COMPETITION APPEAL TRIBUNAL

BETWEEN:

CANADA (COMMISSIONER OF COMPETITION)

Appellant

AND

FIND YOUR ROBIN INC and PENGUIN LTD

Respondents

FACTUM OF THE RESPONDENT

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Overview

[1] Find Your Robin Inc. ("**FYR**") is an online dating service company operating across Canada. Its dating application, Bat Signal, is one of many such applications available for users across Canada. Penguin Inc. ("**Penguin**") is an online dating service company that offers its free application The Hero You Deserve ("**HYD**") only in the Toronto market.

[2] This is an appeal before the Competition Appeal Tribunal (the "**CAT**") from a decision of the Competition Tribunal (the "**Tribunal**") following an application made by the

Commissioner of Competition (the "**Commissioner**") under section 92 of the *Competition Act* (the "**Act**") alleging that the proposed merger between FYR and Penguin (the "**Merging Parties**") would result in a substantial lessening or prevention of competition ("**SLPC**") in Toronto, Montreal, Calgary and Vancouver.

Competition Act, RSC 1985, c C-34, s 92(1) [*Competition Act*].

[3] The Merging Parties notified the Commissioner of a divestiture of a significant asset, Penguin's "secret sauce": the Emperor algorithm, to Riddler Inc. ("**Riddler**") (the "**Divestiture**"). The Divestiture addresses any perceivable anti-competitive effects (which the Merging Parties deny) flowing from the proposed merger. Riddler's exclusive use of Emperor in Ontario as part of the proposed merger would crystallize its status as a capable and vigorous competitor in the Toronto dating application market.

[4.]The evidence supports that, on a balance of probabilities, there would not be a SLPC in any market in Canada even without the Divestiture. It also demonstrates that the Divestiture is pro-competitive and that the Tribunal did not err by dismissing the Commissioner's request for an order to block the proposed merger.

Competition Act, supra para 2, at s 92(1).

[5] The Tribunal committed no palpable or overriding error in finding that the proposed merger would not result in a SLPC in Toronto or any other geographic market. Furthermore, the Tribunal committed no reviewable error in finding that the blocking order sought was not justified in light of the Divestiture. The record demonstrates that the Divestiture is a fundamentally pro-competitive change to the proposed merger that must be considered as part of the section 92 application. The appeal should be dismissed.

Part I—Statement Of Facts

A. The FYR-Penguin Merger Promotes Competition for Dating Applications

[6] FYR is a leading player in the online dating industry and offers its successful Bat Signal dating application to users across Canada. Penguin's HYD is a proprietary and premier dating application intended for the "crème de la crème" that is available only in Toronto.

[7] FYR and Penguin announced, on February 19, 2023, a binding share purchase agreement wherein FYR would acquire all of the shares of Penguin, subject to certain conditions. FYR and Penguin offer their apps free of charge and compete against at least seven other distinct competitors for in-app advertising revenues.

[8] The Merging Parties notified the Commissioner of the proposed merger on March 1, 2023, and requested an advance ruling certificate or a no-action letter.

B. The Penguin-Riddler Divestiture

[9] The Merging Parties, eager to complete the transaction quickly and provide users across Canada with an improved product, moved to divest a significant asset from the proposed merger to ensure that there could be no basis for allegations of a resulting SLPC.

[10] On July 12, 2023, Penguin notified the Commissioner that it had entered a binding memorandum of understanding ("**MOU**") with Riddler—a competitor in the Toronto market and across Canada—for the sale and licensing of Penguin's crown jewel innovation: the source code for its "Emperor" algorithm. Emperor is described as "[t]he 'secret sauce' that powers HYD".

> *Commissioner of Competition v Find Your Robin Inc.* (18 October 2023) at para 20 [*Tribunal Decision*].

