2024 ADAM F. FANAKI COMPETITION LAW MOOT— WINNING FACTA / CONCOURS DE PLAIDOIRIE ADAM F. FANAKI 2024

A. The Problem:

This year's Adam F. Fanaki Competition Law Moot problem required participants to grapple with the competitive effects of a proposed merger between two online dating companies, each with mobile dating applications. Find Your Robin Inc. ("FYR") proposed to both sign the draft agreement and acquire Penguin Ltd. upon the satisfaction of various conditions to closing, including clearance under the *Competition Act* (the "Act").

In the hypothetical problem posed to the moot participants, FYR's "Bat Signal" application is Canada's most popular dating app, with 2.5 million active users. Penguin's application, "The Hero You Deserve" ("HYD"), is available only in Toronto and is aimed at the elite in economic terms. Since its launch, HYD quickly built a loyal following among those deemed "worthy" of entry by its proprietary user admission and matchmaking algorithm, Emperor. The Commissioner of Competition brought an application under s.92 of the Act seeking an order that the parties not proceed with the proposed merger as she contended that it was likely to result in a substantial lessening or prevention of competition ("SLPC") in four cities across Canada, namely, Toronto, Montreal, Calgary and Vancouver (she maintained that expansion into those cities was likely despite the protestations of Penguin's CEO to the contrary).

Two days after the scheduling of the hearing before the Competition Tribunal, and with only weeks to go before the start of the hearing, the merging parties announced that Penguin had entered into a memorandum of understanding with Riddler Inc., a Waterloo based company, pursuant to which Penguin would license the Emperor source code to Riddler for five years, contingent upon, but prior to, the merger's closing (the "Divestiture"). The Commissioner continued to prosecute her case against the originally-proposed merger (not taking the proposed Divestiture into account), but invited the parties to present the proposed deal with Riddler to the Tribunal as a remedy.

The merging parties argued – as had the merging parties in the real-world Rogers/Shaw case – that the Tribunal should only consider the as-modified merger, while the Commissioner maintained that the Tribunal could only consider the Divestiture as a remedy once it had found that the originally-proposed merger would cause a SLPC. A key difference between the two approaches is who bears the burden of proof: must the Commissioner prove that the as-modified merger will cause a SLPC?, or must the merging parties prove that their proposed remedy would eliminate the substantiality of any such lessening or prevention? Unlike the Tribunal in Rogers/Shaw, in the moot problem the Competition Tribunal agreed with the Commissioner that the merger should be considered absent the Divestiture, in the first instance, despite its finding later in the decision that the Divestiture would likely close. In reaching this conclusion, the Tribunal decided that the interests of procedural fairness favoured the Commissioner when presented with the fact that the Divestiture had been proposed by the merging parties only weeks before the start of the hearing, despite having had the opportunity to do so at any point over the course of the Bureau's four month review. The Tribunal also held that the merger would likely result in a SLPC in Toronto (but not in the other cities to which the Commissioner believed Penguin would otherwise have expanded 'but for' the merger), but held that there was no evidence that the Divestiture would be an insufficient remedy (implying that the burden had been on the Commissioner to disprove the remedy's effectiveness, despite holding that the Divestiture should indeed be considered to be a remedy to an otherwise anti-competitive merger).

The Commissioner appealed the Tribunal's decision, and the moot participants acted for either the appellants (the Commissioner) or the respondents (the merging parties) before the (hypothetical) Federal Court of Appeal.

B. Appellant's Arguments:

In their winning factum for the Appellants, Jon Herlin and Olivia Schenk from the University of Toronto Faculty of Law argued that the Tribunal made no palpable and overriding error by assessing the competitive effects of the merger as originally proposed, that is, not including the Divestiture. Although the Appellants agreed that the Tribunal was correct to find a likely SLPC in Toronto, they argued the Tribunal had made a palpable and overriding error by failing to find a likely SLPC in Montréal, Calgary and Vancouver. The Appellants maintained that the Commissioner discharged her burden of proving, on a balance of probabilities, that the merger would likely result in an SLPC in all identified geographic markets by virtue of its adverse effects on non-price competition, and the evidence

of FYH's likely expansion into those cities, absent the merger. Lastly, the Appellants asserted that the merging parties have the burden of proving the adequacy of the divestiture, because the remedy at issue was the Divestiture as proposed by the merging parties, which had not been reflected the draft asset purchase agreement and was contained only in a memorandum of understanding that was still subject to good faith negotiation between the parties. The appellants supported this position by arguing that placing the burden on the Commissioner to prove the ineffectiveness of the Divestiture – a "complex" and "late-stage" solution, would be unfair. In making this assertion, the appellants argued that the settled burden shift principle should apply, which states that the party who asserts a remedy should bear the burden of proof.

C. Respondent's Arguments—Two Winning Facta:

In their factum, Clémence Nizet and Carolina Muñoz from the McGill University Faculty of Law, one of two winning Respondent teams, argued that the Tribunal made an error of mixed fact and law by deciding not to consider the Divestiture as part of the proposed transaction for the purposes of the analysis under s.92 of the Act. Notably, the McGill respondents advanced this argument by focusing on the certainty provided by the memorandum of understanding and the draft asset purchase agreement between the transacting parties in the context of a "sign and close" transaction. Although the respondents agreed with the Tribunal's holding that there would be no SLPC in Vancouver, Calgary and Montreal, they argued that the Tribunal had erred in concluding that the merger would likely result in an SLPC in Toronto. To support their position, the respondents argued that the Commissioner erroneously implied that the increased market share of the merging parties would result in increased market power. The respondents supported this position by citing the Act, which at the time, explicitly precluded the Tribunal from finding that a proposed merger would likely result in a SLPC solely on the basis of increased market share. Lastly, the respondents submitted that the Tribunal was correct in deciding that the Commissioner had failed to discharge her burden of proof to justify the prohibition order sought under s.92 of the Act. The respondents requested the Court of Appeal to uphold the Tribunal's decision not to issue a prohibition order under s. 92 of the Act and to permit FYR to move forward with the merger. In the alternative, the respondents sought an order remitting the question of an appropriate remedy back to the Tribunal.

Aidan Dewhirst and Fionn Ferris from the University of Ottawa Faculty of Law, who tied with the McGill University team for the winning

Respondents' factum, similarly argued that the Tribunal erred in law when it found that the Divestiture should not be considered alongside the proposed merger when deciding if the merger results in a likely SLPC in the relevant geographic markets. The UOttawa team maintained that the Tribunal did not commit a reviewable error in finding that the Commissioner bears the burden of proof regarding the Divestiture as a remedy to the SLPC found to flow from the merger, and in identifying Toronto as the only relevant geographic market. Lastly, the respondents argued that the Tribunal committed a reviewable error of law in finding that the proposed merger created a SLPC in Toronto by highlighting evidence that the market power of the merged entity would be constrained by the breadth of choice in the mobile dating application market in Toronto. The respondents ultimately sought an order dismissing the appeal with costs.

A. Le problème :

Cette année, les participants et participantes au Concours de plaidoirie Adam F. Fanaki en droit de la concurrence devaient traiter des effets concurrentiels du fusionnement proposé entre deux entreprises de rencontres en ligne ayant chacune leur propre application. Find Your Robin Inc. (« FYR ») proposait de signer le projet d'entente et d'acquérir Penguin Ltd. si elle remplissait diverses conditions d'ici la clôture, notamment obtenir l'autorisation prévue dans la *Loi sur la concurrence* (la « Loi »).

Dans ce scénario fictif, Bat Signal, de FYR, est l'application de rencontre la plus populaire au pays, avec ses 2,5 millions d'utilisateurs actifs. L'application de Penguin (The Hero You Deserve ou « HYD »), elle, n'est disponible qu'à Toronto et destinée qu'aux gens fortunés. Depuis son lancement, HYD a rapidement acquis une clientèle fidèle de personnes jugées « dignes » de faire partie des utilisateurs par l'algorithme commercial d'admission et de jumelage de l'application, Emperor. La commissaire de la concurrence a présenté une demande au titre de l'article 92 de la Loi pour obtenir une ordonnance afin que les parties ne procèdent pas au fusionnement proposé qui, selon elle, aurait vraisemblablement pour effet un empêchement ou une diminution sensible de la concurrence (« EDSC ») à quatre endroits au Canada, soit Toronto, Montréal, Calgary et Vancouver (elle soutenait que l'expansion dans ces villes était vraisemblable, même si le chef de la direction de Penguin affirmait le contraire).

