IN THE COMPETITION APPEAL TRIBUNAL

(ON APPEAL FROM THE COMPETITION TRIBUNAL)

BETWEEN:

THE COMMISSIONER OF COMPETITION

Appellant

AND

FIND YOUR ROBIN INC and PENGUIN LTD

Respondents

FACTUM OF THE APPELLANT

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[January 26, 2024]

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Part I—Overview And Statement Of Facts

[1] Find Your Robin ("**FYR**") is the largest online dating company in Canada. Its mobile dating app, Bat Signal, has a leading market share in several of Canada's largest cities. In February 2023, FYR entered into a binding agreement to acquire Penguin, a Toronto-based online dating company, for approximately $477.4 million (*Tribunal Decision*). Penguin's dating app, Hero You Deserve ("**HYD**"), offers a compelling alternative to Bat Signal for elite singles in Toronto who are ready to mingle with other elites in the city. The Competition Appeal Tribunal (the "**Appeal Tribunal**") must block the merger of FYR and Penguin because it will result in a substantial lessening and prevention of competition (an "**SLPC**") in several cities in Canada.

> *Commissioner of Competition v Find Your Robin Inc* (18 October 2023) at para 11 [*Tribunal Decision*].

[2] Bat Signal and HYD compete vigorously in Toronto's dating app market. In Toronto, half of all dating app users are active on one or both of Bat Signal and HYD (*Tribunal Decision*). Internal documents demonstrate that FYR and Penguin consider each other their primary competition.

In Penguin's pitch materials, only Bat Signal was included for cross comparison (*Tribunal Decision*). In addition, FYR created its innovative AI tool ("**Alfred**") as a direct response to Penguin's vigorous competition (*Tribunal Decision*). This competition would clearly extend to other cities in Canada if and when Penguin makes HYD available there. Currently, however, Bat Signal captures the lion's share of dating app users in Vancouver (43 percent), Calgary (51 percent) and Montréal (34 percent) (*Tribunal Decision*).

> *Tribunal Decision*, *supra* para 1 at para 59.

[3] To neutralize its biggest competitive threat, FYR moved to acquire Penguin. In response, the Commissioner of Competition (the "**Commissioner**") brought an application to block the merger under s.92 of the *Competition Act* (the "**Act**") on the grounds that it would substantially lessen competition in Toronto and substantially prevent competition in Montréal, Calgary and Vancouver (the "**Other Cities**") (*Tribunal Decision*). But in July 2023—a mere two months from the hearing at the Competition Tribunal—FYR and Penguin (the "**Merging Parties**") proposed a complicated modification to the merger (*Tribunal Decision*). The Merging Parties entered a Memorandum of Understanding (the "**MOU**") to use their best efforts to enter into an asset purchase agreement in line with the terms set out in an appended draft agreement (the " **Draft APA**") with the company Riddler (*Tribunal Decision*).

> *Competition Act*, RSC 1985, c C-34, s 92 [*Competition Act*]. *Tribunal Decision*, *supra* para 1 at paras 4, 14–16.

[4] Riddler is a Waterloo-based startup that owns a niche trivia dating app called Gord. Riddler has struggled to get a competitive foothold in the dating app market. For example, Gord is used by only 3 percent of Toronto dating app users, whereas Bat Signal and HYD are used by 34 percent and 16 percent of Toronto dating app users respectively (*Tribunal Decision*).

> *Tribunal Decision*, *supra* para 1 at para 27.

[5] The Draft APA contains a proposal according to which Penguin would divest its proprietary user admission and matchmaking algorithm ("**Emperor**") to Riddler; however, Riddler would also agree to grant the Merging Parties a five-year license for exclusive use of Emperor outside of Ontario (*Tribunal Decision*). This divestiture would be negotiated and finalized subsequent to and separate from the merger (*Tribunal Decision*).

But at the time of the hearing at the Competition Tribunal (the "**Tribunal**"), the Draft APA was far from a done deal.

Tribunal Decision, *supra* para 1 at paras 19–20.

[6] At the hearing, the Tribunal agreed with the Commissioner that the relevant merger was the initially proposed merger, rather than the merger as modified by the Draft APA. It also agreed that there was a substantial lessening of competition in Toronto under s.92; however, it disagreed that the merger would substantially prevent competition in the Other Cities (*Tribunal Decision*). Nevertheless, the Tribunal dismissed the Commissioner's application because, in its view, the Commissioner failed to show that blocking the merger was not punitive (*Tribunal Decision*).