[11] Pursuant to the MOU, the Divestiture would see Riddler acquire Emperor and all related intellectual property. The agreement grants the Merging Parties only a five-year exclusive license to use Emperor outside of Ontario, during which Riddler will have exclusive use of Emperor in Ontario. After five years, the Merging Parties would have no rights with respect to Emperor in any geographic market.

[12] The Divestiture is fundamentally linked to the proposed merger and is not a mere remedy. In their "Divestiture Letter" to the Commissioner, the Merging Parties commit to completing the Divestiture alongside the proposed merger. The letter is clear that the Divestiture will be completed whether the merger occurs on a consensual basis or through the Tribunal.

Tribunal Decision, supra para 10, at para 20.

[13] Riddler is a rising player in the dating app market and well positioned to compete by leveraging the Emperor algorithm. Riddler's free-to-use Gord dating application is available across Canada and is poised for growth.

Tribunal Decision, supra para 10, at paras 17 and 19.

C. Market Overview

[14] The Merging Parties do not dispute that for the purpose of this proceeding, "dating applications" constitute the relevant product market and that dating applications have a local geographic dimension that is up to 15 kilometres from the user's location.

[15] Grove and Frolic, the two largest application stores, currently make available no fewer than nine and seven dating applications respectively (including those of the Merging Parties and Riddler). Overall low barriers to entry into the market, as identified by the Commissioner, encourage new entrants as well.

Tribunal Decision, supra para 10, at para 48.

D. The Commissioner's Review of the Proposed Transaction

[16] The Commissioner issued supplementary information requests ("**SIR**"s) to the Merging Parties on March 31, 2023. The Merging parties complied with the SIR by the end of May. The Commissioner then launched her section 92 application, leading to a hearing being scheduled for and commencing on September 18, 2023.

[17] Following the Divestiture Letter of July 12, 2023, the Commissioner had the opportunity to request, seek out, or consider information regarding the Divestiture before the hearing of her section 92 application. She declined to do so. Instead, in a letter dated July 29, 2023, she merely requested that the Bureau be appraised of any developments.

E. The Tribunal's Decision

[18] The Tribunal dismissed the Commissioner's section 92 application. It ruled that the only geographic market that could be considered is Toronto. The Commissioner failed to discharge her burden to demonstrate that, on a balance of probabilities, an order blocking the proposed merger was necessary to eliminate any SLPC in Toronto or any other geographic market.

Part II—Statement Of Points In Issue

[19] The Respondents' position on the issues raised in this appeal is as follows:

a) The Tribunal erred in law when it found that the Divestiture should not be considered alongside the proposed merger when deciding if it results in a SLPC.

b) The Tribunal committed no reviewable error in finding that the Commissioner bears the burden of proof regarding the Divestiture remedying any SLPC found to flow from the merger.

c) The Tribunal committed no reviewable error in finding that the only relevant geographic market is Toronto.

d) The Tribunal committed a reviewable error of law in finding the proposed merger created a SLPC in Toronto. On this alternative basis, if needed, this Appeal should be dismissed.

20. The standard of review applied to questions of law is that of correctness. The standard of review applied to questions of mixed fact and law is overriding and palpable error (*Vavilov*).

> *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 37 [*Vavilov*].

Part III—Argument

A. Considering the Divestiture Separately from the Proposed Merger is an Error of Law and Does Not Accord with the Purpose of the Act or the Jurisprudence

[21] The issue of whether the Divestiture should be considered separately from the proposed merger raises questions of law. As such, the standard is correctness (*Vavilov*).

Vavilov, supra para 20, at para 37.

B. The Tribunal Delved into Fictions and Fantasies by Considering the Proposed Merger Absent the Divestiture

[22] The Tribunal erred by failing to assess what it identified as the more likely merger scenario: that the merger would proceed alongside the Divestiture. The Federal Court of Appeal was clear in *Rogers-Shaw*: "[t]he purpose of the *Competition Act* predominates" (*Rogers-Shaw*). This purpose is to address truth and reality, not fiction and fantasy.