Deux jours après la mise au rôle du dossier pour audience devant le Tribunal de la concurrence, et à seulement quelques semaines du début de ladite audience, les parties au fusionnement ont annoncé que Penguin avait conclu un protocole d'entente avec Riddler Inc., une entreprise de Waterloo, suivant lequel Penguin concéderait à Riddler une licence quinquennale pour le code source d'Emperor, licence subordonnée, mais antérieure, à la clôture du fusionnement (le « dessaisissement »). La commissaire a poursuivi son action contre le fusionnement proposé (sans tenir compte du dessaisissement), mais a invité les parties à présenter au Tribunal la transaction avec Riddler en tant que recours.

Les parties au fusionnement ont fait valoir—à l'instar des parties au fusionnement réel entre Rogers et Shaw—que le Tribunal ne devrait tenir compte que du fusionnement modifié, alors que la commissaire, elle, continuait à dire qu'il devait envisager le dessaisissement comme recours seulement, après avoir établi que le fusionnement proposé à l'origine donnerait lieu à un EDSC. Ce qui distingue essentiellement ces deux approches,

c'est la partie portant le fardeau de la preuve : est-ce la commissaire qui doit faire la preuve que le fusionnement modifié entraînera un EDSC, ou est-ce les parties au fusionnement qui doivent démontrer que le recours proposé éliminera le caractère « sensible » de l'empêchement ou de la diminution de la concurrence? Contrairement à ce qui s'est passé dans l'affaire Rogers-Shaw, le Tribunal de la concurrence s'est rangé, dans ce concours de plaidoirie, du côté de la commissaire, statuant que le fusionnement devait être examiné sans le dessaisissement en premier lieu, malgré son verdict ultérieur selon lequel le dessaisissement aurait sans doute lieu. Pour tirer cette conclusion, le Tribunal a statué que l'équité procédurale favorisait la commissaire puisque le dessaisissement avait été proposé par les parties au fusionnement seulement quelques semaines avant le début de l'audience, malgré la possibilité de le faire n'importe quand durant les quatre mois de l'examen du Bureau. Le Tribunal a aussi soutenu que le fusionnement donnerait sans doute lieu à un EDSC à Toronto (mais pas dans les autres villes, où Penguin aurait, selon la commissaire, connu une expansion s'il n'y avait pas eu fusionnement), mais jugé que rien ne prouvait que le dessaisissement serait un recours insuffisant (suggérant ainsi qu'il incombait à la commissaire de réfuter l'efficacité du recours, même s'il avait été établi que le dessaisissement devait être considéré comme un recours dans ce fusionnement autrement anti-concurrentiel).

La commissaire a interjeté appel de la décision du Tribunal. Les participants et participantes devaient agir soit comme partie appelante (la commissaire), soit comme partie intimée (les parties au fusionnement) devant la Cour d'appel fédérale (fictive).

B. Plaidoirie de la partie appelante :

Dans leur mémoire gagnant pour la partie appelante, Jon Herlin et Olivia Schenk, de la Faculté de droit de l'Université de Toronto, ont fait valoir que le Tribunal n'avait commis aucune erreur manifeste et dominante en évaluant les effets concurrentiels du fusionnement proposé, c'est-à-dire en excluant le dessaisissement. En revanche, même si la partie appelante convenait que le Tribunal avait bien fait de conclure que le fusionnement entraînerait sans doute un EDSC à Toronto, elle a fait valoir qu'il avait commis une erreur manifeste et dominante en ne tirant pas la même conclusion pour Montréal, Calgary et Vancouver. Elle a soutenu que la commissaire s'était acquittée de son fardeau de prouver, selon la prépondérance des probabilités, que le fusionnement donnerait vraisemblablement lieu à un EDSC dans tous les marchés indiqués en raison de son effet négatif sur la concurrence hors prix, et que FYR aurait sûrement connu une expansion

à ces endroits, n'eût été le fusionnement. Enfin, la partie appelante a affirmé qu'il revenait aux parties au fusionnement de démontrer l'efficacité du recours proposé, soit le dessaisissement, puisqu'il était exclu du projet d'entente pour l'achat d'actifs, ne figurant que dans le protocole d'entente toujours en cours de négociation de bonne foi entre les parties. La partie appelante a appuyé cette position en arguant qu'il serait injuste d'imposer à la commissaire le fardeau de prouver l'inefficacité du dessaisissement, une solution complexe et tardive. À l'appui de cette affirmation, elle soutenait que le principe du fardeau inversé devait s'appliquer, c'est-à-dire que c'était à la partie exerçant le recours que revenait le fardeau de la preuve.

C. Plaidoirie de la partie intimée—Deux mémoires gagnants :

Dans leur mémoire, Clémence Nizet et Carolina Muñoz, de la Faculté de droit de l'Université McGill, l'une des deux équipes gagnantes pour la partie intimée, ont soutenu que le Tribunal avait commis une erreur mixte de fait et de droit en décidant de ne pas inclure le dessaisissement dans l'analyse du fusionnement proposé effectuée par le Tribunal suivant l'article 92 de la Loi. Fait intéressant, les équipières ont avancé cet argument en misant sur la certitude que procuraient le protocole d'entente et le projet d'entente pour l'achat d'actifs conclus entre les parties au fusionnement dans le contexte d'une « signature et clôture ». Par ailleurs, même si la partie intimée était d'accord avec le Tribunal que le fusionnement n'entraînerait pas un EDSC à Vancouver, Calgary et Montréal, elle a soutenu qu'il avait commis une erreur en concluant que ce serait vraisemblablement le cas à Toronto. Pour justifier cette position, la partie intimée a indiqué que la commissaire avait erré en suggérant que la part de marché accrue des parties au fusionnement déboucherait sur une plus grande emprise sur le marché. Elle a cité la Loi qui, à ce moment, interdisait explicitement au Tribunal de conclure qu'un fusionnement proposé donnerait lieu à un EDSC en raison seulement de la part du marché. En dernier lieu, la partie intimée a soutenu que le Tribunal avait eu raison de dire que la commissaire ne s'était pas acquittée du fardeau de démontrer le bien-fondé de l'ordonnance d'interdiction demandée en application de l'article 92 de la Loi. La partie intimée a demandé à la Cour d'appel de confirmer la décision du Tribunal, soit ne pas rendre ladite ordonnance et permettre à FYR d'aller de l'avant avec le fusionnement. Dans l'alternative, elle a demandé à la Cour de rendre une ordonnance pour que la question du recours approprié soit réinstruite par le Tribunal.

Aidan Dewhirst et Fionn Ferris, de la Faculté de droit de l'Université d'Ottawa, qui ont remporté le concours à égalité avec l'équipe de l'Université

McGill, ont aussi soutenu que le Tribunal avait commis une erreur de droit en décidant que le dessaisissement devait être exclu de l'examen du fusionnement proposé visant à savoir si un EDSC était probable dans les marchés visés. L'équipe de l'Université d'Ottawa a maintenu que le Tribunal n'avait pas commis d'erreur susceptible de révision en statuant que c'était à la commissaire que revenait le fardeau de la preuve associé au dessaisissement comme recours pour contrer l'EDSC devant découler du fusionnement et en indiquant que le seul marché pertinent était Toronto. Finalement, la partie intimée a fait valoir que le Tribunal avait commis une erreur susceptible de révision en droit en statuant que le fusionnement proposé occasionnerait un EDSC à Toronto, en démontrant que l'emprise sur le marché de l'entité fusionnée serait limitée par la multitude d'applications de rencontres mobiles offertes à Toronto. La partie intimée a demandé une ordonnance de rejet de l'appel avec dépens.

2024 FANAKI COMPETITION LAW MOOT PROBLEM

COMMISSIONER OF COMPETITION V FIND YOUR ROBIN INC

I. Executive Summary

1. The Commissioner of Competition (the "**Commissioner**") has filed an application pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "**Act**"), seeking an order directing Find Your Robin Inc. ("**FYR**") not to proceed with its proposed acquisition of Penguin Ltd. ("**Penguin**"; together with FYR, the "**Merging Parties**") (the "**Merger**") in order to resolve the substantial lessening or prevention of competition ("**SLPC**") that the Commissioner asserts is otherwise likely to result from the Merger (the "**92 Application**").

2. The Merger represents the union of two online dating companies, each of which offers a successful mobile dating application (commonly referred to as "apps"). FYR's Bat Signal application is Canada's most popular dating app, with 2.5 million active users from coast to coast to coast. Penguin's application, The Hero You Deserve ("**HYD**"), is available only in Toronto and, since its launch, has quickly built a loyal following among those deemed "worthy" of entry by its proprietary user admission and matchmaking algorithm ("**Emperor**").

3. The Merger was notified to the Commissioner under Part IX of the Act on March 1, 2023. On June 30, 2023, upon the expiry of the waiting period under subsection 123(1) of the Act, the Commissioner commenced the 92 Application, submitting that the Merger is likely to result in a SLPC with respect to dating applications in four cities across Canada.