Tribunal Decision, *supra* para 1 at paras 99–101.

Part II—Statement Of Points In Issue

[7] The central issue on appeal is whether the Appeal Tribunal should overturn the Tribunal's decision and block the merger under s.92 of the Act. To decide this case, the Appeal Tribunal must resolve the following questions:

i) Did the Tribunal commit any palpable and overriding error in determining that the relevant merger for analysis was the original merger rather than the modified merger?

ii) Did the Tribunal err in law by incorrectly holding that the Commissioner bears the burden with respect to the remedy?

iii) Did the Tribunal commit a palpable and overriding error when it concluded that there would only be an SLPC in Toronto, but not in Montréal, Calgary and Vancouver?

iv) Did the Tribunal commit a palpable and overriding error when it concluded that the Commissioner had met its burden of demonstrating an SLPC based on the non-price effects of the merger?

[8] The Commissioner makes the following submissions:

i) The Tribunal made no palpable and overriding error by assessing the competitive effects of the merger as it was originally proposed.

ii) The burden of proof for the adequacy of the divestiture as a remedy lies on the Merging Parties because the remedy at issue is the divestiture proposed in the Draft APA.

iii) The Tribunal was correct to find a substantial lessening of competition in Toronto but made a palpable and overriding error by failing to find a substantial prevention of competition in Montréal, Calgary and Vancouver.

iv) The Commissioner has discharged its burden of proving on the balance of probabilities that the merger will result in an SLPC in *all* these markets by virtue of its adverse effects on non-price competition.

Accordingly, the Commissioner requests that the Appeal Tribunal grant an order preventing the merger from proceeding. In the alternative, the Commissioner requests that the Appeal Tribunal remand the decision back to the Tribunal for further consideration.

Part III—Statement Of Submissions

A. The Tribunal Committed No Palpable and Overriding Error in Holding the Commissioner's Application is Not Moot

i) The standard of review is palpable and overriding error

[9] Appellate standards of review apply to this case (*Vavilov*) because there is a statutory right of appeal (*Competition Tribunal Act*). The standard of review is correctness for questions of law and palpable and overriding error for questions of fact and questions of mixed fact and law (*Housen*). The Tribunal's determination that the Commissioner's application was not moot relied on the application of the framework from *Rogers* to the specific facts of the case. As this is a question of mixed fact and law, the Tribunal's determination should only be disturbed if it contains palpable and overriding error.

> *Canada (Minister of Citizenship and immigration) v Vavilov* , 2019 SCC 65 at para 37 [*Vavilov*]. *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), s 13(1).
>
> *Housen v Nikolaisen*, 2002 SCC 33 at para 36 [*Housen*].
>
> *Canada (Commissioner of Competition) v Rogers Communications Inc et al* , 2023 FCA 16 [*Rogers*].

[10} In *Rogers*, the question of law was: which factors must the court consider when deciding what is the relevant merger for the purposes of applying the test contemplated in s.92 of the Act, the original merger or the merger as modified by the divestiture (*Rogers*)? Here, the Tribunal correctly identified the two criteria from *Rogers*: (i) which articulation of the transaction best accords with reality and (ii) procedural fairness considerations (*Tribunal Decision*). Regarding the first prong, the Federal Court of Appeal ("**FCA**") stated that "the *Competition Act* aims to address truth and reality" (*Rogers*). Regarding the second prong, the court acknowledged that "there may be a case where the change in transaction is so significant that procedural fairness concerns would arise" (*Rogers*).

Rogers, *supra* para 9 at paras 18–19.

Tribunal Decision, *supra* para 1 at para 68.

In the current matter, the legal test is not at issue. Rather, what is at issue is the application of the test to the facts.

ii) The Tribunal's application of the Rogers test to the facts lacked any palpable and overriding error and is consistent with the jurisprudence

[12] The Tribunal viewed the matter holistically and considered all mandatory factors from the *Rogers* framework. With respect to the first prong, the Tribunal identified that both the original merger and modified merger were real possibilities and thus both were open for consideration (*Tribunal Decision*). With respect to the second prong, the Tribunal determined that procedural fairness considerations weighed heavily in favour of the Commissioner and supported the conclusion that the original merger was the relevant one for the proceeding (*Tribunal Decision*).