> *Canada (Commissioner of Competition) v Rogers Communications Inc*, 2023 FCA 16 at para 18 [*Rogers- Shaw*].

[23] The record demonstrates that, irrespective of the section 92 application, the proposed merger and Divestiture would either occur together or not at all. Furthermore, the testimony of Penguin's President, Mr. Datoe, confirmed that the Divestiture is "baked" and will occur alongside the proposed merger. The Tribunal's decision to consider the merger alone is therefore a foray into fiction and fantasy counter to the predominate purpose of the Act. *Tribunal Decision, supra* para 10, at paras 20, 41, and 77.

[24] Consideration of the proposed merger with the Divestiture represents the forward-looking approach required by the wording of section 92 of the Act (*Tervita*). Section 92 permits the Tribunal to intervene with "a merger or proposed merger [that] prevents or lessens, or is <u>likely</u> to prevent or lessen, competition substantially." In the case at bar, since the merger is yet to occur, the question is whether the proposed merger would be <u>likely</u> to cause a SLPC.

The Tribunal acknowledged that considering the proposed merger without the Divestiture "could be characterized as a departure from reality."

> *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 53 [*Tervita*].
>
> *Rogers-Shaw, supra* para 22, at para 110.
>
> *Tribunal Decision, supra* para 10, at para 70.

[25] The Tribunal's failure to conduct a realistic, forward-looking analysis was not only a departure from the language of the Act, but also antithetical to the efficient use of scarce public resources. In *Rogers-Shaw*, the Federal

Court of Appeal affirmed the Tribunal's refusal to apply their limited resources to consider a merger scenario that would never come to fruition.

Rogers-Shaw, supra para 22, at para 11.

[26] In the same way that Rogers would never own or operate Freedom Mobile, FYR will never own or use the Emperor algorithm in Ontario. The Tribunal's decision to ignore objective facts and consider the proposed merger absent the Divestiture is a departure from *Rogers- Shaw,* the Act, and reality. It is an error that should be overturned.

C. The Tribunal Erred by Distinguishing the Case at Bar from Rogers-Shaw Based on Certainty

[27] The Tribunal found that the proposed merger and Divestiture were "more likely than not" and "likely but not certain" to occur together (*Tribunal Decision*). Conversely, in *Rogers- Shaw*, evidence was adduced showing that the merger and divestiture were certain to occur together; one could not occur without the other. The Tribunal used this distinction to justify its departure from binding precedent set in *Rogers-Shaw* and analyze a state of affairs that is unlikely to ever occur.

Tribunal Decision, supra para 10, at para 69.

[28] The Tribunal erred in law on this point. *Rogers-Shaw* directs the Tribunal's analysis towards the likely future and reality, but it does not require certainty. To read this decision otherwise risks severely limiting the Tribunal's analysis, the efficacy of transactions that come before it, and the ability of the Tribunal to respond to reality.

[29] The Tribunal's finding that the Divestiture and proposed merger are more likely to occur together than not is based on the evidence adduced. Specifically, Mr. Datoe confirmed that the Divestiture was agreed upon and "baked" (*Tribunal Decision*). No evidence was presented to support the notion that the MOU is not binding or, more importantly, that parties to the Divestiture have any intention of extricating themselves from the MOU. *Tribunal Decision, supra* para 10, at paras 69 and 41.

[30] On the question of efficiency, the Federal Court of Appeal noted in *Rogers-Shaw* that limiting the Tribunal's ability to react to intervening events (such as the Divestiture before it here) would often require restarting the entire proceeding under the Act with a new pre- merger notification, application, responding pleadings, and other steps in the litigation which

had already occurred. This would be an inefficient use of the Tribunal's scarce resources, result in unnecessary delay and uncertainty, and discourage potentially pro- competitive transactions (*Rogers*).

