IN THE COMPETITION APPEAL TRIBUNAL

(ON APPEAL FROM THE COMPETITION TRIBUNAL)

BETWEEN:

THE COMMISSIONER OF COMPETITION

Appellant

AND

FIND YOUR ROBIN INC

Respondent

FACTUM OF THE RESPONDENT

Counsel For The Respondents
Team No. 24107
[February 9, 2024]

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Overview

[1] This is a case about how Canada's competition law will adapt to the unique realities of the digital economy (Furman). This is more than a simple merger review, it is a chance for Canada to shape the future of competition law, by recognizing the specific considerations inherent to digital markets. Courts must be careful not to make decisions based on outdated assumptions and presumptions about markets and digital economies. This is necessary to ensure the "adaptability of the Canadian economy" to technological evolution (*Competition Act*).

> Furman, Jason, Unlocking digital competition Report of the Digital Competition Expert Panel (London: Government Publications, 2019), at s 1.61 [Furman].
>
> *Competition Act*, RSC 1985, c C-34 at s. 1.1 [Competition Act].

[2] Find Your Robin's ("**FYR**") acquisition (the "**Merger**") of Penguin Ltd. ("**Penguin**") will not lessen or prevent competition in any market. This transaction aligns with the Competition Act's (the "**Act**") stated goal to "maintain and encourage competition in Canada […] [and] provide consumers with […] product choices." (*Competition Act*).

> *Ibid.*

[3] In a decision dated 18 October 2023 (the "**Tribunal Decision**"), the Competition Tribunal (the "**Tribunal**") refused to grant the Commissioner a prohibition order under s. 92 of the Act. *FYR* asks the Competition Appeal Tribunal (the "**Appeal Tribunal**") to uphold this order.

[4] The Commissioner has not come close to proving the Merger is likely to prevent or lessen competition substantially in either Vancouver, Calgary or Montreal. Any other conclusion put forth by the Commissioner has not been substantiated with enough evidence to overturn the Tribunal's Decision.

[5] The remaining allegations do not withstand further scrutiny. The centrepiece of this case, Penguin, has never been a true disruptor in the Toronto dating app market. Its growth has limitations with its premise of exclusivity and an aim to gatekeep users. Its value arises from an important algorithm that allows the app to cater to its limited user base. The allegations put forward by the Commissioner regarding the anti-competitive nature of this Merger are not consistent with the contemporary

realities of the digital market. FYR therefore requests the Appeal Tribunal to uphold the Tribunal's decision and deny the prohibition order put forth by the Commissioner.

Part I: Statement of Facts

A. The Parties

[6] This proposed merger is an agreement between FYR and Penguin. FYR is a user-focused online dating company, offering dating services with a mission to make love more accessible. Its flagship app, Bat Signal, is designed to assist all singles in finding compatible partners. On the other hand, Penguin offers a differentiated service through its app, the Hero You Deserve ("**HYD"**). This app is an exclusive selection-based service dedicated to creating romantic matches within Toronto's high society.

[7] Each of the parties' apps is available free of charge and permit users to browse and interact with other users' profiles. When two users mutually express interest in each other, they are connected within the app and can communicate using the integrated chat function. However, beyond this shared functionality, the apps differentiate themselves with unique features and services tailored to their specific user bases.

B. The Transaction

[8] This case arises from an application by the Commissioner of Competition (the "**Commissioner**") to block the proposed acquisition of Penguin by FYR. From the start, FYR and Penguin (the "**Merging Parties**") have cooperated fully with the Commissioner. They promptly notified the Competition Bureau (the "**Bureau**") of their impending merger within two weeks of entering into a Share Purchase Agreement. In addition, the Merging Parties swiftly complied with the Bureau's supplementary information request ("**SIR**"), and further acquiesced to the Bureau's request to not close the merger until the Tribunal's final disposition.

[9] Penguin subsequently negotiated an agreement with a third party, Riddler, to sell Penguin's acclaimed algorithm ("**the Sale**"). Riddler is an innovative dating service that offers users a dating app that is based on both users solving the same riddle to be able to interact with one another. This amended merger ("**the Transaction**") was submitted to the Commissioner just two days after the scheduling order was issued, on July 12, 2023. The Commissioner chose to take 17 days to respond to the Transaction as

proposed and refused to accept it as an amendment to the original s. 92 application.