Tribunal Decision, *supra* para 1 at para 69, 71–72.

[13] The Tribunal was justified in reaching a different conclusion than it did in *Rogers* because the facts can be distinguished on both prongs of the test. On the first prong, both the original merger and modified merger remain real possibilities and the Merging Parties purposefully structured the divestiture to make it less certain. On the second prong, the Draft APA makes use of a more complex divestiture structure, which will take more time for the Bureau to assess. It is procedurally unfair to require the Commissioner to consider the divestiture on such short notice.

[14] In *Rogers*, the original merger had become a true impossibility. In the current matter both variations of the merger are possible. In *Rogers*, the Minister of Innovation, Science and Industry publicly confirmed there were no circumstances in which he would "permit the wholesale transfer of wireless spectrum from Shaw to Rogers" (*Rogers CT*). The original proposed merger in *Rogers* was completely dead. In contrast, the divestiture of Emperor's algorithm to Riddler is not certain. Penguin and Riddler have only entered into an MOU and not an enforceable transaction agreement. Therefore, it was open to the Tribunal to consider the merger without divestiture in the current matter because, unlike in *Rogers*, it was still a real possibility.

> *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*
>
> 2023 Comp Trib 1 at para 109 [*Rogers CT*].

[15] Penguin's current president Mr. Datoe admitted that the company could probably get out of the Draft APA without breaching contractual obligations (*Tribunal Decision*). In *Rogers*, by contrast, Rogers would be required to pay a very serious penalty of $265 million to American bondholders if the Divestiture Agreement was not completed (*Rogers CT*). There is no evidence of any break fee for Penguin exiting the Draft APA.

> *Tribunal Decision*, *supra* para 1 at para 41.
>
> *Rogers CT*, *supra* para 14 at para 26.

[16] The Tribunal in the current matter rightly held that any distortion to reality was attributable to the Merging Parties and therefore found that the reality prong was less important (*Tribunal Decision*). In *Rogers*, the merging parties' response to the suggested SLPC concern was a swift, definitive divestiture (*Rogers CT*). Here the Merging Parties continue to assert that the merger without divestiture will not result in an SLPC (*Tribunal Decision*). This explains why a definitive deal with Riddler has not been secured and supports the inference that the deal may fall through if the merger is approved. Thus, the Merging Parties have kept both variants of the merger alive for their own convenience and cannot argue the "more likely" merger should be the only merger considered.

> *Tribunal Decision*, *supra* para 1 at paras 72, 31.
>
> *Rogers CT*, *supra* para 14 at paras 18–22.

[17] Turning to the second prong, it is procedurally unfair to require the Commissioner to consider this complex, late-stage modified merger to be the relevant merger. In *Rogers*, the court allowed the merger to close because the divestiture of Freedom sufficiently addressed the SLPC concern. Shaw's subsidiary Freedom was a vigorous competitor that would no longer compete with Rogers in the market for wireless services after the merger (*Rogers CT*). To resolve this, the proposed divestiture was to sell all of Freedom to Videotron. Under Videotron, Freedom would continue to vigorously compete in the relevant markets. Here, the divested asset, Emperor, is a highly technical algorithm, which makes its impact on the SLPC complicated and uncertain.

Rogers CT, *supra* para 14 at para 349.

[18] In the current matter, it is doubtful—or at the very least, unclear—whether the proposed divestiture will adequately address the SLPC concerns. The Merging Parties have proposed that Penguin sell Emperor's source code and associated IP to Riddler, with Riddler licensing Emperor back to the Merging Parties for five years of exclusive use outside Ontario (*Tribunal Decision*). This divestiture presents a novel and complex proposed solution that requires detailed examination to determine its effectiveness. It is unfair for the Commissioner to be required to evaluate this complex modification on such short notice, when all the Commissioner's previous preparation focused only on the original merger.

Tribunal Decision, *supra* para 1 at paras 18–19.

[19] The current divestiture was introduced much closer to the hearing than in *Rogers* thereby amplifying procedural fairness concerns. Shaw first entered a letter of intent to divest Freedom over seven months before the hearing and entered the final definitive agreement with Videotron nearly three months before the hearing (*Rogers CT*). By contrast, the Merging Parties here first introduced the Draft APA only two months before the hearing and to date have not entered a definitive agreement with Riddler (*Tribunal Decision*). Moreover, in *Rogers*, the Commissioner conceded that there were no grounds for a procedural fairness complaint (*Rogers*). Here, the Commissioner had much less time to contemplate the merits of a far more complex divestiture. Thus, the Tribunal rightly concluded that the current matter raised substantial procedural fairness concerns for the Commissioner (*Tribunal Decision*).