> *Tribunal Decision, supra* para 10, at para 41.
>
> *Rogers-Shaw, supra* para 22, at para 18.
>
> *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc,* 2022 Comp Trib 1 at para 110 [*Rogers*].

[31] Beyond the absence of certainty, the Tribunal also justified its decision to analyze the "less likely reality" on the basis that judicial proceedings regularly operate by disregarding reality. (*Tribunal Decision*). In support of this, the Tribunal cited the rules of evidence as an area of law which "exclude information from consideration that may be regarded as probative."

However, the Tribunal did not cite any legal authority that empowers it to depart from the forward-looking analysis required by the Act.

> *Tribunal Decision, supra* para 10, at para 71.
>
> *Rogers, supra* para 30, at para 110.

D. Similarities to Rogers-Shaw Demonstrate that Procedural Fairness Does Not Justify a Departure from Reality

[32] The Tribunal ruled that concerns of procedural fairness favoured the Commissioner and justified analyzing the proposed merger absent the Divestiture. However, in *Rogers-Shaw*, in response to a similarly delayed divestiture notification, the Tribunal dismissed an invocation of the principle of procedural fairness by the Commissioner because he still had enough time to respond to this development. The Tribunal in the case at bar erred by failing to consider the same.

> *Tribunal Decision, supra* para 10, at para 71.
>
> *Rogers, supra* para 30, at para 115.

[33] The Merging Parties notified the Commissioner of the Divestiture 14 days after she brought her section 92 application whereas in *Rogers-Shaw*, the merging parties notified the Commissioner of the divestiture over one month after the Commissioner brought his section 92 application (*Rogers*).

The Commissioner had the opportunity to request and consider information on the Divestiture but elected not to do so, making any claims of procedural unfairness even more untenable. Further, the merging parties in *Rogers-Shaw* were made aware of the Commissioner's investigation and concerns about the merger over a year before the section 92 application was made, giving those merging parties far more time to arrange a divestiture than that afforded to the Merging Parties here.

Rogers, supra para 30, at paras 24-25 and 18-21.

Rogers-Shaw, supra para 22, at para 16.

Tribunal Decision, supra para 10, at paras 13-15.

[34] No evidence was produced before the Tribunal indicating that the timing of the Divestiture and its notification were prejudicial to the Commissioner. The Tribunal's depature from the *Rogers-Shaw* precedent is unjustified.

E. The Respondents Bear No Burden in this Case with Respect to Remedy

[35] The Tribunal committed no reviewable error in how it determined the burden each party bore. The Tribunal considered the correct legal principles and properly applied them to the facts relating to the transactions before it. This is therefore a question of mixed fact and law (*Vavilov*). Absent a palpable and overriding error, deference must be given to the Tribunal. The Tribunal committed no palpable and overriding error by holding that the Commissioner bears the burden of showing her proposed remedy is effective and non-punitive.

Vavilov, supra para 20, at para 37.

a. Applying Southam, the Divestiture is Not a Remedy Whose Effectiveness Must be Proven

[36] In *Rogers-Shaw*, the Tribunal found that an initial merger agreement subsequently modified by a divestiture did not create a distinct remedy which placed a burden on the merging parties to show how it alleviated any SLPC. It found that the divestiture was the second step of the initial merger which the Tribunal would assess together. The Commissioner, therefore, bore the burden of showing that the order sought was needed to alleviate

the alleged anti-competitive effect of the entire transaction, inclusive of the divestiture (*Rogers*).

Rogers, supra para 30, at para 121.

Rogers-Shaw, supra para 22, at para 15.

[37] The general rule set out in *Southam* that "the person who asserts should prove" is not absolute. In *Rogers-Shaw*, the Tribunal properly distinguished the facts from *Southam* because they were not asked to analyze a completed merger which would require the merging parties to advance a remedy to resolve a SLPC flowing from it (*Rogers*). Similarly, the Divestiture in the case at bar has been advanced as a modification to the proposed merger. It is a second step within the proposed merger transaction, rather than a remedy whose effectiveness must be proven by the Merging Parties. The burden then properly falls to the Commissioner to demonstrate that the proposed merger, as modified by the Divestiture, is likely to cause a SLPC.