4. While the Merging Parties have consistently maintained, including through the course of the 92 Application, that the Merger will not result in a SLPC in any relevant market, on July 12, 2023, the Merging Parties announced that Penguin had entered into a memorandum of understanding (the "**MOU**") with Riddler Inc. ("**Riddler**"), an upstart Waterloo-based dating app, pursuant to which Penguin would divest Emperor's source code to Riddler contingent upon, but prior to, the Merger's closing (the "**Divestiture**").

5. In responding to the 92 Application, the Merging Parties have contended that the Tribunal must consider the Merger as modified by

the Divestiture; in their view, the Commissioner's 92 Application, which asks the Tribunal to find a SLPC with respect to the Merger itself, and without consideration of the Divestiture, is moot. However, the Merging Parties submit that even if it were appropriate for the Tribunal to consider the Merger, exclusive of the Divestiture, the Commissioner bears the burden of demonstrating that the Divestiture is insufficient for resolving the SLPC, which burden the Commissioner has failed to discharge.

6. The Commissioner rejects that the 92 Application is moot and urges the Tribunal to consider the Merger as originally proposed by the Merging Parties, without the Divestiture. The Commissioner further contends that, if the Tribunal finds a SLPC with respect to the Merger, the burden will then fall on the Merging Parties to demonstrate the effectiveness of the Divestiture as a remedy.

7. For the reasons set out below, the Tribunal agrees with the Commissioner that the analysis under section 92 is appropriately undertaken with respect to the Merger (without consideration of the Divestiture). The Tribunal finds that the Commissioner has demonstrated that the Merger is likely to result in a SLPC for dating apps in Toronto; but we do not consider there to be any basis for such a finding in other Canadian cities. In considering the appropriate remedy for the proven SLPC, the Tribunal agrees with the Merging Parties that the Commissioner bears the burden of demonstrating that the Divestiture is insufficient, which burden the Commissioner has not met. As such, the Commissioner's application is dismissed.

II. The Parties

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

9. Headquartered in Winnipeg and publicly-traded on the Toronto Stock Exchange, FYR is the largest online dating company in Canada. Its core product, Bat Signal, is a mobile dating app available nationally through the two leading mobile app stores (Citrus' Grove and Ogle's Frolic). Bat Signal's development and marketing strategy are driven by FYR's foundational belief that "the world is a safer place when everyone has found their perfect partner." In support of FYR's mission to "democratize love", Bat Signal is available free of charge and without the option of in-app purchases, ensuring that the same

features are available to all users. In place of user fees, FYR generates revenues through in-app advertising.

10. Penguin is a privately held, Toronto-based firm that was established by its founder and current president, Daniel Datoe, in 2020. Like FYR, Penguin offers its mobile dating app, HYD, free of charge through Grove and Frolic. However, Mr. Datoe consciously built HYD with the direct aim of offering an experience unlike that of Bat Signal. Penguin describes HYD as "a place the 1% can come to find one another; free of the riffraff clogging up other dating services." In keeping with this objective, prospective users must pass through an application process and be approved by Penguin. Admissions are administered by Penguin's proprietary algorithm Emperor, which has been engineered to assess prospective users based on information submitted directly by applicants, sourced from third-party data providers and the behavior of existing HYD users. Along with its gatekeeper function, Emperor facilitates user matches on HYD by offering users "mate recommendations". Penguin describes Emperor as functioning as a "virtuous feedback loop", whereby "training" from its matchmaking role informs its admissions process and data gathered through the admissions process supports its matchmaking.

III. Procedural Background

11. On February 19, 2023, FYR and Penguin announced that they had entered into a binding share purchase agreement pursuant to which FYR would acquire all of the issued and outstanding shares of Penguin for $477.4 million, upon the satisfaction of various conditions to closing, including clearance under the Act.

12. As the Merger exceeds the thresholds under Part IX of the Act, on March 1, 2023, the Merging Parties filed with the Commissioner and the Competition Bureau (the "**Bureau**") notifications under section 114 of the Act together with a request for an advance ruling certificate or, in the alternative, a no-action letter. On March 31, 2023, the Bureau issued supplementary information requests ("**SIRs**") to the parties, requiring the production of a large volume of normal course business documents and data. The Merging Parties certified compliance with their respective SIRs on May 30, 2023.

13. On June 30, 2023, the Commissioner commenced the 92 Application and brought an application under section 104 of the Act for an order from the Tribunal directing FYR not to proceed with the

Merger until such time as the Tribunal's decision in respect of the 92 Application is finally disposed of.

14. On July 5, 2023, the Commissioner and the Merging Parties entered into a consent agreement, which was registered with the Tribunal the same day, pursuant to which (i) the Merging Parties agreed not to close the Merger until the Tribunal's final disposition of the 92 Application and (ii) all parties agreed to seek an expedited hearing of the 92 Application. On July 10, 2023, the Tribunal issued a scheduling order setting the hearing of the 92 Application to commence on September 18, 2023.

15. On July 12, 2023, the Merging Parties wrote to the Commissioner to advise her that they had entered into an MOU with Riddler providing for the Divestiture (the "**Divestiture Letter**").

16. On September 18, 2023, the five day hearing of the 92 Application opened in front of this Tribunal. While the Merging Parties asserted general pro-competitive benefits of the Merger, they did not put forward that the Merger will generate efficiencies for purposes of section 96 of the Act. Accordingly, the so-called "efficiencies defence" is not at issue in this application.

IV. The Divestiture

17. Riddler is a Waterloo-based start-up founded in 2015 and offering an eponymous app that is available across Canada and in the United Kingdom. Initially focused on trivia, Riddler took off during the COVID-19 lockdowns as users flocked to its virtual pub quiz nights. As usage declined over the course of the gradual reopening, Riddler augmented its app's functionality through the introduction of a dating feature (called "**Gord**") in February 2022. Building on Riddler's core strengths, Gord requires potential couples to correctly answer the same riddle in order to chat with one another. While Gord has attracted a committed user base within certain social circles, it has struggled to gain broad recognition or widespread popularity. As Riddler looks to raise additional venture capital, it has pitched Gord as a key vehicle for growth and has been making efforts to broaden its appeal and attract new, and more valuable, users (like Bat Signal and HYD, Gord does not charge user fees and generates revenues through ad sales).

18. The MOU entered into between Penguin and Riddler provides that Penguin and Riddler will negotiate in good faith and use best efforts to enter into an asset purchase agreement substantially in line with the terms set out in a draft agreement appended to the MOU (the "**Draft APA**").

19. Pursuant to the Draft APA, Riddler would acquire from Penguin the source code and all related intellectual property for Emperor; however, the Draft APA also provides that Riddler would grant to the Merging Parties a five year license for the exclusive use of Emperor outside of Ontario. In effect, pursuant to the Draft APA, for five years, Riddler would enjoy exclusive use of Emperor in Ontario, while the Merging Parties would be entitled to exclusive use of Emperor outside of Ontario. After five years, the Merging Parties would have no rights with respect to Emperor.

20. In the Divestiture Letter, the Merging Parties wrote to the Bureau:

> Penguin is prepared to enter into a binding agreement with Riddler promptly upon the final disposition of the 92 Application on terms that allow for completion of the Merger; whether that occurs, as we hope, on a consensual basis or through the Tribunal. The agreement will be on terms consistent with those in the Draft APA. As the Bureau will note, the Draft APA provides for an immediate sign and close and is not subject to any third-party clearances or approvals (for greater certainty, the proposed transaction between Penguin and Riddler will not require notification under Part IX of the Act).
>
> While we maintain that the Merger is not likely to result in a SLPC in any relevant market, we trust that you will agree that the sale of Emperor to Riddler demonstrates this conclusion beyond any reasonable doubt. In particular, by providing Riddler with exclusive access in Toronto (the only location in which FYR and Penguin could be considered to compete) to the "secret sauce" that powers HYD, the Emperor transaction will ensure that Riddler fully replaces any competition that currently exists between the Merging Parties.

21. On July 29, 2023, the Bureau wrote to the Merging Parties in reply to the Divestiture Letter. The Bureau: (i) advised the Merging Parties that, given the pendency of the 92 Application, the Bureau was not

in a position to evaluate the Divestiture, (ii) asked that the Merging Parties, nonetheless, continue to keep the Bureau appraised of any developments with respect to the Divestiture, and (iii) noted that the Merging Parties were at liberty to offer the Divestiture to the Tribunal as a remedy in the course of the 92 Application.