C. Procedural History

[10] The Tribunal rejected the Sale as an amendment to the Merger and concluded that the Merger, unmodified, would lead to a substantial lessening of competition ("**SLC**") in Toronto. Nevertheless, the Tribunal agreed that the Merger would not substantially prevent competition in Vancouver, Montreal and Calgary. Despite its conclusions on the effect of the Merger on competition in the Toronto market, the Tribunal did not find there was enough evidence to support the prohibition remedy sought by the Commissioner.

Part II: Statement of Points In Issue

[11] The central issue is whether there is sufficient cause to overturn the Tribunal's Decision and make an order under s.92 of the Act. To decide this issue, the Appeal Tribunal must determine:

i. Did the Tribunal incorrectly assess the evidence in respect to assessing the admissibility of the merger without regard to the Sale?

ii. Did the Tribunal appropriately hold that there would be no substantial prevention of competition in Vancouver,Calgary and Montreal?

iii. Did the Tribunal err in concluding that the Merger will likely result in a substantial lessening of competition in Toronto?

iv. Did the Tribunal correctly establish that the burden of proof was not discharged by the Commissioner and therefore no remedy order could be made?

The answer to all these questions is "yes".

Part III: Statement of Submissions

1. The Tribunal Should Have Completed its Merger Analysis with the Sale Included

[12] The Tribunal incorrectly determined that the Merger should not be considered with the Sale as the basis of the Transaction for which the s. 92 application is being challenged. By not considering all the relevant factors that would establish the contextual analysis, the Tribunal erred on mixed fact and law when it applied the *Rogers/Shaw* test. The test's application is

a mixed question of fact and law and will be determined on a standard of palpable and overriding error.

> *Canada (Commissioner of Competition) v Rogers Communication Inc*, 2023 FCA 16 [*Rogers* FCA].
>
> *Housen v. Nikolaisen*, 2002 SCC 33 [Housen].

[13] The Federal Court of Appeal in *Rogers/Shaw* follows a two-step test. It requires a consideration of (i) which transaction best accords with reality and (ii) procedural fairness. Although the Tribunal correctly applied the test, it committed an error in its evaluation of the evidence put forth by the Commissioner. This misapprehension led the Tribunal to an incorrect conclusion.

> *Rogers* FCA, *supra* para 12 at para 18

1.1 The Merger with the Sale is the Transaction that Best Accords with Reality

1.1.1 The Duty of Good Faith is a Binding Obligation on the Parties

[14] The Tribunal erroneously concluded that the Sale was uncertain based on the Commissioner's evidence that Penguin and Riddler had "entered only into an MOU and not an actual transaction agreement".

> *Commissioner of Competition v Find Your Robin Inc*, 2024 Comp Trib at para 40 [FYR].

[15] The Tribunal did not properly assess the MOU and Draft Agreement ("**Draft APA**") based on the requirement to "negotiate in good faith and use best efforts" as a basis to consider the certainty of the Sale (para 18). The principle of good faith is a duty recognized by the Courts that is grounded in substantive jurisprudence (*Bhasin*). The MOU and the Draft APA were inaccurately determined to be uncertain due to a misapplication of the good faith principle in the common law. As the Court explains in *Molson*, "there may well be a distinction… between an obligation to negotiate *simpliciter* and an obligation to negotiate in good faith".

> *Bhasin v Hrynew*, 2014 SCC 71 [*Bhasin*]
>
> *Molson Canada 2005 v Miller Brewing Company*, 2013 ONSC 2758 at para 91 [*Molson*].

[16] Although not binding on this Appeal Tribunal, the good faith analysis outlined in *Molson* can serve as a persuasive legal test to establish the strength of the MOU and Draft APA. In *Molson*, the Court establishes that "any covenant to negotiate in good faith, as any other contractual obligation, must be interpreted in accordance with the intention of the parties in the context in which the agreement was negotiated and executed" (*Molson*).

Ibid at para 108.

[17] The letter sent to the Bureau to inform the Commissioner of the Sale (the "**Letter**") is sufficient evidence to demonstrate the intention of Penguin to enter into a binding agreement with Riddler. Although conditional on the completion of the Merger, the Letter calls for "an immediate sign and close" and "is not subject to any third-party clearances of approvals" (*FYR*). By providing the Draft APA, the Letter and the MOU, the Parties have demonstrated their intention to be legally bound to negotiate an agreement "substantially in line with the terms" in the Draft APA (*FYR*).

FYR, supra para 14 at para 20 & 19.