Rogers CT, *supra* para 14 at paras 22–26.

Tribunal Decision, *supra* para 1 at paras 15–16, 72.

Rogers, *supra* para 9 at para 16.

[20] Additionally, if this late-stage, uncertain merger modification were permitted, it would pose a serious risk that merging companies in the future will strategically introduce late-stage modifications to avoid merger regulation. The consequence of *Rogers* cannot be that merging parties can at the last minute suggest a hypothetical remedy that fundamentally shifts the goalposts of a merger hearing.

B. The Merging Parties Bear the Burden of Demonstrating the Proposed Divestiture was a Sufficient Remedy

i) The standard of review is correctness

[21} It is an unsettled question of law as to when the burden of proof shifts to the merging parties when a merger modification is proposed in advance of a tribunal hearing. In *Rogers*, the issue of a burden shift was irrelevant. Therefore, this question remains unresolved.

Rogers, *supra* para 9 at para 14.

[22] In the current matter, the Tribunal determined that the burden shift principle from *Southam*—that the person who asserts a remedy should bear the burden of proof—did not apply (*Tribunal Decision*). The Tribunal held that binding commitments cannot be considered a proposed remedy for which the *Southam* principle can apply (*Tribunal Decision*). This new rule limiting what properly constitutes a "proposed remedy" is a question of law to be reviewed on a standard of correctness.

Canada (Director of Investigation and Research) v Southam Inc, 1 SCR 748 at para 89, 144 DLR 4th 1 [*Southam*].

Tribunal Decision, *supra* para 1 at paras 78–79.

ii) The principle from Southam should encompass the Merging Parties' divestiture and so the burden of proof rightly shifts to the Merging Parties

[23] The Tribunal incorrectly found that the *Southam* burden shift principle did not apply to the current matter. This is because the current matter is much more like *Southam* than *Rogers*. First, in *Rogers*, the divestiture was

irrevocable and would occur simultaneously with the merger. Second, in *Rogers*, the issue of a possible burden shift was completely irrelevant.

[24] In *Rogers*, the Court did not apply *Southam*. In *Rogers*, the merger itself was being irrevocably modified in advance; in *Southam*, the merger was completed and then a remedy was proposed afterwards (*Rogers CT*). In *Rogers*, had the original merger been blocked by the Tribunal, the companies could have immediately applied and been approved for the new modified merger because it addressed the SLPC concerns. It was efficient for the Tribunal to avoid this waste of time and resources and simply approve the modified merger. The determination that the divestiture in *Rogers* was not a proposed remedy made sense on the facts. By contrast, in the current matter the divestiture is not finalized, nor does it sufficiently address the SLPC concerns.

> *Rogers CT*, *supra* para 14 at para 122, aff'd in *Rogers*, *supra* para 9 at para 20.
>
> [25] In *Rogers*, the divestiture agreement was intended to close simultaneously with the merger (*Rogers CT*). Unlike *Rogers*, however, the Merging Parties' Divestiture Letter to the Bureau clearly states that Penguin would only begin the final process of entering a binding sale agreement of Emperor to Riddler *after* the disposition of the s.92 application (*Tribunal Decision*). Here, the divestiture is clearly being implemented separately, after the merger. Therefore, the divestiture is a proposed remedy.
>
> *Rogers CT*, *supra* para 14 at para 31.
>
> *Tribunal Decision*, *supra* para 1 at para 20.

[26] The burden shift matters because it is unclear if the remedy proposed by the Merging Parties will sufficiently address the SLPC. In *Rogers*, the FCA stated that the burden of proof can matter when ignoring it may cause procedural unfairness to a party. To place the burden on the Commissioner to prove the ineffectiveness of this unconfirmed and complex late-stage solution is simply unfair. The burden must rightly shift to the Merging Parties.

> *Rogers*, *supra* para 9 at para 16.

[27] In sum, the proposed divestiture of Emperor should be considered a "proposed remedy" and thus the burden shift from *Southam* applies. As discussed below, the Merging Parties cannot meet their burden.

