

2025 ADAM F. FANAKI COMPETITION LAW MOOT PROBLEM***COMMISSIONER OF COMPETITION V KINGSLAND INC.,
DRAGONRIDER PICTURES & TALLTURRET STUDIOS*****I. Executive Summary**

- 1) The Commissioner of Competition (the “**Commissioner**”) has filed an application pursuant to section 79 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “**Act**”), seeking an order requiring Kingsland Inc. (“**Kingsland**”) to terminate its exclusive supply agreement with Lion House Cinemas (“**Lion House**”) (the “**Agreement**”). The Commissioner asserts that the implementation of the Agreement is a practice of anti-competitive acts that is resulting in a substantial lessening or prevention of competition (“**SLPC**”).
- 2) Kingsland is a film distribution joint venture co-owned by Dragonrider Pictures (“**Dragonrider**”) and Tallturret Studios (“**Tallturret**”), two of the three major movie studios in Canada’s production industry.
- 3) Lion House operates a major chain of independent movie theatres across Canada.
- 4) On December 16, 2023, Kingsland and Lion House entered into the Agreement, which, *inter alia*, provides Kingsland exclusive rights to distribute movies within Lion House theatres. On December 29, 2023, the CEO of Wolf House Films (“**Wolf House**”), an independent movie studio, filed a complaint with the Competition Bureau criticizing the agreement as anti-competitive and against consumer interests. On January 5, 2024, the Commissioner commenced an inquiry under section 10 of the Act.
- 5) The Commissioner’s application alleges that the Agreement contravenes section 79 of the Act. Specifically, the Commissioner alleges that each of the three elements of section 79 is satisfied:
 - a. Kingsland substantially or completely controls the market for the distribution of movies to independent theatres in Canada;
 - b. Kingsland is engaged in a practice of anti-competitive acts by excluding other studios from showing their films in Lion House theatres; and

- c. Kingsland has engaged in conduct that is having the effect of substantially lessening or preventing competition for the distribution of films through independent theatres, resulting in higher prices and reduced choice for independent theatres and consumers.
- 6) In the alternative, the Commissioner alleges that:
 - a) Tallturret and Dragonrider are jointly dominant in the market for film distribution across all theatres in Canada;
 - b) Tallturret and Dragonrider are, through the implementation of Kingsland's exclusive distribution agreement with Lion House, engaging in a practice of anti-competitive acts by excluding other studios from showing their films in Lion House theatres; and
 - c) Tallturret and Dragonrider are, through the implementation of Kingsland's exclusive distribution agreement with Lion House, engaging in conduct that is having the effect of substantially lessening or preventing competition for the distribution of films through independent theatres, resulting in higher prices and reduced choice for independent theatres and consumers.
- 7) For the reasons set out below, the Tribunal finds that the relevant market is the distribution of films to all theatres in Canada, and that Kingsland is not dominant in that market. However, the Tribunal finds that Dragonrider and Tallturret are jointly dominant in the relevant market.
- 8) The Tribunal finds that the implementation of the Agreement constitutes a practice of anti-competitive acts by Dragonrider and Tallturret. However, it is not likely to result in an SPLC in the market for film distribution to all theatres in Canada, given the small percentage of total films distributed through the channels affected by the Agreement, and effective remaining competition from other film distributors, as well as the competitive constraint represented by streaming services.
- 9) The Commissioner's application is granted. The Tribunal prohibits Kingsland from implementing the exclusivity provisions in the Agreement, but does not require the dissolution of the Agreement as sought by the Commissioner.

I. The Parties

- 10) The Commissioner is the public official appointed by the Governor in

Council under section 7 of the Act to be responsible for the administration and enforcement of the Act.

- 11) Lion House is headquartered in Brampton, Ontario and operates one of Canada's largest independent theatre chains under the Lion House brand. Lion House operates 30 Lion House locations with 270 movie screens across Canada. This represents just over 10% of the total movie theatre screens in Canada and 50% of independent theatre screens. However, Lion House is expanding aggressively and is one of the fastest-growing chains of independent theatres. Accordingly, their market share is expected to grow in the future.
- 12) Kingsland is a film distributor to independent theatres, and is a joint venture which is 50/50 owned by Dragonrider and Tallturret (all together, the "**Respondents**"). Kingsland distributes exclusively Dragonrider and Tallturret films.
- 13) Dragonrider and Tallturret are two of the three major film studios in Canada. Prior to the Agreement, they made 60% of all films shown in Canadian theatres.