[18] Furthermore, the Commissioner incorrectly uses Mr. Datoe's testimony as evidence of the inherent uncertainty of the MOU. This confers too much weight on the opinion of a non-legal expert's interpretation of a pre-contractual legal obligation. Although Mr. Datoe believes that he "could probably get out of the MOU if [he] really wanted" (*FYR*) without being in breach of Penguin's obligation to negotiate an asset purchase agreement, this cannot be held to have the same effect as a legal analysis on the obligations and duties of the parties beholden to the MOU. Mr. Datoe specifically mentions that the "lawyers are still racking up billable hours on monkey business behind the scenes" and that he doesn't "get involved in that nonsense" (*FYR*). This testimony is not a relevant piece of evidence to the *Rogers/Shaw* test given its speculative nature.

Ibid at para 41

Rogers FCA, supra para 12.

1.1.2 The Tribunal Failed to Address the Importance of Efficiency in Merger Challenges

[19] The Tribunal failed to consider the second important consideration of the Federal Court of Appeal in *Rogers/Shaw*. The Court affirms that the Act aims to "address truth and reality, not fiction and fantasy" but also

presents the importance of the "efficiency" goal. The Court upheld that not accepting the Shaw divestiture as an amendment to the original transaction would be contrary to the purpose of "efficiency" as promoted by the *Act*. Excluding the divestiture would "require the entire process under the Act, including the Bureau's study and assessment of the transaction to start all over again from the beginning" (*Rogers* FCA). The delay could have a significant impact on the Merger itself by causing "a transaction that is procompetitive and in the public interest, to die" (*Rogers* FCA).

> *Rogers* FCA, *supra* para 12 at para 18.

[20] If the remedy, as it stands, is granted to the Commissioner, this transaction will be blocked, and the Merging Parties will have to apply for a s. 92 evaluation for a second time. This would create an undue burden on both the Merging Parties and the Commissioner, who will have to reassess this case with the Sale included as a new merger. The Appeal Tribunal can respect the clearly stated goal of efficiency in the *Act* and approve the Sale as an amendment to the Transaction to ensure the decision is accurate the first time.

[21] Moreover, although not binding on the Appeal Tribunal, accepting an amended Transaction would be in line with international jurisprudence and competition law standards. This is one of the first s. 92 challenges that have been litigated while a transaction is incomplete. Due to this limited jurisprudence, it is important to look at persuasive sources of law for inspiration on how to best achieve a balance between enforcement and business efficiency.

> *Canada (Director of Investigation and Research) v Southam Inc*, 1997 CanLII 385 (SCC) [Southam].
>
> *Canada (Director of Investigation and Research) v. Hillsdown Holdings Ltd.*, 1992 CanLII 2092 (CT) [Hillsdown].
>
> *Canada (Commissioner of Competition) v Superior Propane Inc.,* 2001 FCA 104 [Superior Propane].

[22] U.S. courts have disagreed with the Commissioner's proposed approach. In the leading case on a post-application divestiture filing, the Court was "unwilling simply to ignore the fact of the divestiture". The Federal Trade Commission (FTC) had to accept the merger as amended by the divestiture, even after a pre-merger notification had been made as well as a request for additional information (*Arch Coal*). The FTC has since

established that where a "merger [is] unconsummated and would occur simultaneously or almost simultaneously with the divestiture" and the "parties entered into the divestiture agreement before the [antitrust authority] filed the complaint or soon after", "the divestiture could be deemed part of the transaction being challenged" (Otto). The current case is analogous to *Arch Coal* in the timeline and submission of a post-review sale proposal to amend an ongoing merger. Following the FTC's lead would put Canada's competition enforcement in line with international standards.

> *Federal Trade Commission v Arch Coal*, Inc. 329 F. Supp (2d) 109 (D.D.C. 2004) at pp. 2-5 & 7-8 [*Arch Coal*].
>
> *In re Otto Bock HealthCare North America*, Inc, 2019 FTC 79 at p 52 [*Otto*].

1.2 The Commissioner Was Not Owed a Duty of Procedural Fairness

1.2.1 The Commissioner Imposed His Own Expedited Timeline

[23] The second step of the *Rogers/Shaw* test requires a contextual analysis of the potential unfairness that could arise from an amended merger agreement. The Tribunal erroneously concluded that they could not consider the Sale as an amendment since 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" (*FYR*). The Commissioner argues that the timeline is distinguishable from *Rogers/Shaw* since the Bureau was not informed of the divestiture with enough time to prepare accordingly. According to the Commissioner, the turnaround between the current review and the beginning of the litigation process was a lot shorter leading to procedural unfairness.