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

Rogers, supra para 30, at paras 122 and 123.

[38] Despite the Tribunal erroneously assessing the competitive impact of the proposed merger absent the Divestiture, it recognized that the Divestiture is not a remedy which shifts the burden of proof to the Merging Parties. The Tribunal understood that even if the Divestiture is assessed separately from the proposed merger, it does not automatically become a remedy when the merger is not yet complete, as was the case in *Rogers-Shaw*. Despite the Tribunal's error, it still adhered to the jurisprudence from *Rogers-Shaw* by recognizing that *Southam's* rule is not absolute.

Tribunal Decision, supra para 10, at para 79.

Rogers-Shaw, supra para 22, at para 20.

[39] In the case at bar, the Tribunal found, when considering the entire factual record, the Commissioner had not demonstrated on the balance of probabilities that the Divestiture is insufficient to resolve any SLPC likely to arise from the proposed merger. This is a finding of mixed fact and law which is subject to deference for which no palpable or overriding error has been shown.

Tribunal Decision, supra para 9, at paras 102 and 104.

b. If the Divestiture is a Remedy, it Resolves any SLPC likely to Occur in Toronto

[40] If the CAT finds that the burden falls on the Respondents to show that the Divestiture resolves any anti-competitive effect found, the evidence before the Tribunal demonstrates that it effectively remedies any substantial lessening of competition in Toronto caused by the proposed merger. The Tribunal erred to the extent that it found otherwise. Under *Southam,* a remedy must restore competition to the point at which it can no longer be said to be substantially less than it was before the merger.

Southam, *supra* para 37, at para 85.

[41] The Tribunal found that the Divestiture "will significantly strengthen a third-party rival to the Merging Parties, mitigating FYR's post-merger market power". Despite this, it made an error of mixed fact and law by viewing Riddler as limited in its ability to compete due to its size. The Tribunal overlooked the clear evidence of parallels between Riddler and Penguin, two firms aiming to achieve growth while catering to a small but loyal user base. On the back of Emperor, Penguin rose to be a leading firm in Toronto in just three years. The evidence showed that Riddler, already the fifth-largest firm in Toronto, is poised for a similarly meteoric rise. Riddler's ability to strengthen its position as a rival to the merged entity and effectively replace Penguin in the Toronto market as a result of the Divestiture ensures that any lessening of competition caused by the proposed transaction will not be substantial.

Southam, *supra* para 37, at para 41.

Tribunal Decision, supra para 10, at paras 17 and 27.

F. The Relevant Geographic Market Does Not Include Vancouver, Calgary or Montreal: Absent the Proposed Merger, Penguin Had No Plans to Expand Outside Toronto

[42] The Tribunal did not err when it found that, on a balance of probabilities, the only relevant geographic market that can be considered in the section 92 application is Toronto.

Tribunal Decision, supra para 10, at para 89.

Competition Act, supra para 2, at s 92.

F.H. v McDougall, 2008 SCC 53 at paras 40 and 49.

[43] As a factually suffused issue, and therefore a question of mixed fact and law, the basis for review is palpable and overriding error (*Vavilov*). Absent such an error, deference is owed to the Tribunal's decision. The threshold for this finding is high; the error must both be obvious and "go to the core of the outcome of the case" (*South Yukon Forest Corp*).

Vavilov, *supra* para 20, at para 37.