C. The Tribunal Erred By Misapplying the Legal Test for the 'Likely to Prevent Competition Substantially' Prong of s.92 of the *Competition Act*

[28] In *Tervita*, the Supreme Court of Canada ("**SCC**") stated the legal test for the prevent prong under s.92 of the Act as follows:

> "The analysis…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*].

[29] In this case, the Tribunal misunderstood and misapplied the legal test from *Tervita* in several ways. First, the Tribunal committed an error of mixed fact and law by treating Mr. Datoe's testimony as dispositive with respect to the likelihood of Penguin's entry into the Other Cities. Second, the Tribunal erred in law by treating lead time as a limiting factor when assessing the likelihood of entry. Third, the Tribunal failed to consider that Penguin's entry into the Other Cities would likely have had a substantial effect on competition in them. Ultimately, the Tribunal made a palpable and overriding error in concluding that blocking the merger was a punitive solution to the SLPC.

i) The Tribunal erred by treating Mr. Datoe's statements as dispositive

[30] The Tribunal improperly treated Mr. Datoe's statements as "dispositive" of the likelihood of Penguin's entry into the Other Cities and failed to consider additional relevant factors (*Tribunal Decision*). The Tribunal properly identified the potential competitor as Penguin and acknowledged that barriers to entry are low, but then it inexplicably fixated on Mr. Datoe's elitist vision for HYD to remain exclusively available to Torontonians. Critically, the Tribunal failed to consider the fact that Mr. Datoe no longer had control of the company at the time of the merger. Rather, third-party investors had acquired enough shares to elect a majority of the board of directors of Penguin (the "**Board**"), and the Board has the final say regarding Penguin's strategic plans (*Tribunal Decision*). The Board also has a fiduciary duty to act in the best interests of the company.

Tribunal Decision, supra para 1 at paras 86–87, 53.

[31] The Commissioner accepts that, in conducting the "but for" analysis, the Tribunal should not "make future business decisions" for the Merging Parties (*Tervita*). However, the Commissioner does not ask the Tribunal to substitute its own business strategy; rather the Commissioner insists the Tribunal must determine what a reasonable business would do in the same circumstances.

Tervita, supra para 28 at para 76.

[32] One persuasive authority for this is the Competition Tribunal's decision in *Tervita*. In *Tervita*, one of the merging parties—the vendors of the Babkirk landfill—argued that, in the "but for" world, they would have continued trying to operate their bioremediation business unprofitably. However, the Tribunal rejected this argument: "it is unreasonable to suppose that [the vendors] would have been prepared to operate unprofitably beyond the fall of 2012, when they could have generated additional revenues by accepting more waste into the Secure Landfill part of their facility" (*Tervita CT*, emphasis added). Consequently, the Tribunal held that the transaction was likely to prevent competition substantially in the relevant market. Moreover, the SCC did not overrule this line of reasoning in its decision—the dispositive holding at the SCC was instead the efficiencies defence under s.96 of the *Act*, which is not relevant to the present matter.

The Commissioner of Competition v CCS Corporation et al, 2012 Comp Trib 14 at para 206 [*Tervita CT*].

[33] At the time of the merger, Penguin had completed several "funding rounds" and was majority-owned by third-party investors (*Tribunal Decision*). These investors can be reasonably presumed to be motivated by making a return on their investments. Hence, they would reasonably expect Penguin to expand into the Other Cities to maximize profits and value for eventual sale. Mr. Datoe's reason, however, for keeping HYD exclusive to Toronto is personal prejudice. He testified: "HYD is not intended for everyone...[I]f you're in Canada and can't be bothered to move to the Six, I don't want you on my app" (*Tribunal Decision*). If Mr. Datoe's vision for the company did not align with the investors' goal of profit-maximization, they would likely have used their voting power to replace him.

Tribunal Decision, *supra* para 1 at para 53.

[34] In addition, FYR's plan to make HYD available in the Other Cities approximately nine months after the merger clearly attests to the demand for HYD there. FYR attributes 57 percent of the merger's overall value as being based on bringing HYD to the Other Cities (*Tribunal Decision*). While FYR's plans are not strictly determinative of any plans that Penguin may or may not have had "but for" the merger, they do provide strong evidence for what *any* profit maximizing business in the position of Penguin would have done—expand.

> *Tribunal Decision*, *supra* para 1 at para 49.