II. Factual Background

- 14) Canada's movie industry is dominated by the three major studios, Dragonrider, Tallturret, and Saltwater Serpent Pictures ("**Saltwater Serpent**"). 80% of films distributed in Canada originate from these three studios. Dragonrider and Saltwater Serpent's production stages are located on adjacent lots in Vancouver, with Tallturret producing films in Toronto.
- 15) The Canadian film industry utilizes three primary channels to supply movies to end consumers: large "multi-plex" theatres with at least 15 screens per theatre, smaller independent theatres and streaming platforms. Since the introduction of online streaming in 2005, consumers have increasingly utilized streaming platforms to access movies, with over 90% of Canadians reporting usage of streaming services.
- 16) Canada has two major theatre chains, ValePlex and StreamVision that, combined, represent 75% of total movie theatre screens in Canada. The remaining movie theatre screens are operated by numerous national and regional independent movie theatre chains, including Lion House. However, the evidence before the Tribunal indicates that Canadians' preferences are skewing towards independent movie theatres because

of the decline in reputation of major theatre chains. Part of that decline can be attributed to a perception that the major chains are not as “consumer-friendly” and are sometimes misleading moviegoers into paying higher prices for tickets. As a result, more independent movie theatres have been opening—or reopening—in Canada.

- 17) The most popular streaming platform, HealerFlix, carries movies made by all Canadian studios and many foreign studios. Each of the three major Canadian studios also operates a streaming platform. They are named Dragonrider Plus, TallturretTV, and Max (formerly Saltwater Serpent Max).
- 18) While streaming viewership has grown in recent years, theatre distribution still forms an important part of the industry. Research has shown that movies that undergo a theatrical release perform much better over their lifetime than movies released directly to streaming services because theatrical releases drive awareness and publicity around the movie, which in turn leads to subscriptions and viewership for the studio’s respective streaming services once the films are released on streaming platforms following their run in theatres.
- 19) In 2019, Dragonrider and Tallturret established Kingsland, a joint venture created to distribute their films to independent movie theatres and reduce the costs of distribution of films produced by their studios.
- 20) On December 16, 2023, Lion House and Kingsland announced that they had entered into an agreement pursuant to which Kingsland would be the exclusive supplier of movies shown in Lion House theatres. This would involve Lion House immediately ending any contracts in place with other movie studios, including Wolf House.
- 21) On December 29, 2023, the CEO of Wolf House filed a complaint with the Competition Bureau criticizing the Agreement as anti-competitive and against consumer interests. The company is known for the originality and artistic style of films it produces, and positions itself as a disruptive and artistic studio in contrast to Canada’s three major studios. Wolf House operates its own distribution company, which relies heavily on distribution through independent cinemas. The Agreement would

have the effect of excluding Wolf House from Lion House theatres, as well as any other competing studios.

- 22) On January 5, 2024, the Commissioner commenced an inquiry into the alleged anti-competitive conduct.
- 23) On April 1, 2024, the Commissioner commenced an application under section 79 of the Act. This application seeks a finding that the implementation of the Agreement constitutes a practice of anti-competitive acts that is resulting in a SLPC and an order requiring that the Agreement be dissolved.

III. Position of the Parties

Section 79 Positions

- 24) The Commissioner and the Respondents take opposing positions with respect to each element of section 79 of the Act. The parties' positions with respect to each element are set out below.