South Yukon Forest Corp v R, 2012 FCA 165 at para 46.

a. The Tribunal Correctly Ascertained that the Market was Limited to Toronto

[44] The Tribunal was tasked with determining whether the proposed merger would be likely to result in a substantial prevention of competition ("**SPC**") in three geographic markets where Penguin has no presence: Montreal, Calgary, and Vancouver. Section 92 of the Act, under the prevention of competition branch, is concerned with the possibility of a firm with market power using a merger to limit competition in an otherwise contestable market (*Tervita*). The Tribunal concluded, on the facts and the applicable law, that Penguin was not a poised entrant in any additional market identified by the Commissioner.

Tervita, supra para 24, at para 60.

[45] The Tribunal applied the appropriate legal test to come to this finding (*Tervita*). First, it correctly determined the potential competitor is Penguin, the party being acquired. A "but- for" analysis was conducted to assess the nature of competition absent the proposed merger, taking into consideration relevant market conditions. Elements such as likelihood of entry, timing and substantiality of the proposed merger's effect all help to determine whether there is a SPC.

Tervita, supra para 24, at paras 61–78.

[46] Deference is owed to the Tribunal's finding that the Commissioner did not provide evidence to support, on a balance of probabilities, a finding that Penguin was a poised entrant in Vancouver, Calgary, or Montreal (*Tribunal Decision*). No palpable and overring error was committed.

Tribunal Decision, supra para 10, at para 86.

b. The "but-for" Scenario Demonstrates no SPC in Vancouver, Calgary, or Montreal

[47] The "but-for" test is designed to identify what market competitiveness would look like absent the proposed merger. It assesses three main components: likelihood of entry, time needed to overcome entry barriers in a new market, and sufficiency of effect (*Tervita*). Importantly, the test is non-speculative in nature (*Tervita*) and must be evidence-based.

[48] The Commissioner's claim that Penguin is a poised entrant in these three markets, absent the proposed merger, is based upon insufficient evidence arising out of merger documents related to integration planning, speculative timelines and incentives, and wording in the Merging Parties' joint press release (*Tribunal Decision*). The Tribunal therefore correctly ascertained that the Commissioner's position was purely speculative in nature (*Tribunal Decision*).

Tervita, supra para 24, at paras 67-79, and 65.

Tribunal Decision, supra para 10, at para 49.

c. Penguin Was Unlikely to Enter the Vancouver, Calgary, and Montreal Markets

[49] *Tervita* states that the mere possibility of entry is not enough, there must be evidence to support the contention that independent entry is likely. Mr. Datoe stated that the only Canadian market that Penguin is interested in, absent the proposed merger, is Toronto.

Expansion into other Canadian cities was "antithetical" to its mission (*Tribunal Decision*).

[50] Ordinary course business document plans are an inherent part of the likelihood test (*Tervita*), and Mr. Datoe's plan for Penguin is plain and obvious. The Commissioner put forth as evidence of likely entry a joint statement by Penguin and FYR outlining FYR's goal to help individuals "across Canada" as evidence of intention to expand (*Tribunal Decision*).

In determining a SPC, sufficient evidence related to Penguin's plans absent the proposed merger must be assessed (*Tervita*).

Tribunal Decision, supra para 10, at paras 53 and 49.

Tervita, supra para 24, at paras 68 and 67.

[51] The Commissioner contends that the expansion of Penguin into the relevant markets would be "extremely profitable." However, her supporting evidence are integration planning documents concerning the value assigned to Penguin by FYR as part of the merger. These documents only show increased revenue attributable to Penguin in relation to the proposed merger, and do not suggest that Penguin—acting independently—had any profit incentive to enter other markets in Canada (*Tribunal Decision*). The Tribunal committed no error in finding that the Commissioner had not shown that Penguin's alleged expansion absent the proposed merger was likely because there was no evidence to support such a proposition. *Tribunal Decision, supra* para 10, at para 49.

d. Penguin Would Not Establish Itself as a Viable Substantial Competitor in a Discernable Timeframe in Vancouver, Calgary, or Montreal

[52] For a SPC to be found, the profitable entry of Penguin into the relevant markets would have to be likely within a "discernible timeframe" (*Tervita*). As part of the forward-looking analysis, the Tribunal correctly refused to speculate on an undiscernible timeframe because there was no evidence before it that Penguin had any plans to enter any other Canadian market absent the proposed merger (*Tribunal Decision*). The Tribunal correctly refused to engage in speculation as to whether entry was likely given the lack of any supportable evidence grounded in reality.