[35] Last, the Tribunal's reasons regarding the geographic market fail to pay any serious attention to the nature of the product or the market as a whole. Dating applications are not like traditional brick and mortar stores. There is virtually no economic downside to scaling up due to the low cost and ease of entering a new geographic market. Citrus and Ogle testified that HYD can be made available on their app stores in new cities in as little as two to three days (*Tribunal Decision*). Moreover, because HYD is selling ad space, Penguin benefits from maximizing user count. Thus, it would be unreasonable for them *not* to expand.

> *Tribunal Decision*, *supra* para 1 at para 48.

ii) The Tribunal committed an additional error of law by treating lead time as a limiting factor for evaluating likelihood of entry

[36] The Tribunal also committed an error of law when conducting its alternative analysis of whether Penguin was likely to expand outside Toronto in the near future (*Tribunal Decision*). In particular, the Tribunal erroneously treated lead time as the limiting factor for evaluating Penguin's likelihood of entry into the other geographic markets, which is contrary to the SCC's explicit instructions in *Tervita*. Therefore, the Appeal Tribunal owes no deference to the Tribunal's conclusion that Penguin was not likely to enter the Other Cities within three months.

> *Tribunal Decision*, *supra* para 1 at para 87.

> [37] Lead time "refers to the inherent time delay that a new entrant, facing certain barriers and acting diligently to overcome them, could be expected to experience when trying to enter the market" (*Tervita*). Lead time is one relevant factor to consider when assessing a firm's likelihood of entry into a geographic market. The SCC stated that the "relevant lead time

> may be short, and thus a determination of whether market entry is likely within that timeframe may be sufficiently definite to meet the "likely" test" (*Tervita*, emphasis added).

Tervita, *supra* para 28 at paras 71, 74.

[38] The Tribunal appropriately cited this passage from *Tervita* (*Tribunal Decision*); however, it failed to pay attention to the context in which the SCC made these comments. The SCC's point was that lead time is *less* useful as a measuring stick for the likelihood of entry when it is lengthy. However, it does not follow that, when it is short, lead time is the only or even the most important consideration with respect to likelihood of entry.

Tribunal Decision, *supra* para 1 at para 88.

[39] Nonetheless, the Tribunal arbitrarily used lead time as a maximum duration it could look into the future in determining whether Penguin was likely to enter the Other Cities. For example, it stated: "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 approximated by the lead time it would require to do so." (*Tribunal Decision*, emphasis added). In fact, this is not consistent with *Tervita*; rather, *Tervita* says that "the timeframe that can be considered must of course be determined by the evidence in any given case" (*Tervita*).

Tribunal Decision, *supra* para 1 at para 87.

Tervita, *supra* para 28 at para 75.

[40] The Tribunal also gave no explanation for why it chose a figure of three months. It seems to have accepted the Merging Parties' submissions on this point without second thought. The lead time could just as easily have been nine months—this is how long FYR thinks it will take to bring HYD into the Other Cities following the merger (*Tribunal Decision*). Ultimately, the Tribunal's choice of three months was arbitrary and insufficiently justified. The Bureau's *Merger Enforcement Guidelines* ("**MEGs**") state that timely entry "means that such entry would have occurred within a reasonable period of time, given the characteristics of the market in question" (*MEGs*). While the MEGs are not binding on the Tribunal, it should have explained how its figure of three months was reasonable in light of "the characteristics of the market in question."

Tribunal Decision, *supra* para 1 at para 54.

Canada, Competition Bureau Canada, *Merger Enforcement Guidelines* (Ottawa: 6 October 2011) at 2.11 [*MEGs*].

iii) Penguin's entry into Montréal, Calgary and Vancouver would have had a substantial effect on competition

[41] Because the Tribunal found that Penguin was not likely to enter the Other Cities, it never considered the third prong of the test with respect to those cities: whether Penguin's entry would have had a substantial effect on competition there "but for" the merger. Hence, the Commissioner proposes that the Appeal Tribunal decide this issue *de novo*. Penguin's entry into the Other Cities would have had a substantial effect on competition in those local geographic markets.

[42] Crucially, Penguin was competing vigorously with FYR in Toronto prior to the merger. The Tribunal appropriately found that there was a documented record of rivalry between the two companies in Toronto (*Tribunal Decision*). This is also demonstrated by the companies' market shares in Toronto. Bat Signal and HYD possess the largest market shares at 34 percent and 16 percent respectively (*Tribunal Decision*). Meanwhile, the rest of the market is fragmented, with no other application having a market share over 10 percent.