Paragraph 79(1)—Substantial or Complete Control of a Class or Species of Business

- 25) The Commissioner alleges that distribution of films to independent movie theatres constitutes a “class or species of business” within the meaning of paragraph 79(1) of the Act, over which Kingsland has substantial or complete control.
- 26) The Commissioner submits that, because independent movie theatres provide an important channel for smaller movie studios to supply their films to the public, and section 1.1 of the Act sets out the encouragement of equitable opportunities for small and medium-sized enterprises as a purpose of competition law, distribution to independent movie theatres must be considered as a class or species of business separate and distinct from the distribution of films to the larger movie theatre market.
- 27) The Commissioner submits that Kingsland is dominant in the market for the distribution of films to independent theatres. Kingsland distributes the majority of films shown in independent movie theatres. Prior to the Agreement, Kingsland supplied 65% of films shown in independent movie theatres. After the Agreement was implemented, this rose to 80% of all films shown in independent movie theatres in Canada. The Commissioner submits that these market shares are clearly above the

indicators set out in the Abuse of Dominance—Enforcement Guidelines published by the Competition Bureau (“**Guidelines**”).

- 28) In the alternative, the Commissioner submits that the distribution of films to the broader movie theatre market, including major multi-screen movie theatres, constitutes a “class or species of business” within the meaning of paragraph 79(1) of the Act, over which Dragonrider and Tallturret are jointly dominant due to their significant combined market share of distributed films. As noted above, prior to the Agreement, Tallturret and Dragonrider together supplied 60% of all films shown in all movie theatres in Canada. After the implementation of the Agreement, their joint market share rose to 63% of all films, and is expected to rise further.
- 29) The Commissioner argues that streaming services do not constitute a part of any properly defined relevant market in this matter. The Commissioner submits that the vast majority of consumers do not consider watching a movie in the cinema or at home using a streaming service as entirely substitutable because, in part, of the additional services and options offered at movie theatres. These include food service, a higher quality audio-visual experience, VIP seating and experiences and the ability to watch movies at or closer to the time of release. However, the Commissioner acknowledges that streaming services may exert a certain competitive pressure on independent and major multi-screen movie theatres.
- 30) The Respondents reject the Commissioner’s assertion that the distribution of films to independent theatres constitutes a “class or species of business”. The Respondents assert that the Commissioner’s position is too narrow as theatres of all sizes show both films produced by major and small studios, and that large and independent theatres compete for the same movie-viewing customers on price and quality of experience, and also against streaming services, whose share of movie distribution is rapidly growing.
- 31) The Respondents submit that the relevant market should be defined as the distribution of films to all types of movie theatres and to streaming services. Each time that a consumer decides that they want to watch a movie, they must decide whether they want to go to a theatre (and if so, which) or watch in the comfort of their own home. At its core, this is where competition occurs, with consumers taking into account pricing, convenience and variety of each of these methods of movie

consumption. The vast majority of consumers have access to smart televisions in their homes that have the ability to download the myriad streaming services available on the market as a substitute for going to a theatre, and, when streaming, consumers have ultimate control over when they can watch their desired film.

- 32) Streaming services have advanced tremendously in recent years, with many new releases being available immediately or within weeks of a theatrical release. The vast majority of movie-watchers are not cinephiles demanding opening night tickets, but rather are everyday people looking for enjoyable entertainment at their leisure. Watching movies in the comfort of home also allows consumers to choose their own snacks, pause the movie for bathroom breaks and split movies into portions for convenience.
- 33) Alternatively, the Respondents submit that the relevant market should not be narrower than the distribution of films to all theatres. The product offerings at all theatres are substantially the same, the experience is substantially the same, and consumers decide which theatre to attend based primarily on location and show times.
- 34) Kingsland submits that it is not anywhere close to dominant in the distribution of films to all theatres in Canada, as its share is below 10%. This share approaches 1-2% when streaming services are taken into account. Further, the exclusivity agreement is restricted to Lion House theatres, which constitute only a portion of independent movies theatres and a small percentage of total movie theatre screens in Canada.
- 35) Further, Tallturret and Dragonrider submit that they are not jointly dominant for the distribution of films to all theatres because their combined share is, at most, 63%. They also submit that their combined market share is approximately 35% if the market is deemed to include streaming services. Both numbers are below the indicators for joint dominance outlined in the Guidelines. Furthermore, Tallturret and Dragonrider compete aggressively for the distribution of their films in all theatres and across streaming platforms, with the exception of their Kingsland joint venture. They assert that they cannot possibly be considered to be jointly dominant in any market other than for the distribution of independent films, as they are not acting in concert or collaborating in any way.