Tervita, supra para 24, at paras 71 and 74.

Tribunal Decision, supra para 10, at para 53.

G. The Proposed Merger Would Not Result in a Substantial Lessening of Competition in Toronto

a. The Tribunal's Analysis Did Not Properly Consider Evidence of Substantiality

[53] The Tribunal erred in its analysis of substantial lessening of competition ("**SLC**") in Toronto by not turning its mind to the evidence before it concerning the <u>substantiality</u> element. In so doing, it committed a reviewable error on the standard of correctness (*Southam*).

Southam, supra para 37, at para 41.

[54] In assessing whether lessening of competition was substantial, the Tribunal erred in law by failing to consider two requisite key elements of non-price effects: degree and duration (*Tervita*). The Tribunal erronsouely stated that all that is required to be shown for this assessment is that competition is substantially lessened in a "general sense" (*Tribunal Decision*). The Tribunal never engaged with the issues of degree and duration in its substantiality assessment and therefore committed a reviewable error.

> *Tervita, supra* para 24, at para 45.

> *Tribunal Decision, supra* para 10, at para 95.

b. The Proposed Merger Will Not Materially Lower Quality, Variety, Service, or Innovation in Toronto

[55] The Commissioner argues that the merged entity could profitably exercise greater market power in Toronto to substantially lower non-price elements of competition. The Commissioner's position is that, as a direct result of increased market share, there would be less choice, quality, and poorer service in the Toronto market (*Tribunal Decision*).

> *Tribunal Decision, supra* para 10, at para 60

[56] The Commissioner's position on the "substantial" element of a SLC fails to consider the Merging Parties' practical ability and incentive to substantially lower the non-price effects of competition as a result of the proposed merger.

[57] For the Tribunal to ascertain whether substantiality is made out, the Commissioner must adduce sufficiently clear evidence regarding the degree and duration of the SPC (*Parrish*). However, the record shows that the Merging Parties' ability to reduce non-price elements, in degree and duration, would be tightly constrained by market forces and that the incentive to do so is non-existent.

> *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited,* 2022 Comp Trib 18 at para 476 [*Parrish*].

c. Network Effects in the Toronto Market Do Not Permit the Exercise of Materially Greater Market Power

[58] The Tribunal held that it was sufficient for the Commissioner to "theoretically" illustrate the ways in which increased market power could

have substantial non-price effects (*Tribunal Decision*). However, the record showed that market power is highly constrained. Due to factors such as multi-homing and low switching costs, dating application users have the ability to swiftly respond to any reduction in quality, variety, service or innovation by dating application providers. This capacity for a swift response by users disincentivizes application providers to alter non-price elements and severely curtails their ability to do so.

Tribunal Decision, supra para 10, at para 98.

[59] Multi-homing refers to users using more than one platform simultaneously, resulting in a decrease in the effective market power of a single service. The Commissioner led testimony that multi-homing does take place in the Toronto market, as users are known to use both Bat Signal and HYD, among others (*Tribunal Decision*). Multi-homing not only creates a less defensible network, but it also allows for multiple networks to exist simultaneously, greatly diminishing the barriers created by network effects (*Am Express Co*.)

Tribunal Decision, supra para 10, at para 51.

United States v American Express Co, (2015) 88 F. Supp. 3d 143 at para 233.

[60] Application users have many choices and can switch easily to resist any exercise of market power. Switching costs refer to the cost incurred by a user to switch from one dating application to another. In a freemium model, all switching costs would be limited to non- price costs (*Cheng*). Multi-homing demonstrates low-switching costs in general.