> *FYR*, *supra* para 14 at para 72.

[24] This interpretation of the timeline is inaccurate and does not properly consider the role of the Commissioner in setting her own investigation and enforcement timelines. First, the Commissioner had the right to commence a s. 92 application any time after the SIRs were complied with and certified. The Commissioner chose to file the application right after finishing the review of the proposed Merger. The only statutory imposed timelines included the 30-day waiting period after the initial pre-merger notification and the subsequent 30-day waiting period after the SIRs. If the Commissioner wanted more time, the s. 92 application could have been filed months

after the SIRs were complied with and up to year after the Merger was completed. In *Rogers/Shaw*, the s. 92 application was filed a whole year after the initial pre-merger notification. To indicate that the expedited timeline in FYR was outside of the control of the Commissioner and caused procedural unfairness mischaracterizes the powers of the Bureau.

> *Rogers* FCA, *supra* para 12.
>
> *Competition Act, supra* para 1 at s 123(1).

1.2.2 A Duty of Procedural Fairness Was Owed to the Respondents, not the Commissioner

[25] The second prong of the *Rogers/Shaw* demands that procedural fairness be considered in the evaluation of the admissibility of a merger amendment. The Tribunal erred in applying the concept of procedural fairness without considering what this duty should entail in context. In the seminal case of *Baker v. Canada*, it was established that decision-makers must be reasonable and that procedural fairness standards can differ depending on several contextual factors.

> *Baker v Canada,* 1999 SCC 699 [*Baker*].

[26] Although this appeal is not a judicial review of administrative action, the standards of procedural fairness set out by administrative law principles can still inform the process by which this branch of the test should be evaluated. Important factors include the statutory scheme and the legitimate expectations of the Merging Parties based on the review process. As it has been implied in the *Competition Act* and the *Merger Enforcement Guidelines* (MEG) drafted by the Bureau, the s. 92 application is meant to be an ongoing conversation between the parties to determine which parts of the transaction are problematic to encourage resolution before litigation.

> Competition Bureau Canada, "Merger Enforcement Guidelines" (last modified on 16 January 2024) [MEG].

[27] If this was not the intent, then there would not be an option to negotiate a settlement and effective remedies. Procedural fairness dictates that the affected party should have the chance to respond in cases where this dialogue is a legitimate expectation. The wording of the *Act* and the guidance provided by the MEG support this concept of an ongoing dialogue when they claim that the "Bureau generally attempts to negotiate an agreement with the merging parties without proceeding to litigation" (point 4).

The Merging Parties were not afforded this opportunity to participate in an ongoing dialogue and had no choice but to submit the Sale proposal after the s. 92 application was put forth. The Tribunal should accept the Merger as amended by the Sale to ensure procedural fairness for the Respondents.

2. The Tribunal Correctly Concluded That There Would Be No Prevention of Competition in Vancouver, Calgary, and Montreal

[28] The Tribunal correctly found on a balance of probabilities that there would be no prevention of Competition in Vancouver, Calgary, and Montreal. The Tribunal was correct in its finding that it was unlikely that Penguin would enter the markets but for the merger, and that such finding was sufficient to dispose of the issue (*Tervita* SCC, & *FYR*).

> *Tervita Corp v Canada (Commissioner of Competition),* 2015 SCC at para 6-61 [*Tervita* SCC]. *FYR, supra* para 14 at para 84.

[29] The test's application is a question of mixed fact and law and will be determined on a standard of palpable and overriding error (*Housen*). The Appeal Tribunal shall therefore be highly deferential to the Tribunal's findings. We see no obvious error that goes to the "very core of the outcome of this case." (*South Yukon Forest*) The Tribunal findings should stand.

> *Housen*, *supra* para 12.
>
> *Canada v South Yukon Forest Corporation,* 2012 FCA 165 at para 46 [South Yukon Forest].

3. The Merger Will Not Result in Any Substantial Lessening of Non-Price Competition in Toronto

[30] The Tribunal erred in law and in analyzing questions of mixed fact and law when it determined that there was a SLC in Toronto. To determine if a merger will cause an SLC the Tribunal must look at the factors outlined in s. 93 of the Act.

> *Competition Act*, *supra* para 1 at s 93.