Paragraph 79(1)(a) and (b)—Practice of Anti-Competitive Acts or Conduct resulting or likely to result in an SLPC

- 36) The Commissioner alleges that the implementation of the Agreement is an abuse of dominance by Kingsland in the distribution of films to independent theatres, or alternatively an abuse of joint dominance by Dragonrider and Tallturret in the market for the distribution of films to all theatres.
- 37) The amendments in Bill C-56 to the Act have changed the substantive test for abuse of dominance, allowing an abuse of dominance to be found when a firm engages in the practice of anti-competitive acts or engages in conduct having or likely to have the effect of preventing or lessening competition substantially. The Commissioner submits that the Agreement meets both of these standards.
- 38) The Commissioner submits that the implementation of the Agreement is an anti-competitive act under subsection 78(j) of the Act as a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market.
- 39) Independent movie studios, such as Wolf House, have grown in popularity through the expansion of streaming and a societal push against the blockbuster studios that have dominated the market in recent years. These studios work to reinvigorate the art of cinema and pose a distinct threat to the three major studios and others.
- 40) The Commissioner submits that the Agreement is a response to this trend and has as its purpose a goal of limiting the distribution of movies from independent studios in independent theatres, thereby protecting Kingsland's dominant position in the distribution of independent films.
- 41) The reasonably foreseeable consequences of the Agreement are (i) Kingsland and its owner studios will increase their market share in the independent movie theatre market and (ii) independent movie studios will be inhibited from getting their movies in front of consumers, thereby reducing the economic benefit to independent movie studios and forcing them to reduce the number of films produced or leave film production entirely.
- 42) The Commissioner submits that the implementation of the Agreement is conduct having the effect of preventing or lessening competition substantially. Further, the Commissioner submits that, even if no

anti-competitive intent exists, it is reasonably foreseeable that the Agreement would exclude competitors from the market.

- 43) The Commissioner asserts that, “but for” Kingsland’s practice of anti-competitive acts in the form of the Agreement, the market for the distribution of films to independent movie theatres would be more competitive, leading to lower prices and greater choice for consumers and lower barriers to entry for smaller studios.
- 44) Finally, the Commissioner asserts that, should the Tribunal find that Kingsland is not dominant unilaterally in the market for the distribution of films to independent theatres but that Tallturret and Dragonrider are jointly dominant in the market for the distribution of films to all theatres, their arguments in relation to the practice of anti-competitive acts and to the harm resulting therefrom apply *mutatis mutandis* to the Tribunal’s analysis under paragraphs 79(1)(a) and (b).
- 45) The Respondents reject the Commissioner’s assertions that the implementation of the Agreement is a practice of anti-competitive acts, and that the Agreement is conduct having or likely to result in an SLPC.
- 46) The Respondents reject the Commissioner’s proposed “but for” world and asserts that, in any event, the Agreement is not and will not be the cause of an SLPC.
- 47) The Respondents argue that the Agreement represents a justifiable business decision in the normal course of its relations with movie theatres such as the Lion House chain. Kingsland asserts that the Agreement is pro-competitive, as it guarantees distribution for artistic, independent films, thus encouraging their development and production.
- 48) Kingsland further argues that the Agreement is efficiency-enhancing because it will allow for films to be distributed at greater scale, which will reduce marginal costs.
- 49) Finally, Tallturret and Dragonrider assert that, if the Tribunal finds that they are jointly dominant in the relevant market, the business justifications put forth are applicable *mutatis mutandis* in the Tribunal’s analysis of any alleged practice of anti-competitive acts.

Paragraph 79(1) and (3.1)—Remedy

- 50) The Commissioner submits that, as Kingsland is engaging in a practice of anti-competitive acts that is resulting in an SLPC, or that, in the

alternative, Dragonrider and Tallturret are jointly engaging in a practice of anti-competitive acts that is resulting in an SLPC, the Tribunal should impose an order under section 79(1) directing Kingsland to dissolve the Agreement with Lion House.

- 51) The Respondents submit that the elements of section 79 have not been made out, including any practice of anti-competitive acts, let alone conduct that is resulting in an SLPC, and, accordingly, the Tribunal should not impose any remedy.