Tribunal Decision, *supra* para 1 at paras 93, 26–27.

[43] Ultimately, if the court finds that Penguin was likely to enter the Other Cities, then it should be uncontroversial to find that HYD would have a substantial effect on competition in those cities. In Montréal, Calgary and Vancouver, Bat Signal is also the most used app, with market shares of 34 percent, 51 percent and 43 percent respectively (*Tribunal Decision*). That is, Bat Signal's position in the market is roughly equally as dominant in Montréal as it is in Toronto and even more dominant in Calgary and Vancouver. Penguin's entry into these markets would have served as a check on FYR's pre-existing market power.

Tribunal Decision, *supra* para 1 at para 59.

D. The Tribunal Properly Found That the Merger Would Substantially Lessen Competition in Toronto

[44] Despite the issues with its analysis of the prevent prong of s.92, the Tribunal rightly found that there would be a substantial lessening of competition in Toronto due to the non-price effects of the merger (*Tribunal*

Decision). The Appeal Tribunal should uphold this finding for two reasons: first, the Tribunal committed no palpable and overriding error in determining that the merger would substantially diminish non-price competition in Toronto; second, the divestiture of Emperor is likely an insufficient remedy for the anti-competitive non-price effects of the merger.

Tribunal Decision, *supra* para 1 at paras 92–93.

i) The Tribunal applied the correct law in evaluating whether the merger would substantially lessen competition in Toronto

[45] Whether the Tribunal applied the right legal test is an extricable question of law. Therefore, the standard of review is correctness. The Tribunal's approach for the lessening analysis was correct and should be upheld.

[46] First, the Tribunal applied the appropriate sections of the Act, ss.92 and 93 subsections (g) through (g.3) (*Tribunal Decision*). In particular, subsection 93(g) states that, in making an order under s.92, the Tribunal may have regard to "the nature and extent of change and innovation in a relevant market" (*Competition Act*).

Tribunal Decision, *supra* para 1 at para 96.

Competition Act, *supra* para 3, s 93(g).

[47] Second, the Tribunal properly stated and followed the test for a substantial lessening of competition as set out in *Tervita*. As the Tribunal put it: "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. In order to engage s.92, any such lessening must be substantial" (*Tribunal Decision*, emphasis in original). This is consistent with the guidance from the SCC in *Tervita*.

Tribunal Decision, *supra* para 1 at paras 91–92.

Tervita, *supra* para 28 at paras 44–46.

[48] Third, the Tribunal correctly relied on *Toronto Real Estate Board* as persuasive authority with respect to non-price effects and in particular innovation (*Tribunal Decision*). In *TREB*, the tribunal formulated the test as follows: "With respect to non-price dimensions of competition, such as quality, variety, service, advertising or innovation, the test applied is to determine whether the level of one or more of those dimensions of

competition was, is or likely would be materially lower than in the absence of the impugned practice" (*TREB CT*, emphasis added). The Tribunal's reasoning was upheld by the FCA.

> *The Toronto Real Estate Board v Canada (Commissioner of Competition)* , 2017 FCA 236 [*TREB*].
>
> *Tribunal Decision*, *supra* para 1 at para 92.
>
> *Commissioner of Competition v Toronto Real Estate Board* , 2016 Comp Trib 7 at para 464 [*TREB CT*].

ii) The Tribunal committed no palpable and overriding error in finding that the merger would result in substantially diminished non-price competition

[49] Ultimately, the Tribunal found that FYR's market power post-merger "could, in theory, be wielded to degrade non-price dimensions of competition" and thus the merger resulted in an SLPC in Toronto (*Tribunal Decision*). This is a finding of mixed fact and law and is entitled to deference.

> *Tribunal Decision*, *supra* para 1 at para 98.

[50] On the record before the Tribunal, it was reasonable to find that the Commissioner met the evidentiary burden of showing an SLPC based on non-price effects. Non-price effect "substantiality can be demonstrated by the Commissioner through quantitative or qualitative evidence" (*TREB CT*, emphasis added).

> *TREB CT*, *supra* para 48 at paras 469–470.