V. Market Overview

22. As noted above, FYR and Penguin each offer a mobile dating application (Bat Signal and HYD, respectively), which carry out the same core function: the Merging Parties' apps allow users to view and express interest in the profiles of other users; where two users mutually express interest in one another, they are connected through the app and are able to communicate through a built-in chat function.

23. FYR and Penguin both serve two distinct customer groups: each of the Merging Parties sells in-app advertising space to advertisers and makes their app available to users free of charge. In the Merging Parties' initial filings with the Bureau, they asserted that their advertising businesses compete with an "endless range of alternative digital advertising opportunities" and that "on an individual and combined basis they account for a *de minimis* share of the digital advertising market." While the Commissioner has not endorsed the Merging Parties' characterization of their advertising businesses, the 92 Application does not assert a SLPC with respect to digital advertising and only the Merging Parties' supply of their respective applications to users is considered relevant to this application.

24. The Commissioner asserts that Bat Signal and HYD both compete in the "dating application market". The Merging Parties, in their submissions, contend (i) that dating applications, including their own, compete with a wide range of alternative matchmaking methods (the Merging Parties described their competitors as including, in addition to other dating applications, "dating websites, general purpose social media applications, in person mixers, professional matchmakers and everyday "meet cute" opportunities"), and (ii) that their respective applications offer differentiated experiences from one another. Nonetheless, the Merging Parties have not challenged that "dating applications" constitute a relevant antitrust market and, for purposes of this application, this is the product market within which the Tribunal will consider the Merging Parties to compete.

25. The Commissioner further asserts that dating applications, generally, compete within a relatively local geographic market. Based on data from the Merging Parties and third-party data applications, the Commissioner observed that over 85% of dating application users set their preferences to source potential matches within 15km of their own location, which the Commissioner contends is consistent with the fact that such applications are typically used to facilitate eventual in-person meetings. As discussed below, the Commissioner submits that there is actual or potential competition between the Merging Parties in four cities across Canada and that each city represents a relevant geographic market. The Merging Parties have not challenged the Commissioner's general local approach to geographic market definition, but, for the reasons detailed below, do assert that there is only a single relevant geographic market for purposes of the Tribunal's analysis: Toronto.

26. Bat Signal is the leading dating application nationally and in each local geographic market identified by the Commissioner. Unchallenged data introduced by the Commissioner shows that 60% of Canadians that use a dating application are users of Bat Signal. In Canada, Grove and Frolic currently make available no fewer than nine and seven dating applications, respectively (including those of the Merging Parties and Riddler). However, outside of Bat Signal, no individual app is used by more than 10% of Canadian dating app users.

27. For Toronto dating app users, Bat Signal and HYD are the two most frequently used apps, with Bat Signal and HYD in use by 34% and 16% of local dating app users, respectively. Riddler is the fifth most popular dating app in Toronto with 3% of users. The third and fourth most popular dating apps in Toronto, Fumble and Knob, are in use by 9% and 6% of users, respectively.

VI. Contested Positions Of The Parties

28. In the course of their written submissions and oral arguments, the parties put in issue both procedural matters and substantive considerations. The parties' positions on both fronts are summarized below.

a) Parties' Positions on Procedural Matters

29. The parties have urged on the Tribunal opposing approaches to the Divestiture and disagree with one another on the implications the

Tribunal's decision on that issue have for the allocation of burden as between the parties.

30. The Merging Parties assert that it is "clearly settled law" that there is only a single "proposed merger" for the Tribunal to consider for purposes of section 92 of the Act; and that is the Merger as modified by the Divestiture. As such, the Merging Parties contend that the Commissioner bears the burden of proving on a balance of probabilities that the combination of FYR and Penguin, but with Emperor sold to Riddler (on the terms contemplated by the Divestiture) will result in a SLPC in one or more markets.

31. While the Merging Parties deny that the Merger, without the Divestiture, would result in a SLPC, they insist that this is, in any event, irrelevant. As FYR's counsel remarked in oral argument: "asking the Tribunal to decide whether the Merger is bad is like asking it to decide what I should have had for breakfast yesterday; it doesn't matter; stop living in the past." Simply stated, the Merging Parties' position is that the Commissioner's application with respect to whether the Merger (on its own) will result in a SLPC is moot.

32. The Merging Parties submit that as a matter of both law and policy it is "right" that "the courts have made clear that an order under section 92 must relate to a live transaction, not a historic relic." As a matter of law, the Merging Parties contend that their approach is consistent with the future oriented nature of merger review and the well-established recognition that the Tribunal's analysis can incorporate significant events that occur after execution of a merger agreement, and, indeed, even after the completion of a merger in question.

33. From a policy perspective, the Merging Parties highlight that consideration of the Merger and the Divestiture is consistent with US case law. While the Merging Parties acknowledge that US law is not binding on this Tribunal, they submit, first, that the considered approach of our southerly neighbours should be persuasive, particularly given their robust merger control experience and well developed merger jurisprudence; and, second, that the development of a cohesive and consistent approach to merger litigation is desirable, particularly given the frequency with which mergers extend across borders and are subject to review under both Canadian and US competition laws.

34. Moreover, the Merging Parties contend that the Commissioner's position is merely an attempt to engineer a transaction that is

most to her liking and that such an approach is inconsistent with the scheme of the Act. The Merging Parties emphasise that mergers are "presumptively legal" under the Act. It is only where a merger gives rise to a "substantial lessening or prevention of competition" that the Tribunal can intervene, and, even then, only to the degree necessary to remove the substantiality. The Merging Parties submit that (i) the Commissioner is "an enforcer not a regulator", (ii) is not charged with devising what she considers to be a "competitively optimal" outcome, and (iii) cannot complain where private parties enter into transactions that fail to deliver an enforcement opportunity by remaining below the SLPC threshold.

35. While the Merging Parties urge the Tribunal to make a finding as to the bounds of the "proposed merger" for purposes of the 92 Application, and emphasise the importance of there being "clear and reaffirmed law" on this point, they submit that the Tribunal's decision on this issue has no bearing on this particular matter. Beyond the Merging Parties' submission that the Merger will not result in a SLPC (as discussed below), the Merging Parties contend that even if the Tribunal looks first at the Merger and only then at the Divestiture, the Commissioner must bear the burden of demonstrating on a balance of probabilities both that (i) the Merger is likely to result in a SLPC and (ii) that the Divestiture is an insufficient remedy.

36. The Merging Parties acknowledge that it has been established that the party proposing a remedy bears the burden of supporting it. However, the Merging Parties emphasise that they are not proposing a remedy. As the Merging Parties explained, their position is "simply that the Merger will not result in a SLPC"; they have not put forward that, in the alternative, the Tribunal should order the Divestiture to remedy any SLPC. Rather, the Merging Parties have merely identified to the Commissioner and the Tribunal, as a factual matter, that they have entered into the Divestiture and that the Merger will not be completed without the Divestiture. Faced with this fact, the Commissioner bears the burden of justifying the prohibition order it seeks, including satisfying the Tribunal that the order would not be punitive.

37. The Commissioner strenuously rejects the Merging Parties' position that the 92 Application, as it relates to the Merger (without consideration of the Divestiture), is moot and that the Tribunal's decision on this point is immaterial.

38. The Commissioner acknowledges that this Tribunal recently found that an initially proposed merger had been modified by a subsequent transaction and that the merger as modified was to be considered for purposes of a section 92 application. However, the Commissioner submits that that decision reflects the unique facts of that case, which are distinguishable from the present application, and that this Tribunal's jurisprudence more broadly establishes that a two-step process must be followed:

    a. First, the Tribunal must determine whether the Merger (as initially proposed) is likely to result in a SLPC. The Commissioner acknowledges that she bears the burden of demonstrating this on a balance of probabilities.

    b. Second, if the Tribunal finds that Merger is likely to result in a SLPC, the Tribunal must determine the appropriate remedy. Contrary to the position of the Merging Parties, the Commissioner asserts that precedent unambiguously establishes that at this second stage the Merging Parties bear the burden of establishing that the Divestiture is an effective remedy.

39. In support of the requirement for the Tribunal to first consider the Merger as initially proposed, the Commissioner points to the wording of section 92, which states that the Tribunal's jurisdiction is only engaged "on application by the Commissioner". As such, the Commissioner asserts that it is her Notice of Application that established the transaction that is to be considered.

40. The Commissioner notes that it is beyond dispute that the Divestiture was not finalized prior to the commencement of the 92 Application and submits that, in fact, the Divestiture is yet to be finalized and remains a mere uncertain possibility. The Commissioner emphasizes that Penguin and Riddler have entered only into an MOU and not an actual transaction agreement.