IV. The Issues

- 52) As detailed below, the Tribunal considers the outcome of the matter to turn on four principal issues:
- a) What is the proper market definition with respect to the distribution of films in Canada?
 - b) In the market identified above, is Kingsland dominant or, alternatively, are Tallturret and Dragonrider jointly dominant?
 - c) Has the Commissioner established the existence of a practice of anti-competitive acts, or conduct that is resulting or is likely to result in an SPLC?
 - d) If the elements of section 79 are met, what is the proper remedy?

V. Tribunal's Analysis

- 53) The Tribunal has carefully considered the parties' submissions, the relevant jurisprudence and the evidence before it. For the reasons below, the Tribunal has concluded that:
- a) The relevant market is the distribution of films to all movie theatres in Canada, not just independent movie theatres, and does not include streaming services. However, streaming services may exert a certain competitive pressure on competitors in the relevant market.
 - b) Kingsland is not dominant in the "all-theatre" distribution market due to its small share of overall film distribution.
 - c) The Guidelines sets out an appropriate analytical framework and market share indicators for unilateral or joint dominance. Having regard to those indicators and the totality of the evidence,

Dragonrider and Tallturret are jointly dominant in the “all-theatre” distribution market. In the properly defined relevant market, Dragonrider and Tallturret’s combined market share is slightly below the indicators in the Guidelines for joint dominance, but it is growing in an expanding channel within the market, and other factors suggest that they can jointly exercise a substantial degree of market power.

- d) The implementation of the Agreement represents a practice of anti-competitive acts by Dragonrider and Tallturret as they are the sole owners of Kingsland and the Agreement relates directly to the exclusive distribution of their films in Lion House theatres.
- e) However, the practice of anti-competitive acts is not having, nor is it likely to have, the effect of substantially lessening or preventing competition in the relevant market.
- f) As the Commissioner has made out joint dominance and a practice of anti-competitive acts but has not proven that the conduct is resulting or likely to result in an SLPC in the relevant market, the implementation of the exclusivity provisions contained in the Agreement should be prohibited.

Relevant Market

- 54) Paragraph 79(1) of the Act requires that a firm “substantially or completely control, throughout Canada or any area thereof, a class or species of business.” In the present case, whether the first element of section 79 of the Act is made out turns on the question of how to define the “class or species of business”, i.e. relevant market.

i) Analytical Framework

- 55) The Tribunal has consistently interpreted the words “class or species of business” to refer to the relevant product market in which the respondent is alleged to have substantial or complete control.
- 56) The Tribunal’s approach to market definition, as set out in *Commissioner of Competition v Toronto Real Estate Board*, 2016 Comp Trib 7 (“**TREB**”) focuses upon whether there are close substitutes for the products at issue.
- 57) In **TREB**, the Tribunal supported the use of the hypothetical monopolist

test, as defined at paragraph 4.3 of the Bureau's 2011 *Merger Enforcement Guidelines*, reading:

Conceptually, a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area, in which a sole profit-maximizing seller (a "hypothetical monopolist") would impose and sustain a small but significant and non-transitory increase in price ("SSNIP") above levels that would likely exist in the absence of the merger.

- 58) The Tribunal has typically defined the SSNIP as a 5% price increase lasting one year. As the Tribunal explained in TREB:

If sellers of a product or of a group of close substitute products in a provisionally defined market, acting as a hypothetical monopolist, would not have the ability to profitably impose and sustain a five percent price increase lasting one year, the product bounds of the relevant market will be progressively expanded until the point at which a hypothetical monopolist would have that ability and degree of market power.

ii) Application of the Hypothetical Monopolist Test

- 59) The Commissioner has asked the Tribunal to apply the hypothetical monopolist test here, and contends that under this test, the distribution of films to independent movie theatres constitutes the relevant product market for purposes of the Tribunal's analysis.
- 60) Having reviewed the evidence and such factors as switching costs and the behaviour of buyers, the Tribunal finds that the Commissioner has defined the relevant market too narrowly and that the proper relevant market to consider is the distribution of films to all movie theatres.
- 61) The Tribunal agrees with the Commissioner that independent movie theatres constitute an important channel through which movie studios supply their films to the public; however, they have not demonstrated why consumers would be unable to attend another theatre if their desired movie was unavailable at an independent theatre. The switching costs between independent and larger chain theatres are *de minimis* and so the relevant market must be expanded to a point where the hypothetical monopolist would have sufficient market power to impose a SSNIP.
- 62) The Tribunal finds that there are similarities in the films shown in

independent theatres and multi-plex theatres, such that certain customers would be able to view many films in either form of venue, or would switch venues in response to a price increase. While the Commissioner has led evidence of certain independent films that are available only in independent theatres, they have not established that patrons of these films would not be willing to switch to another form of theatre or see other films in response to a price increase.