[31] The Commissioner provides insufficient basis for its allegation that the merger will cause a SLC in Toronto. She maintains that this is demonstrated by a. the removal of an effective competitors, b. the lack of remaining effective competition in the market and c. the limited and reduced nature

of change and innovation in the market caused by the Merging Parties increased market power.

[32] It may be helpful for the tribunal to conceptualize a) and b) as matters that may enable an increase in market power, while c) are the likely results of increased market power.

3.1 Market Shares and Market Power Are Two Distinct Concepts

[33] The Commissioner falsely implies that the increased market shares of the Merging Parties post-Merger will provide the Merging Parties with greater market power (*FYR*). The Tribunal fails to consider the important differences between market shares and market power. Market shares are the relative amounts of a total available market that is being serviced by a company while market power is, "the ability to **profitably influence** price or non-price dimensions of competition **for an economically meaningful period of time.**" (*P&H*) Moreover, the Tribunal fails to include in its analysis that the Act explicitly precludes the Commissioner or a tribunal from finding that a merger will substantially lessen competition solely on the basis of increased market shares (*Competition Act*).

> *FYR, supra* para 14 at paras 59 & 93.
>
> *Canada (Commissioner of Competition) v Parrish & Heimbecker Limited*, 2022 Comp Trib 18 at para 158 [P&H].
>
> *Competition Act*, *supra* para 1 at s 92(2).

[34] Consequently, the Appeal Tribunal cannot find a SLC in Toronto solely on the basis that the Merger will increase FYR's market shares.

3.2 The Merger Will Not Remove a Vigorous and Effective Competitor from the Toronto Market.

[35] Most horizontal mergers will cause the removal of a competitor. Consequently, in s. 93(f) the Act requires the Commissioner to demonstrate that a merger will cause the removal of an effective competitor. But Penguin is not an effective competitor of FYR. If the Act solely required the removal of **a** competitor**,** most mergers would not be allowed to take place.

> *Ibid* at s 93.

HYD offers a highly differentiated service, that potentially overlaps with a meager part of FYR's consumer base. HYD is not meant for the masses. It is a

product that caters to the 1%. This exclusivity is bred into HYD through the Emperor algorithm which ensures that only those who are deemed worthy may use HYD. A product that is meant for the elite does not meaningfully compete with a product designed for broad consumption. This contrasts starkly with prior cases in which the removal of a vigorous and effective competitor was found. In *Secure Energy*, the Tribunal concluded that an effective competitor was removed because the merging parties "competed head-to-head on price and service." (*Secure Energy)*

> *Canada (Commissioner of Competition) v Secure Energy Services Inc,* 2023 Comp Trib 02 at para 570. [Secure Energy].

[36] Similarly, Secure warns us of the risk of assuming that a firm offering similar services is an effective competitor. When dealing with the question of remaining competition, the Tribunal in

Secure Energy realized that what at first glance were thought to be effective competitors were not truly substitutes to the product *Secure* offered (*Secure Energy*). The alleged competitors in *Secure* were not effective competitors as they either i) did not accept all types of waste, ii) were not considered an acceptable alternative by customers or iii) were located significantly farther from the customers than the facilities of the merged parties (*Secure Energy*). A parallel can be drawn between the findings in *Secure Energy* and the fact that many of FYR's customers would either not be viable candidates for the HYD, and/or would not deem HYD as a desirable substitute to FYR, and vice-versa.

> *Secure Energy*, *supra* para 35 at paras 252, 254 & 256.

[37] Moreover, by its own design HYD will inherently be capped at a small number of Toronto's population as it is not meant to achieve broad adoption. Given the lack of overlap between the two apps the Merger will not cause an aggregation of market power.

3.3 The Remaining Competitors in Toronto Will Be Effective

[38] The evidence produced by the Commissioner has at most demonstrated that HYD is one of FYR's many competitors. For example, the Commissioner claimed that FYR's internal documents demonstrated that Penguin was an effective competitor because FYR was "losing users every day to **new offerings, such as** HYD." (*FYR)* This internal document does not prove that HYD is an effective competitor, but rather that HYD was a

part of the competitive pressure exerted by the array new offerings present in Toronto. Such pressure will remain after the Merger.

> *FYR, supra* para 14 at para 59.

3.3.1 The Appeal Tribunal Must Also Find That the Remaining Competition Will Be Insufficient to Constrain Increased Market Powers.