41. The Commissioner does not challenge Mr. Datoe's assertion that Penguin and Riddler opted for an MOU and draft agreement in the interest of expediency, as this allowed the Merging Parties to provide the Commissioner and Tribunal a clear indication of their plans at the earliest possible opportunity. As Mr. Datoe further explained: "the sale to Riddler is baked as far as I'm concerned; my people tell me the lawyers are still racking up billable hours on monkey business behind the scenes, but I don't get involved in that nonsense." However, the

Commissioner stresses that the best of intentions cannot overcome inherent uncertainty and point to Mr. Datoe's admission on cross-examination that "I could probably get out of the MOU if I really wanted" without being in breach of Penguin's obligation to negotiate in good faith and use best efforts to enter into an asset purchase agreement with respect to the Divestiture (on the advice of counsel, Mr. Datoe refused to expand on this point, claiming solicitor-client privilege).

42. The Commissioner also strenuously disputes the Merging Parties' position that policy considerations favour the Merging Parties. Rather, the Commissioner emphasized to the Tribunal that critical considerations of efficiency and fairness militate in favour of the Commissioner's position. The Commissioner warned that the Merging Parties are seeking to turn merger litigation into "a game of three-card monte", where private parties have "free reign" to continuously amend their proposed transaction in order to "duck and weave" as the Commissioner seeks to enforce the Act. The Commissioner submits that this raises serious issues of efficiency and judicial economy and is an affront to basic principles of justice. The Commissioner urged the Tribunal to reject the Merging Parties' attempt to "out maneuver the Commissioner's public interest mandate" and to reaffirm the Tribunal's well established two-step process.

43. For the foregoing reasons, the Commissioner contends that her application is not moot and that the Tribunal must first reach a finding on whether the Merger is likely to result in a SLPC and only then consider whether the Divestiture is a suitable remedy. The Commissioner was resolute in asserting that, contrary to the Merging Parties' position, at the second stage, the burden of establishing the Divestiture as an effective remedy falls squarely on the Merging Parties. The Commissioner characterized the Merging Parties' burden as a core tenet of our judicial system, citing the well-known adage that "the party that asserts must prove."

44. The Commissioner submits that the Merging Parties' assertion that the Divestiture is not a proposed remedy is a "cute attempt to bamboozle the Tribunal" and that "if it looks like a remedy, swims like a remedy and quacks like a remedy, it's a remedy." While the Commissioner acknowledges that the Merging Parties have not used the word remedy or made the Divestiture conditional on its acceptance as a remedy (i.e., in the form of a consent agreement or Tribunal

order), she submits that it was plainly developed in response to the Commissioner's concerns and in an effort to resolve those concerns. The Commissioner asks that the Tribunal not establish "remedy" as a "magic word" and that it approach the Divestiture based on what it is in all practical effect: a remedy.

b) Parties' Positions on Substantive Analysis

45. Apart from their starkly different views on the procedural aspects of this application, the Commissioner and the Merging Parties disagree with respect to two fundamental components of the section 92 analysis itself, namely, (i) which geographic markets are affected by the Merger and (ii) whether the Merger is likely to result in a SLPC within such geographic markets.

i) Relevant Geographic Markets

46. The Commissioner asserts that the Merger will result in a SLPC with respect to online dating apps in four major cities across Canada: Toronto, Vancouver, Calgary and Montréal. While the Commissioner acknowledges that HYD is currently only available in Toronto, she submits that it is a poised entrant with respect to each of Vancouver, Calgary and Montréal, such that the Merger will have competitive implications in all four cities, with Bat Signal already being on offer in each one.

47. The Commissioner contends that Penguin faces no barriers to entry with respect to Vancouver, Calgary and Montréal (though she acknowledged in her closing argument that Penguin's entry into Montréal may be limited to the city's Anglophone population). Rather, the Commissioner described Penguin's expansion into these cities as requiring merely the "flipping of a switch."

48. Executives from the world's two leading smartphone operating system suppliers, Citrus and Ogle, testified at the hearing that for each of their respective app stores, app developers simply instruct Citrus and Ogle which jurisdictions they wish to have their apps available in; downloads will then be enabled for devices that connect to the app stores from such jurisdictions. Citrus and Ogle testified that changes to geographic availability will generally be implemented within 48 and 72 hours, respectively, of a request being made. While Citrus and Ogle also both testified that app developers are responsible for ensuring their apps comply with legal requirements in any jurisdictions

where they request their apps be made available, Mr. Datoe confirmed on cross-examination that Penguin did not consider there to be any licensing requirements or other legal impediments that would prevent HYD from being offered in Vancouver, Calgary or Montréal.

49. In support of the contention that Penguin, absent the Merger, is likely to effectively establish itself in each of Vancouver, Calgary and Montréal, the Commissioner emphasised FYR's rationale for the Merger and its post-merger integration plans. In particular:

a. The Merging Parties' joint press release announcing the Merger described it as "supporting FYR's goal of helping individuals across Canada find their perfect partner in crime fighting" (emphasis added).

b. FYR's investment recommendation presentation (which was delivered to FYR's board of directors in order to obtain internal approval for the Merger and was produced to the Bureau as part of FYR's Part IX notification filing): (i) indicates that HYD will be available in Toronto, Vancouver, Calgary and Montréal; (ii) forecasts annual advertising revenues of $20 million to $45 million attributable to users outside of Toronto; and (iii) identifies 57% of the Merger's overall value as being related to HYD's future availability in Vancouver, Calgary and Montréal.

c. Integration planning documents produced to the Bureau as part of FYR's SIR response set out a detailed timeline and workplan for HYD's launch outside of Toronto. An April 2023 presentation provides for the rollout to begin with the launch of HYD in Vancouver nine months after the Merger's closing and for HYD to be gradually introduced in Calgary and Montréal over the following six months. Planning documents prepared by FYR from March through May 2023 propose varying specifics for the rollout, with estimated budgets varying from $500,000 to $6.5 million. The planning documents estimated the net present value of the expansion over eight years to range from $18 million to $52 million.

50. The Commissioner also asserts that the Divestiture itself, which includes a carve-out allowing the Merging Parties continued use of Emperor outside of Ontario, is demonstrative of Penguin's planned expansion.

51. The Commissioner contends that the evidentiary record establishes, beyond a balance of probabilities, that HYD could be introduced in Vancouver, Calgary and Montréal in less than two years and that such entry would be extremely profitable. The Commissioner asserts that if the Tribunal accepts the evidence that Penguin would have both the ability and financial incentive to offer HYD in Vancouver, Calgary and Montréal, then it must also conclude that it is likely to do so.

52. The Merging Parties do not dispute that FYR intends to expand HYD's geographic coverage, but they submit that this is entirely beside the point. They assert that the Commissioner must establish that Penguin, absent the Merger, intended to do so and that a "mere objectively demonstrated" incentive and ability to expand are insufficient to discharge the Commissioner's burden.

53. FYR emphasizes that the Commissioner has not led any evidence of Penguin's subjective intent to expand and that, rather, the evidence demonstrates an intent not do so. On direct examination, Mr. Datoe explained that "expansion—at least within Canada—is antithetical to my mission. Let me be clear—HYD is not intended for everyone. This is a premier dating service intended for the *crème de la crème*. As far as I'm concerned, if you're not living in Toronto, you don't qualify. Maybe there are some A-listers hanging out in Madrid or something—could be—but if you're in Canada and can't be bothered to move to the Six, I don't want you on my app." However, on cross-examination, Mr. Datoe conceded that, in connection with various funding rounds Penguin has completed, third-party investors are entitled to appoint directors that account for the majority of Penguin's board and that the board has ultimate authority for the approval of Penguin's strategic plan (neither party led any evidence with respect to the directors).

54. The Merging Parties further contend that on the Commissioner's own theory, Penguin's geographic expansion should not be considered sufficiently timely to be "likely" within the meaning of section 92 of the Act. The Merging Parties note that the Commissioner, in her own argument, has only submitted that entry was likely to occur within two years; however, in that same argument, the Commissioner asserts that there are "no meaningful barriers to entry" and that entry could occur "nearly instantaneously and certainly in as little as three months." In this regard, the Merging Parties note that, while FYR's integration plans provide for HYD to make an appearance

outside Toronto only nine months after closing, the planning documents make clear that the timeline is driven largely by more general integration efforts to combine the two companies, which must be completed prior to expansion. The Merging Parties submit that the Commissioner's reference to entry being possible "certainly in as little as three months" is inconsistent with the fact that expansion specific action items do not show up on the integration planning timeline until month seven post-close.

55. The Merging Parties assert that, even if objective evidence of ability and incentive are sufficient, which for the reasons above it disputes, Penguin's entry can only be considered "likely" if it would occur within the time required to implement such entry—i.e., within the next three months. The Merging Parties deny that entry within three months was likely and contend that the Commissioner has not provided any evidence to support that it is likely.