- 63) The Tribunal agrees with the Commissioner that streaming services should not constitute part of the relevant market. However, while outside of the relevant market, streaming services can and do exert a certain competitive pressure on distribution in theatres because there may be some consumers at the margins who may consider switching from viewing a movie in a theatre to streaming it at home in response to a SSNIP imposed by a hypothetical monopolist.
- 64) Given the market is properly defined as “all-theatres”, Kingsland is clearly not dominant given that its market share is less than 10%.

Joint Dominance

- 65) Should the Tribunal not find Kingsland to be dominant, the Commissioner has asked the Tribunal to find, in the alternative, that Tallturret and Dragonrider are jointly dominant in the distribution of films to all theatres.
- 66) The Tribunal recognizes that Canada’s film distribution sector is relatively concentrated with three major players and a number of smaller studios producing content for distribution. As noted in the Guidelines, the existence of high market share is usually a necessary, but not sufficient, condition to establish the existence of a substantial degree of market power. In the case of joint dominance, the Commissioner has expressed in the Guidelines that a 65% market share (or greater) between a group of firms is an indication of joint dominance in a market.
- 67) The Tribunal agrees with the analytical approach set out in the Guidelines, including the indicative value of the thresholds therein. The Tribunal has identified the relevant market as the distribution of films to all movie theatres as opposed to just the independent theatre channel. As a result, the combined market share of Tallturret and Dragonrider

was 60% prior to the implementation of the Agreement, and is now 63% and is expected to rise.

- 68) The Tribunal finds that, while the current combined market share of Tallturret and Dragonrider is below the 65% indicative threshold set out in the Guidelines, there are other factors that indicate that these two firms are jointly dominant.
- 69) The Guidelines contemplate that, in exceptional cases, firms with lower market share may be found to possess a substantial degree of market power where other evidence establishes its existence. Evidence that may indicate market power includes the ability to impose supra-competitive pricing, exercise significant commercial leverage, influence a relevant dimension of competition or to restrict the output of other actual or potential market participants and thereby profitably influence prices.
- 70) First, the evidence before the Tribunal indicates that the current market share is expected to rise. Indeed, it has increased by 3% in a few short months since the implementation of the Agreement. With more independent movie theatres opening in Canada, it is reasonable to expect shares to continue to increase beyond the 65% indicator in the Guidelines. Second, the Agreement on its face appears to be a demonstration of the ability of Tallturret and Dragonrider to exclude. In this case, the Agreement has served to exclude an existing competitor in the form of Wolf House. This is also linked to the two firms' significant commercial leverage, since they are able to exclude Wolf House by implementing an agreement that affects Wolf House's dealings with a major customer, namely Lion House.
- 71) Tallturret and Dragonrider point out that the Commissioner has failed to lead any evidence that these parties have engaged in any joint conduct or collaboration outside of the Agreement, and Tallturret and Dragonrider have introduced significant evidence of the competition between the two studios for the distribution of their films in all other channels.
- 72) The Tribunal acknowledges the evidence adduced by Tallturret and Dragonrider in respect of rivalry between them, but finds that, on a balance of probabilities, the expected growth in the number of independent movie theatres will increase the ability and incentive of the two firms to engage in an exercise of joint dominance over time. In other words, the sufficiency of competition among the two firms is likely to

erode to the point where it may not discipline their joint exercise of a substantial degree of market power.

- 73) As a result, the Tribunal finds that Tallturret and Dragonrider are jointly dominant in the market for the distribution of films to all theatres in Canada.