Shin-Ru Cheng, “Market Power and Switching Costs: An Empirical Study of Online Networking Market” (2021) 90:1 U Cin L Rev 122 at 146.

[61] The Toronto dating application market contains a wide selection of choices with Ogle and Citrus’s respective app stores providing nine and seven dating applications respectively (*Tribunal Decision*). These applications provide services unaffected by compatibility concerns (there are no device specific restrictions to the applications) or costs associated with searching (finding alternatives is simple in the app stores). Additionally, costs relating to uncertainty of service with another application are attenuated by the zero-risk nature of consumers exploring different networks. This evidence demonstrates existing competitors’ ability to constrain any

exercise of market power and was required to be considered by the Tribunal in its assessment of a SLPC.

Tribunal Decision, supra para 10, at para 26.

d. There Would Still be a Large Number of Competitors and Potential Competitors in Toronto Even with the Proposed Merger

[62] The Toronto market features a signfnicant number of competitors and existing competition is effective because of the distinct qualities of the networks in the dating application market and the low barriers to entry.

[63] Low barriers to entry encourage more competitors to enter the Toronto market. The Commissioner led evidence – which the Tribunal did not find against – that there were no significant barriers to entry into related markets (*Tribunal Decision*), and there is no reason to suspect that this finding would be any different in the Toronto market. Given these factors, the Toronto market is currently competitive and poised to become more competitive with HYD's depature.

Tribunal Decision, supra para 10, at para 47.

[64] The scope of any substantial lessening of competition would therefore be severely limited by the competitive Toronto market. This high level of competition would effectively constrain the Merging Parties in their ability to exercise market power in any material part of the market. Therefore, any non-price effect would not be substantial in scope (*Parrish*). The Tribunal erred when it overlooked this evidence regarding non-price effects.

Parrish, supra para 57, at para 474.

e. The Duration of any Alleged SLC in the Toronto Market is Not Substantial

[65] The lessening of competition as a result of the proposed merger is only substantial if it can be shown "that a material reduction in non-price dimensions of competition resulting from a merger is likely to be maintained for approximately two years" (*Parrish*). In the present case, there is no likelihood that a material reduction in non-price dimensions could survive even remotely this long given the dynamic nature of the dating application industry. The Tribunal's erred in not turning its mind to the duration element of the substantiality test.

Parrish, supra para 57, at para 475.

[66] Given the significant number of effective remaining competitors, the dynamic nature of the market, multi-homing practices, low switching costs and barriers to entry, there is little that impedes effective competition from counteracting any reduction in non-price dimensions.

Conclusion

[67] The proposed merger would ultimately not produce a SLPC in any market. The Merging Parties cooperated at all times with the Commissioner in order to ensure compliance with the Act. The Divestiture represents a significant pro-competitive transaction that cannot be separated from the proposed merger, and which satisfies any lingering doubts concerning the possibility of a SLPC resulting in any market.

Part IV—Order Sought

[68] The Merging Parties respectfully request an order dismissing the appeal with costs.

APPENDIX A—LIST OF AUTHORITIES

A. Legislation

Competition Act, RSC 1985, c C-34.

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, 2022 Comp Trib 1.

Canada (Commissioner of Competition) v Rogers Communications Inc., 2023 FCA 16. *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 S.C.R. 748. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

Commissioner of Competition v Find Your Robin Inc., (18 October 2023).

CSX Transportation, Inc. v ABB Inc., 2022 FCA 96.

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

Jensen v Samsung Electronics Co. Ltd., 2021 FC 1185.

South Yukon Forest Corp. v R., 2012 FCA 165, 4 B.L.R. (5th) 31.

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

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

United States v American Express Co., (2015) 88 F. Supp. 3d 143.

C. Secondary Sources

Shin-Ru Cheng, "Market Power and Switching Costs: An Empirical Study of Online Networking Market" (2021) 90:1 U Cin L Rev 122.