56. As such, the Merging Parties submit that Toronto is the only relevant geographic market for purposes of the Tribunal's analysis.

ii) SLPC

57. Under section 92 of the Act, the Tribunal can find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially in an industry (which is understood, for purposes of the analysis, to equate to a market). Both parties made extensive submissions on the likelihood of the Merger to lessen or prevent competition, and whether any such market effect is substantial.

58. The Commissioner submits that the Merger will have substantial negative effects in the market for dating applications. The Commissioner submits that, in Toronto, the Merging Parties are two of the largest such applications, and, in Vancouver, Calgary and Montréal, Bat Signal is the largest such application and HYD is an important potential competitor; such that in each city, the Merger creates a number of anticompetitive effects.

59. While the Commissioner raised the possibility of price effects, she conceded that neither of the Merging Parties currently charge any user fees and she did not lead any specific evidence that this was likely to change post-Merger. Rather, the Commissioner's submissions focused on the Merger having substantial non-price effects.

60. The Commissioner asserts that the evidence demonstrates that the Merger will eliminate important rivalry between FYR and Penguin and substantially increase FYR's market power. In particular:

a. Data obtained from Citrus and Ogle shows that, in Toronto, approximately 50% of all users of dating apps are users of either or both of Bat Signal and HYD, while Bat Signal captures a material share of users in each of Vancouver (43%), Calgary (51%) and Montréal (34%).

b. FYR's internal documents demonstrate that Penguin incented innovation. For example, a September 2022 email from FYR's VP Product to the development team for FYR's AI tool ("**Alfred**"), which provides users recommended chat prompts and replies, emphasized that "it is critical that we bring this tool to market ASAP—we're losing users every day to new offerings, such as HYD—we need to give people a reason to choose us." Alfred was ultimately introduced in February 2023.

c. Penguin's pitch materials to prospective advertisers contrast HYD's user base to that of other applications. Bat Signal is the only other dating app included in the cross-comparison.

d. FYR's investment recommendation presentation describes FYR's plans to combine the user databases of Bat Signal and HYD and claims that the larger dataset will allow for "better matchmaking and an enhanced user experience" on both apps.

e. FYR's integration planning documents set out plans to build Bat Signal into HYD in order to provide "all HYD users with the ability to seamlessly switch between the walled garden of HYD and the town square of Bat Signal."

f. The Commissioner's expert witness, Dr. Ivy, testified that applications that facilitate social connections (a broad category she characterizes as including a range of apps including social media apps and dating apps), benefit from network effects and that her study of "social connection" apps found that user growth is exponential, with an app's growth rate increasing as its base grows.

61. The Commissioner submits that as a result of the lost rivalry and enhanced market power, the Merger is likely to result in substantially less innovation and lower product quality, and more specifically that:

    a. The likelihood of entry will be reduced, as the merged firm's size will serve as a barrier to entry for competitor apps that do not have a comparable user base and thus will struggle considerably to compete.

    b. There is likely to be a decrease in quality of the user interface and the introduction of fewer new features for both Bat Signal and HYD due to decreased investment in product development.

    c. There is likely to be an increase in in-app advertising, which consumer studies have shown detracts from the user experience.

62. The Merging Parties submit that the Commissioner has failed to demonstrate a SLPC. While the Merging Parties concede that Bat Signal and HYD compete to at least some degree in Toronto, they assert that the Commissioner's contention that the Merger will result in a substantial lessening or prevention of competition in Toronto, let alone in Vancouver, Calgary and Montréal, is entirely speculative and without foundation.

63. The Merging Parties summarize the Commissioner's approach as having been to identify indicia of market power and rivalry and to then hypothesize as to negative outcomes that may arise if a firm were to exercise market power. The Merging Parties criticize the Commissioner for having provided no quantum of harm and no empirical evidence, let alone specific qualitative evidence, such as plans by the Merging Parties to reduce investment, or specific third-party entry or expansion that is likely to be thwarted by the Merger.

64. The Merging Parties assert that, "plainly", the Commissioner's approach would be considered inadequate were the allegation to relate to price effects. The Merging Parties submit that it is well-accepted that a merger should give rise to at least a small but significant and non-transitory increase in price ("**SSNIP**"), for which the Commissioner would be expected to provide evidence of the quantum (or at least the range of quantum) and the expected duration. The Merging Parties submit that it cannot be that less rigour is required with respect to showing non-price effects as compared to price-effects.

65. While the Merging Parties recognize that the Tribunal's analysis is contextual, they insist that there should nonetheless be a cognizable standard against which the evidence can be assessed. The Merging Parties propose that in order for non-price effects to be "likely" and "substantial", there must be "a specific and direct link between a merger and the posited effect and that mere hypotheticals are insufficient." The Merging Parties submit that the Commissioner has failed to discharge this burden.

VII. Summary Of Issues

66. Based on the parties' written submissions and oral arguments, as summarized above, the Tribunal considers that the outcome of this application turns on four principal issues:

a. Is the Tribunal required to assess the Merger as modified by the Divestiture (i.e., is the Commissioner's as-filed application moot), or should the Tribunal first determine whether the Merger (without consideration of the Divestiture) results in a SLPC and, if so, only then consider the Divestiture in the course of determining the appropriate remedial order?

b. If the Commissioner's application is not moot, what burden does each party bear with respect to the Tribunal's determination of the appropriate remedy? In particular, do the Merging Parties bear the burden of demonstrating, on a balance of probabilities, that the Divestiture will remedy any SLPC found by the Tribunal?

c. Should the Tribunal's analysis be limited to the City of Toronto, where Bat Signal and HYD are both currently available, or is Penguin properly considered a competitor in other Canadian cities as well? In particular, in order for other cities to be relevant, must there be evidence of Penguin's likely entry within three months absent the Merger?

d. Has the Commissioner demonstrated that the Merger is likely to have substantial non-price effects? What is the relevant test for doing so?

VIII. Tribunal's Analysis

67. The Tribunal has carefully considered the parties' submissions, the relevant jurisprudence and the evidence before it. For the reasons below, the Tribunal has concluded that:

a. The Commissioner's application with respect to the Merger (without consideration of the Divestiture) is not moot. The Tribunal will first consider whether the Merger (as initially proposed) is likely to result in a SLPC and will then consider the appropriate remedy.

b. At the remedy stage, the Merging Parties bear no burden in this case. There is only a single potential order before the Tribunal and that is the prohibition order being sought by the Commissioner. The Commissioner bears the burden of demonstrating that the remedy she seeks is appropriate, including that it is not punitive on the facts of the case.

c. The only relevant geographic market for purposes of this application is the City of Toronto. In order for Penguin to be considered a potential competitor in any other geographic market, there must be evidence that such entry was likely to occur within the next three months. There is no such evidence.

d. The Merger is likely to result in a substantial lessening of competition with respect to dating applications in the City of Toronto. The Commissioner has demonstrated, on a balance of probabilities, that, post-Merger, FYR will have the ability to control non-price dimensions of competition and that this is likely to result in substantial non-price effects.

a) Is the Commissioner's Application Moot?

68. Like the Commissioner, the Tribunal is cognizant of the decision this Tribunal rendered in *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc* ("***Rogers/Shaw***"). The Tribunal also appreciates that there may be certain similarities between this application and that case. However, the Tribunal agrees with the Commissioner that the decision in *Rogers/Shaw* reflects the facts of that case and is not necessarily dispositive of whether the Commissioner's application in this case is moot. On the facts of this case, the Tribunal finds that the Divestiture should not

be considered along with the Merger. The Commissioner's original application is not moot.

69. Section 92 of the Act allows the Tribunal to make an order "where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially." The decisions of both this Tribunal and the Federal Court of Appeal in *Rogers/Shaw* do not stand for the proposition that the "proposed merger" for purposes of a section 92 application is clay in the hands of the merging parties, for them to shape and reshape at their whim. Rather, both decisions establish a contextual analysis, which we summarize as requiring consideration of (i) which articulation of the transaction best accords with reality and (ii) procedural fairness.

70. With respect to the first branch, in *Rogers/Shaw,* the Federal Court of Appeal held that the Act "aims to address truth and reality, not fiction and fantasy." We disagree with the Merging Parties' assertion that this holding necessarily requires consideration of the Merger as modified by the Divestiture. Rather, what is required is for the Tribunal to consider, on the facts of the case, which of the initially proposed transaction and the modified transaction more roundly accords with truth and reality, and which requires a "foray in fiction and fantasy". On the facts of this case, we consider that the Divestiture is more likely than not to occur. However, the evidence does not support that the Merger alone "will not and cannot happen" (as this Tribunal found to be the case for the initially proposed transaction in *Rogers/Shaw*). Simply stated, we find that the Divestiture is likely but not certain. In this context, we do not find consideration of the Merger to be an exercise in fictional futility.

