v. Milliken</i> , 2002 <i>CACT</i> 41 (<i>CanLII</i>), at para 8, https://canlii.ca/t/1brn2#par8
13	<i>Royal Bank of Canada v. Soundair Corporation</i> , [1991] <i>OJ No 1137</i> (<i>ONCA</i>)
14	<i>The Commissioner of Competition v Canadian Waste Services Holdings Inc.- CT-2000-002 (Competition Tribunal, 2001)</i> at paras 38-48, https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/464689/index.do

COMPETITION TRIBUNAL
IN THE MATTER OF the Competition Act, R.S.C.
1985, c. C-34 (the “Act”);

AND IN THE MATTER OF an application by JAMP
Pharma Corporation for an order pursuant to section
103.1 of the Act granting leave to bring an application
under section 75 and 79 of the Act;

AND IN THE MATTER OF an application by
Goshen Professional Care Inc., for an order pursuant to
section 75 and 79 of the Act;

BETWEEN:

GOSHEN PROFESSIONAL CARE INC.

Applicant

– and –

THE SASKATCHEWAN HEALTH AUTHORITY
and THE MINISTRY OF HEALTH

Respondents

APPLICATION FOR LEAVE
(Pursuant to section 103.1 of the Competition
Act)

APPLICANT’S MEMORANDUM OF FACT
AND LAW

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