[39] While FYR strongly believes that the Merger will not eliminate a strong and effective competitor, it maintains that even if the Appeal Tribunal reaches a different conclusion, it would not be sufficient on its own to prove an increase in market power in Toronto. This is because the remaining competitors, (amongst others Riddler, Fumble and Knob,) will remain sufficiently effective.

[40] The consequences of the removal of an effective competitor on competition will be highly dependent on the effectiveness of the remaining competition (MEG). At trial, the Tribunal erroneously limited its evaluation to the removal of an effective competitor and did not observe the ensuing impact on market power. Instead, the Tribunal should have considered all relevant indicators of market power (*P&H*). In its limited analysis, the Tribunal failed to find that the remaining competition in Toronto will be sufficiently effective to prevent the exercise of increased market power by the Merged Parties. First, the presence of at least 7 other dating apps available within the Toronto market signals, at a minimum, that the Merged Party will not become a monopoly (*HYD*). This contrasts with *Secure Energy*, where the removal of a competitor left consumers with only one corporation that could reasonably fulfill their waste collection needs. (*Secure energy*).

> MEG, *supra* para 26 at s 6.6. *P&H, supra* para 33 at para 466. *FYR, supra* para 14 at para 27.

> *Secure Energy*, *supra* para 35 at paras 254 & 256.

[41] Second, the Commissioner has not introduced any evidence that demonstrates the inability of the remaining competitors to compete effectively, beyond the fact that the Merging Parties will have a greater share of the market. This ignores the dating app market's distinctive structure and characteristics, which enables competitors with smaller market shares to compete effectively. The German Competition authority found that, amongst other factors, differentiation, the multi-homing of users, the predominance of new customer business and low barriers to entry made it

highly unlikely that merged parties could acquire sufficient market power to negatively impact competition. The following sections will demonstrate how such dynamics are also present within the Toronto market.

> Beschlussabteilung des Bundeskartellamtes [Decision Division of the Federal Cartel Office], 22 October 2015, *OCPE II Master/EliteMedianet,* B6-57/15 (Germany) at para 140, 145-147, 151 & 155 [*OCPE II Master*].

3.3.2 The High Levels of Differentiation Between Dating Apps Acts as a Safeguard Against Market Power Concentration

[42] The Appeal Tribunal should give considerable weight to the high level of differentiation between dating apps. For example, Riddler caters to puzzle enthusiasts, while HYD seeks elite Torontonians. In such circumstances, lower market shares should not be equated with a failure to effectively compete. Instead, it reflects an incredible differentiation of products, catering to varying consumer preferences. This high degree of consumer choice is indicative of a highly competitive market.

3.3.3 Multi-homing Acts as a Guardian Against Network Effects

[42] The Commissioner claims that the strong network effects caused by the Merged Parties, will increase barriers to entry, making it challenging for new entrants to build substantial consumer bases. She erroneously adduces that the Merged Parties will consequently lose their incentives to invest in newer features and become more inclined to boost advertising for increased profits. Although this may be true in industries where barriers to entry are high and switching is difficult, these characteristics are not representative of the dating app market, in which multi-homing is prevalent. "Multi-homing refers to a situation in which users […] use several competing platform services in parallel." (EC) Multi-homing reduces switching costs, thereby lowering barriers to entry. New entrants and other competitors are therefore not required to persuade customers to exclusively use a new and unfamiliar platform, as consumers can simultaneously take advantage of multiple platforms. (OECD *Non-price effects*) The CMA having declared multi-homing as a "possible 'antidote' to strong network effects." (Furman)

> EC, *Multi-homing: obstacles, opportunities, facilitating factors: analytical paper 7,* [2021] (Publications Office) at 8 [EC].

> OECD, *Non-price effects of mergers – notes by Germany*, Doc no DAF/COMP/WD (2018) 12 (2018) at para 23 [OECD *Non-price effect*].

Furman, *supra* para 1 at s 1.88.

[44] Consequently, the Appeal Tribunal should not accord any weight to the Commissioner's claim that the Merged Parties possible increased market share will cause a SLC.

4. The Sale is Not a Remedy and a Prohibition Order Would Be Punitive in Nature

[45] The Supreme Court of Canada (**"SCC"**) in *Southam* held that the party asserting a remedy bears the burden of proving it. Following this assertion, the Commissioner rightfully bears the burden of justifying the prohibition order it seeks under s. 92. Unlike the order submitted by the Commissioner, the Merging Parties have not submitted a remedy that would shift the burden to them to prove the likelihood of this remedy addressing the SLPC.

Southam, *supra* para 21.