71. We acknowledge that given our conclusion that the Divestiture is likely, consideration of the Merger (on its own) could be characterized as a departure from reality. However, while courts may not like to call attention to it, judicial proceedings in fact disregard reality with some regularity. The rules of evidence exclude information from consideration that many may regard as probative. Other procedural rules bar the introduction of otherwise admissible evidence if it is introduced in a manner that offends the orderly disposition of matters before the decision-maker.

72. Consistent with the judicial practices noted above, whether it is appropriate to adopt what we would describe as a "less likely reality" (the Merger being completed without the Divestiture) over a "more likely reality" (the Merger being completed with the Divestiture) will turn on consideration of other values, in particular, the procedural fairness branch of the test we articulated above.

73. In *Rogers/Shaw*, both this Tribunal and the Federal Court of Appeal acknowledged the relevance of procedural fairness to question at hand. In this case, the Tribunal finds that the interests of procedural fairness favour the Commissioner. To the extent there is any distortion to reality through consideration of the Merger, such distortion is attributable to the Merging Parties themselves. It is the Merging Parties that decided to introduce the Divestiture at a late stage, having had the opportunity to do so at any time over the course of the Bureau's four month review. Indeed, the Merging Parties could even have presented the Divestiture together with the Merger in the first instance. As the authors of their own circumstance, the Merging Parties are not now entitled to put the Commissioner on the back foot.

74. Accordingly, the Tribunal will in the first instance consider whether the Merger, unmodified by the Divestiture, results in a SLPC. If the Commissioner discharges her burden in this regard, the Tribunal will then assess the appropriate remedy.

b) Who Bears the Burden at the Remedy Stage?

75. Having found that the Commissioner's application is not moot, the Tribunal must consider, and determine, the allocation of the burden of proof at the remedy stage. As discussed below, in the present case, this issue is in fact of determinative importance. While the Tribunal is satisfied that the Divestiture would remedy the SLPC to at least a significant degree, we cannot determine, on a balance of probabilities, whether or not it will remedy it to the extent that it could no longer be considered "substantial." As such, on the one hand, if the Merging Parties bear the burden of demonstrating the sufficiency of their remedy, the Tribunal's inability to find in their favour will support granting the order the Commissioner seeks; on the other hand, if the Commissioner bears the burden of demonstrating that there is a SLPC notwithstanding the Divestiture (i.e., that a prohibition order is necessary to remedy the SLPC), the Tribunal's inability

to find that the Divestiture is insufficient will support dismissing the Commissioner's application.

76. The Commissioner contends that this question is cut and dry and has been resolved by the Supreme Court of Canada's decision in *Canada (Director of Investigation and Research) v Southam Inc* ([1997] 1 SCR 748 at 791-92 [*Southam SCC*]). While this Tribunal recognizes that the Court's decision in *Southam* is binding on us and does not intend to suggest that it should be reconsidered, the Tribunal finds that *Southam* does not apply to the question at hand.

77. *Southam* concerns the proper exercise by the Tribunal of its power to order a remedy where the parties each move an alternative remedy before the Tribunal. The Merging Parties assert, and the Tribunal agrees, that this is not the case here. Rather, only a single potential remedy is before the Tribunal: the prohibition order sought by the Commissioner. In seeking this remedy, the Commissioner bears the burden of supporting it on a balance of probabilities.

78. The Tribunal considers *Southam* to stand for three equally important propositions:

    a. "It is beyond doubt that a remedial order under s. 92 of the Act cannot be imposed for the purpose of achieving punitive objectives. The Act proscribes only unacceptable levels of anti-competitive behaviour and, consequently, punishment is not a consideration which the Tribunal can take into account when fashioning an appropriate remedy" (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1995] 127 DLR (4th) 329 at para 14 (FCA)).

    b. "Because the *Competition Act* addresses the problem of substantial lessening of competition, the appropriate remedy is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger" (*Southam SCC*).

    c. "The Tribunal did not wrongly require the appellants to demonstrate the effectiveness of their proposed remedy; the person who asserts should prove" (*Southam SCC*).

79. In the present case, the Tribunal finds that the first and second principles bear on the decision, while the third one does not. Specifically,

the remedy ordered by the Tribunal should ensure that the Merger does not result in a substantial lessening or prevention of competition and must not be punitive. As the Merging Parties have not proposed a remedy to the Tribunal, there is nothing that they have asserted and must now prove.

80. The Commissioner suggests that the Divestiture is a remedy by a different name and urges the Tribunal to consider substance over form. However, with respect, the Tribunal does not agree with the Commissioner that the Divestiture is, in substance, equivalent to a remedy proposal. Indeed, there is a key distinction between a remedy proposal and the Divestiture: the Divestiture is a binding commitment on Penguin, not a proposal that the Tribunal may or may not adopt as an order. Stated differently, the Divestiture will occur (or, at least, as explained above, is more likely to occur than not) irrespective of whether the Tribunal finds a SLPC.

81. As the implementation of the Divestiture is independent of this Tribunal and any decision it may make, the Merging Parties have nothing to prove with respect to it. Conversely, the Commissioner is seeking an order from this Tribunal and, before making such an order, the Tribunal is duty bound to ensure the order is within its jurisdiction. Consistent with the holdings in *Southam*, the Tribunal considers that an order will be punitive and improper if it goes further than necessary to remedy the SLPC. The Commissioner bears the burden of demonstrating, on a balance of probabilities, that the remedy it seeks is appropriate, including that, on the facts (which include the Divestiture), that it is necessary to eliminate the substantiality of any lessening or prevention of competition (and, accordingly, would not be punitive).

82. The Tribunal pauses to note that it does not consider there to be any inconsistency between the finding here and the finding above with respect to mootness. Above, the question was whether the Merger, absent the Divestiture, amounted to "fiction and fantasy"; and the answer was that it does not. Here, the question is whether the Divestiture is a remedy proposal; and, again the answer is that it is not. The Tribunal acknowledges here, as above, that there is a possibility that the Divestiture is not implemented; however, this possibility does not transmute a binding legal commitment between two private parties into an offer to a judicial body. We further note that it is open to the Commissioner to raise any uncertainty associated with the

Divestiture in support of a contention that the prohibition order is necessary to eliminate the SLPC. Moreover, consideration of procedural fairness also weighs differently on the question of burden as compared to the question of mootness. Above, the introduction of the Divestiture directly alters the key factual underpinnings of the Commissioner's application, which the Commissioner can fairly consider to have been previously settled. At the remedy stage, the appropriate remedy is necessarily informed by the Tribunal's findings with respect to the SLPC. The Divestiture can no more be considered an unfair change of course for the Commissioner than could a finding by the Tribunal that the SLPC is different from that initially alleged by the Commissioner.

c) What are the Relevant Geographic Markets?

83. The Tribunal considers the parties' submissions as to which geographic markets are relevant to the Tribunal's analysis to, in effect, raise the question of whether the Merger engages the "prevent" branch of section 92. For the reasons set out below, the Tribunal finds that it does not (the Tribunal considers whether the Merger is likely to result in a substantial lessening of competition in Toronto below).

84. As the Supreme Court of Canada has explained:

> The concern under the "prevention" branch of s. 92 is that a firm with market power will use a merger to prevent competition that could otherwise arise in a contestable market. The analysis under this branch requires looking to the "but for" market condition to assess the competitive landscape that would likely exist if there was no merger. It is necessary to identify the potential competitor, assess whether but for the merger that potential competitor is likely to enter the market and determine whether its effect on the market would likely be substantial (*Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 60 [Tervita]).

85. The Commissioner asserts that Penguin is a potential competitor with respect to dating apps in each of Vancouver, Calgary and Montréal. Having identified the potential competitor, the Tribunal must now assess whether, but for the Merger, Penguin in likely to enter the foregoing geographic markets. In carrying out this analysis, the Tribunal must not only determine that Penguin would be likely to enter these markets, but the "timeframe for entry must be discernible"

(*Tervita* at para 68). The Merging Parties contend, and the Tribunal agrees, that not only does the evidence not support that Penguin was likely to expand into new geographic markets, but, moreover, the Commissioner's own position does not support that entry would occur within a discernable timeframe.

86. The Supreme Court of Canada has explained, and this Tribunal agrees, that:

> In assessing whether a merger will likely prevent competition substantially, neither the Tribunal nor courts should claim to make future business decisions for companies. Factual findings about what a company may or may not do must be based on evidence of the decision the company itself would make; not the decision the Tribunal would make in the company's circumstances (*Tervita* at para 76).