The Commissioner adduced significant qualitative evidence with respect to the merger's impact on innovation. Specifically, FYR's internal documents show that Penguin incentivized FYR to innovate. FYR's emails stated that FYR introduced Alfred as a feature of Bat Signal precisely because of HYD. In their own words, FYR was worried about Penguin out-innovating them and cutting into their market share: "it is critical that we bring this tool to market ASAP—we're losing users every day to new offerings, such as HYD … " (*Tribunal Decision*). This demonstrated incentive to innovate will be substantially diminished if FYR acquires Penguin.

> *Tribunal Decision*, *supra* para 1 at para 59.

[52] In addition, the Merging Parties' position—that the Commissioner must prove how innovation will be reduced—is a misreading of *TREB* (*Tribunal Decision*). In *TREB*, the Commissioner had a concrete theory about how the impugned practice would prevent innovation in the market (*TREB*). However, *TREB* did not hold that the Commissioner must prove one specific theory of how innovation would be diminished. Innovation by its very nature involves unpredictability. It may not be possible to know exactly *how* innovation will be reduced, yet at the same time it may be likely that innovation will be reduced in some meaningful way as a result of the merger. This is one of those cases.

Tribunal Decision, *supra* para 1 at para 62.

TREB, supra para 48 at para 2.

[53] Moreover, the legislature has made the important choice to include subsections (g) and (g.3) in the Act. Accordingly, imposing an impossible standard of proof on the Commissioner would defeat the legislative objective of protecting non-price competition. The key question is whether, on the balance of probabilities, the merger will result in an SLPC. The potential impact on non-price competition is one factor to consider when answering that question. The Tribunal was rightly cognizant of this, and its approach was sufficiently precise (*Tribunal Decision*).

Tribunal Decision, *supra* para 1 at para 97.

iii) The divestiture is not a sufficient remedy to the anticompetitive non-price effects of the merger

[54] As stated above, the Tribunal erred by failing to put the burden on the Merging Parties to demonstrate that the divestiture is an adequate remedy for the SLPC in Toronto and the Other Cities. The Merging Parties are unable to meet this burden. In the alternative, the Commissioner takes the position that the divestiture is insufficient to eliminate the substantial lessening and prevention of competition in the relevant markets.

[55] Riddler's Gord app does not pose any serious threat to FYR's market power in Toronto. The Merging Parties contend that acquiring the Emperor algorithm will help Riddler broaden Gord's appeal such that it can compete with Bat Signal. However, there is no evidence that any gains in the market made by Riddler will offset the loss of Penguin as a vigorous competitor in Toronto. Emperor was designed to work with HYD—not Gord.

Transplanting an algorithm from one app to another does not mean that Gord will suddenly become a compelling and competitive product.

[56] Riddler is *not* Videotron. In *Rogers*, the Tribunal rightly emphasized the fact that Videotron was a proven market disruptor which had already achieved substantial success in Québec (*Rogers CT*). Riddler is an early-stage start-up. In addition, the divestiture will not solve the SLPC in the Other Cities because of the Merging Parties' exclusive license to use Emperor outside Ontario. Thus, outside Ontario, it will be as if Penguin never sold the algorithm. Without the benefit of the algorithm outside Ontario, it is unlikely that Riddler will be able to enter the other geographic markets.

Rogers CT, *supra* para 14 at para 402.

Part IV—Remedy Sought

[57] In light of the above, the Commissioner respectfully requests an order allowing the appeal and blocking the merger.

APPENDIX A—TABLE OF AUTHORITIES

A. Legislation

Competition Act, RSC 1985, c C-34.

Competition Tribunal Act, RSC 1985, c 19 (2nd Supp).

B. Jurisprudence

Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited, 2022 Comp Trib 18.

Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc, 2023 Comp Trib 01.

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

Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc, 2023 FCA 16.

Canada (Director of Investigation and Research) v Southam Inc, [1997] 1 SCR 748, 144 DLR 4th 1.

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65. *Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp Trib 7. *Housen v Nikolaisen,* 2002 SCC 33.

Tervita Corp. v Canada (Commissioner of Competition), 2015 SCC 3.

The Commissioner of Competition v CCS Corporation et al, 2012 Comp Trib 14.

The Toronto Real Estate Board v Canada (Commissioner of Competition), 2017 FCA 236.

C. Government Documents

Canada, Competition Bureau Canada, *Merger Enforcement Guidelines* (Ottawa: 6 October 2011).