4.1The Sale is not a Remedy

[46] The Sale should not be considered a remedy. As the Tribunal correctly assessed, a true remedy would have a binding effect on the Sale between the Merging Parties. We continue to assert that the Sale is certain if the Merger were to be approved due to the binding nature of the principle of good faith. Despite this pre-contractual negotiation obligation, right now there is no obligation of result like there would be if this was a proposed divestiture meant to rectify an SLC.

[47] As per the Bureau's definition of a remedy, "terms must be clear and measures must be sufficiently well defined… clear terms and defined measures ensure that such remedies can be enforced by the Bureau or the Tribunal" (Competition Bureau Bulletin). This is not the nature of the MOU and the Draft APA between Penguin and Riddler. The duty to negotiate in good faith to enter into an agreement as set out in the Draft APA is the only enforceable obligation included in the MOU. The Commissioner claims that the Sale is so uncertain it should not be considered a legal reality while asserting that the Sale is such a certainty that it must be evaluated and labelled as a remedy (*FYR*).

Canada, Competition Bureau, *Information Bulletin on Merger Remedies in Canada* (Bulletin), (Ottawa: 2006) at para 8 [Competition Bureau Bulletin].

FYR, *supra* para 14 at para 79.

[48} Although jurisprudence has shown that divestitures are used by the Competition Bureau and merging parties as negotiated or imposed remedies, this does not mean that every sale agreement will meet the standards of an effective remedy and should be treated as much more than a simple business transaction (*Southam, Tervita & Secure Energy*).

Southam, supra para 21.

Tervita, *supra* para 28.

Secure Energy, *supra* para 35.

4.2 The Sale and the Burden of Proof

[49] The Commissioner bears the burden of proof, whether the Sale is included in the original transaction or not. The Tribunal correctly applied *Southam* in this case when it differentiated a situation where both parties proposed alternative remedies before the Tribunal rather than the present reality, where one party has proposed a remedy and the Merging Parties have presented the Sale agreement. The burden of proof remains on the Commissioner to establish that the Sale is not an adequate remedy to resolve a potential SLPC to justify a full prohibition order that is not to be interpreted as punitive. The Tribunal correctly asserted that the "Commissioner bears the burden of supporting it [the prohibition order] on a balance of probabilities".

FYR, *supra* para 14 at para 76.

4.3 A Prohibition Order is Punitive and Not the Only Effective Remedy Available

[50] The Tribunal correctly established that there was only one remedy proposed at trial. This remedy was put forward by the Commissioner and sought to completely block the Merger. Despite this being the sole remedy proposed, the Tribunal chose not to grant the Commissioner this prohibition order due to its punitive nature. The Tribunal correctly assessed that the remedy sought by the Commissioner was not appropriate and was not the only effective remedy available.

[51] The burden of proof remains on the Commissioner to demonstrate why the prohibition order is the least intrusive remedy. The Commissioner

has not provided enough evidence for the Tribunal to determine the effectiveness of a potential divestiture, and until this burden is effectively disposed of, the prohibition order will remain a punitive remedy.

[52] The applicable standard for what constitutes a punitive remedy can be found in *Southam*, where the Court argued that the remedy presented "is not punitive, because the Tribunal found that it was the only effective remedy". These facts are distinguishable from the present case, where the Tribunal did find that the prohibition order would be effective but did not have sufficient evidence to make an informed conclusion on the effectiveness of a divestiture. *Southam* further clarifies that "if the least intrusive of the possible effective remedies overshoots the mark … such a remedy is not defective". As opposed to the full evaluation of both remedies put forth to the Court in *Southam*, in this case, the Tribunal was not able to determine the effectiveness of the least intrusive of the possible effective remedies. The Commissioner continues to bear the burden of proof to provide enough evidence to demonstrate that the divestiture is not an effective remedy. Only then can the prohibition order be considered appropriate.

Southam, supra para 21 at paras 89 and 104.

[53]Furthermore, the Competition Bureau in its own publication gives guidance on the appropriateness of a full prohibition order. It explains that "most structural remedies involve a divestiture of asset(s) rather than an outright prohibition or dissolution of the merger) (Competition Bureau Bulletin). The publication claims that "prohibition or dissolution will be required when less intrusive remedies, which would otherwise eliminate the substantial lessening or prevention of competition, are unavailable" (Competition Bureau Bulletin). The Commissioner is not following her own guidance by pushing for a prohibition order, knowing that there are other less intrusive remedies.