87. In the present case, the evidence before the Tribunal supports that, absent the Merger, Penguin would not have launched HYD in any of Vancouver, Calgary or Montréal. The Commissioner's case is compelling in supporting that Penguin could expand into these geographies and even that it should do so. But this Tribunal's responsibility is to make findings with respect to the decisions Penguin, absent the Merger, was likely to make; it is not this Tribunal's responsibility to evaluate the soundness of those decisions. Were we sitting as dragons in a den, Mr. Datoe's evidence may indeed not have left us eager to part with our cash; however, in our role as members of this Tribunal, we found Mr. Datoe's evidence that he would not have introduced HYD into other Canadian cities to be clear, convincing and uncontested.

88. While our finding above is dispositive of this issue, we note that even if the Commissioner's evidence were considered sufficient to demonstrate that Penguin was likely to eventually expand outside of Toronto, the Commissioner has not led any evidence that such expansion was likely to occur in the near future. Consistent with *Tervita*, the Tribunal considers that the length of time into the future it can look for determining whether Penguin's entry into a market is likely is approximated by the lead time it would require to do so. The Tribunal accepts the Commissioner's evidence that Penguin faces low barriers to launching HYD in each of Vancouver, Calgary and Montréal and agrees with the Commissioner that such entry could occur within three months, if not less. Accordingly, the Tribunal finds

that in order for Penguin's entry into a new geographic market to be "likely", within the meaning of section 92 of the Act, the evidence must demonstrate that Penguin was likely to achieve such entry within the next three months.

89. The Tribunal recognizes that lead time has been described as a "guidepost and not a fixed temporal rule" (*Tervita* at para 74); however, the Supreme Court of Canada cautioned against relying on lead time as a marker in instances where it is "so lengthy that a determination of the probability of market entry at the far end of that timeframe would be influenced by so many unknown and unknowable contingencies as to render such a prediction largely speculative" (*Tervita* at para 74). Plainly, that is not the case here. Rather, in this case, the lead time is short "and thus a determination of whether market entry is likely within that timeframe may be sufficiently definite to meet the "likely" test" (*Tervita* at para 74).

90. The Tribunal finds that the Commissioner has not demonstrated on a balance of probabilities that Penguin was likely to enter the market for dating apps in any of Vancouver, Calgary or Montréal within the next three months, and, accordingly, that the "prevention" branch of section 92 is not engaged by the Merger.

d) Will the Merger Result in a Substantial Lessening of Competition in Toronto?

91. Having determined, for the reasons above, that there is no scope for the Merger to result in a substantial prevention of competition for dating apps in Vancouver, Calgary or Montréal, the Tribunal must now consider whether the Merger may result in a substantial lessening of competition for dating apps in Toronto, where the Merging Parties' apps are both presently available.

92. The appropriate test for determining whether there will be a lessening of competition is whether the merger is likely to facilitate the exercise of new or increased market power by the merged entity. In order to engage section 92, any such lessening must be substantial. As the Supreme Court of Canada has recognized, "What constitutes "substantial" will vary from case to case. The Tribunal has not found it useful to apply rigid numerical criteria" (*Tervita* at para 46).

93. While as a general matter this Tribunal has rejected the application of a firm numerical test, the inapplicability of a clear objective threshold

for determining a substantial lessening of competition is even more apparent where, as here, non-price effects are asserted. As the Tribunal has observed in the past, non-price competitive effects, such as reduced innovation, are inherently less amenable to quantification as compared to price effects; such that "when dealing with innovation, reliable statistical or empirical evidence is sometimes not available and the Commissioner may need to resort to more qualitative tools and instruments to demonstrate the competitive effects of a challenged conduct" (*Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp. Trib. 7 at 471).

94. The Commissioner asserts, and the Tribunal agrees, that the evidence demonstrates, on a balance of probabilities, that the Merger will enhance FYR's market power by a substantial degree. In particular, the Tribunal considers that this conclusion is manifestly supported by (i) the Merging Parties' combined dominant share of dating app users in Toronto, (ii) the documentary record of rivalry between the Merging Parties, (iii) the fact that the Merger will expand the Merging Parties' trove of user data, which will in turn enhance the strength of their offering, and (iv) FYR's plans to integrate Bat Signal into HYD, which will support further growth of Bat Signals user base. On the evidence, the Tribunal finds that the Merger is likely to enable FYR to exercise materially greater market power than it can today and, accordingly, that the Merger is likely to result in a substantial lessening of competition with respect to dating apps in Toronto.

95. The Merging Parties complain that the Commissioner has, at best, made it only half way down the field. They assert that, on the Commissioner's own argument, she has, at best, shown that FYR will have greater market power, but has not demonstrated that any specific dimension of non-price competition (e.g., quality, variety, service, advertising or innovation) is likely to be at a materially lower level following the Merger.

96. The Tribunal accepts that the potential implications of FYR's market power identified by the Commissioner are best understood as illustrative theoretical examples and that the Commissioner has not demonstrated, on a balance of probabilities, that any one such example is likely to in fact transpire post-Merger. However, the Tribunal finds that there is no obligation on the Commissioner to precisely identify the manner in which non-price competition will be substantially harmed and, rather, it is sufficient to show that the

merged firm will benefit from materially greater market power, such that competition will be substantially lessened in a general sense. To require more from the Commissioner would be inconsistent with the Act.

97. The Act specifically recognizes the importance of non-price dimensions of competition and explicitly places them on equal footing with price competition. For example, section 1 of the Act asserts that the Act's purpose includes providing "consumers with competitive prices and product choices" (emphasis added). Similarly, section 93 of the Act includes the following among the factors the Tribunal may have regard to in determining whether a merger is likely to result in a SLPC:

> (g) the nature and extent of change and innovation in a relevant market;
>
> (g.1) network effects within the market;
>
> (g.2) whether the merger or proposed merger would contribute to the entrenchment of the market position of leading incumbents;
>
> (g.3) any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy;

98. It would be inconsistent with the statutory scheme, and this Tribunal's jurisprudence, to hold the Commissioner to the challenging standard of demonstrating the specific manners in which non-price competition will degrade through an exercise of market power, in particular, in technology-enabled, innovation-driven markets.

99. An inherent element of innovation is its unpredictability. Section 92 is concerned with protecting the competitive process through preventing the accumulation of materially greater market power. The Commissioner has demonstrated that the Merger will result in such an accumulation and has illustrated for the Tribunal the manners in which such power could, in theory, be wielded to degrade non-price dimensions of competition. We cannot expect the Commissioner to prove the specific manner (or manners) in which private parties will take advantage of their market power, in particular, in innovation-driven markets.

100. Accordingly, we find that the Merger is likely to result in a substantial lessening of competition for dating applications in Toronto.

IX. Remedy

101. Having determined that the Merger is likely to result in a substantial lessening of competition within the meaning of section 92 of the Act, the Tribunal must now determine the appropriate remedy. As explained above, the Tribunal considers there to be only a single remedy proposal before it, namely the Commissioner's application for a prohibition order, which she bears the burden of substantiating.

102. The Tribunal is satisfied that the order sought by the Commissioner would be effective in remedying the substantial lessening of competition identified above. However, the Tribunal finds that the Commissioner has not demonstrated on a balance of probabilities that such an order would not be punitive.

103. In considering the appropriateness of the order sought by the Commissioner, the Tribunal considers it necessary to have regard to the complete factual record, including the Divestiture. The Tribunal considers that the Divestiture, by providing Riddler with access to Emperor, will significantly strengthen a third-party rival to the Merging Parties, mitigating FYR's post-Merger market power.

104. The Commissioner asserts that the Divestiture will not go far enough and, in particular, that Riddler's ability to effectively restrain FYR's post-Merger exercise of market power will be limited by its small user base and weak brand recognition. As such, the Commissioner contends that, while the Divestiture will mitigate to some degree the Merger's anti-competitive effects, it will not do so to such a degree that the Merger would no longer result in a substantial lessening of competition.

105. The Tribunal is mindful of the limitations raised by the Commissioner and agrees that, for those reasons, the Divestiture may not fully remedy the Merger's substantial lessening of competition. However, the Tribunal does not consider there to be sufficient evidence to demonstrate that, on a balance of probabilities, that Divestiture is insufficient to remedy the substantial lessening of competition. As such, the Tribunal finds that the Commissioner has not discharged her burden with respect to the order she seeks.

X. Order

106. For these reasons, the application brought by the Commissioner is dismissed.

DATED at Ottawa, this 18th day of October 2023.

SIGNED on behalf of the Tribunal by the Panel Members