Competition Bureau Bulletin, *supra* para 47 at para 11.

4.4 The Tribunal Does Not Have to Impose an Order as Established by Statute and the Appeal Should Give Deference to this Discretionary Power

[54] Since the Commissioner was not able to discharge her burden to establish that her remedy was not punitive, it is erroneously assumed that the Tribunal must step in and make an order anyway. S. 92(1) of the Act explicitly states that "the Tribunal **may**" impose an order on the Merging

Parties. This does not mean that the Tribunal **must** impose an order (*Competition Act*). The statute gives the Tribunal significant discretion to decide whether to impose an order on the Merging Parties. The Tribunal correctly exercised this discretionary power when it decided that there was not enough evidence to justify any remedial order (*FYR*).

> *FYR*, *supra* para 14 at para 104.
>
> *Competition Act, supra* para 1 at s 92(1).

[55] As established in Rona, "in exercising its discretion, the Tribunal must be guided by the purposes of the Competition Act" (*Rona*). By refusing to issue a punitive order or a remedy without proper justification, the Tribunal correctly exercised its discretion to "maintain and encourage competition in Canada" (*Competition Act*).

> *RONA inc v Commissioner of Competition, 2003* Comp Trib 7, at para 91 [Rona].
>
> *Competition Act, supra* para 1 at s 1.1.

[56] The use of this discretionary power to address the facts at hand is a question of mixed fact and law. The Appeal Tribunal should defer to the decision of the Tribunal and not interfere, since the standard of "palpable and overriding error" has not been met (*South Yukon Forest*). The Tribunal provided enough justification for its decision as well as a thorough weighing of all the evidence put forth before it to exercise its discretionary power appropriately.

> *South Yukon Forest, supra* para 28 at para 46.

Part IV: Remedy Sought

[57] FYR requests the Appeal Tribunal to uphold the lower Tribunal's decision to not issue a prohibition order under s. 92 of the *Act* and permit FYR to move forward with the Merger. In the alternative, the Respondents seek an order remitting the question of an appropriate remedy back to the Tribunal, where the effectiveness of a divestiture can be evaluated based on the evidence that must be submitted by the Commissioner.

APPENDIX A: TABLE OF AUTHORITIES

A. Legislation: Canada

Competition Act, RSC 1985, c C-34.

B. Jurisprudence: Canada

Baker v Canada, 1999 SCC 699.

Bhasin v Hrynew, 2014 SCC 71.

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

Canada (Commissioner of Competition) v Rogers Communication Inc, 2023 FCA 16. *Canada (Commissioner of Competition) v Secure Energy Services Inc,* 2023 Comp Trib 02. *Canada (Commissioner of Competition) v Superior Propane Inc*., 2001 FCA 104.

Canada (Director of Investigation and Research) v Hillsdown Holdings Ltd., 1992 CanLII 2092 (CT).

Canada (Director of Investigation and Research) v Southam Inc, 1997 CanLII 385 (SCC).

Canada v South Yukon Forest Corporation, 2012 FCA 165. *Commissioner of Competition v Find Your Robin Inc*, 2024 Comp Trib. *Housen v Nikolaisen*, 2002 SCC 33.

Molson Canada 2005 v Miller Brewing Company, 2013 ONSC 2758.

RONA inc v Commissioner of Competition, 2003 Comp Trib 7.

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

Tervita Corporation v Canada (Commissioner of Competition), 2013 FCA 28.

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

C. Jurisprudence: United States of America

Federal Trade Commission v. Arch Coal, Inc. 329 F. Supp (2d) 109 (D.D.C. 2004).

In re Otto Bock HealthCare North America, Inc., 2019 FTC 79.

D. Jurisprudence: Germany

Beschlussabteilung des Bundeskartellamtes [Decision Division of the Federal Cartel Office], 22 October 2015, *OCPE II Master/EliteMedianet*, B6-57/15.

E. Government Documents: Canada

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2024), online: <ised-isde.canada.ca> [perma.cc/ YSQ5-L46B].

F. Other Materials

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APPENDIX B: GLOSSARY

CMA: Competition Market Authority (UK Competition Agency) FYR: Find Your Robin HMT: Hypothetical Monopolist Test HYD: The Hero You Deserve

ICN: International Competition Network

SLPC: Substantial Lessening or Prevention of Competition SLC: Substantial Lessening of Competition

SPC: Substantial Prevention of Competition

SSNIP: small but significant and non-transitory increase in price