Paragraph 79(1)(a)—Practice of Anti-competitive Acts

- 74) Having found that Tallturret and Dragonrider are jointly dominant in the properly defined relevant market, the Tribunal now turns its attention to the assessment of the practice of anti-competitive acts alleged by the Commissioner, namely the implementation of the Agreement.
- 75) This is the first time that the Tribunal has been called upon to opine on paragraph 79(1)(a) of the Act, as amended by Bill C-56. However, the term “practice of anti-competitive acts” used in paragraph 79(1)(a), read in the context of the rest of section 79, should be interpreted in the same way as it was when that term was used in the former paragraph 79(1)(b) of the Act. The wording of the term remains the same—it is merely its positioning within section 79 that has changed.
- 76) The Tribunal’s assessment of paragraph 79(1)(b) of the Act was addressed in detail in TREB CT. That approach was affirmed by the Federal Court of Appeal in *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 (“**TREB FCA**”) and most recently applied in *Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 (“**VAA**”). The framework does not need to be repeated here and can be applied *mutatis mutandis* to paragraph 79(1)(a) of the current Act.
- 77) The Commissioner has alleged that the Agreement is a practice of anti-competitive acts because it is a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor’s entry into, or expansion in, a market or eliminating the competitor from a market. In addition, the Commissioner asserts that the Agreement is reasonably foreseeable to exclude competitors from the market. The Respondents have refuted these assertions and alleges that the Agreement is pro-competitive and efficiency-enhancing.
- 78) The Tribunal agrees with the Commissioner that the implementation of the Agreement is a practice of anti-competitive acts. The Agreement effectively excludes Wolf House and any other studios from competing for distribution of films to the independent theatre channel within the

relevant market. As noted previously, this is significant as that channel grows to the detriment of the major movie theatre chains.

- 79) The Tribunal accepts the evidence that Wolf House provides a differentiated product. Accordingly, the Tribunal disagrees with the argument put forward by Tallturret and Dragonrider that the Agreement would be pro-competitive by guaranteeing the distribution of independent, artistic films. It is demonstrably not the case that this is the type of film produced by these two firms, and the Agreement is specifically designed to exclude such films, as Lion House would be required to screen only films made by Tallturret and Dragonrider.
- 80) The Tribunal in VAA noted that the jurisprudence establishes that a business justification must contain a rationale that is linked to the respondent—in this case, Dragonrider and Tallturret. Further, the legitimate business justifications must outweigh any exclusionary negative effect of the conduct on a competitor and/or the subjective intent of the act, such that the overall character or overriding purpose of the impugned conduct was not anti-competitive in nature. The Tribunal acknowledges that the Agreement may have marginal benefits in terms of cost reductions and efficiencies that accrue to Dragonrider and Tallturret and that may be passed on to customers or end consumers. However, on a balance of probabilities, the Tribunal finds that Dragonrider and Tallturret have not demonstrated that any enhancements to efficiency would outweigh any exclusionary negative effect of the Agreement on Wolf House, or indeed on any other competitor. Accordingly, they have not established to the requisite degree that the overall character or overriding purpose of the Agreement was not anti-competitive in nature.
- 81) Having found no legitimate business justification that outweighs the anti-competitive nature of the Agreement, the Tribunal finds that the implementation of the Agreement constitutes a practice of anti-competitive acts for the purposes of paragraph 79(1)(a) of the Act.

Paragraph 79(1)(b)—Conduct resulting or likely to result in an SLPC

- 82) The Tribunal now turns its attention to the assessment of the harm resulting or likely to result from the practice of anti-competitive acts by Dragonrider and Tallturret.
- 83) For the same reasons as noted above with respect to the interpretation of the term “practice of anti-competitive acts”, the analysis of the substantial

lessening or prevention of competition should follow the framework established in the jurisprudence, as summarized in paragraphs 632 to 644 of the Tribunal's decision in VAA. While the framework does not need to be reproduced here, two elements bear noting in particular.

- 84) First, the analytical framework focuses on a two-stage assessment of competition in the relevant market in the presence of the impugned practice and in a “but for” world where the impugned practice is absent (*Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 (“**Tervita SCC**”)).
- 85) Second, the Commissioner bears the burden of establishing the substantiality of the harm on a balance of probabilities by adducing sufficiently clear and convincing evidence to this effect (*Tervita SCC* at para 65; *TREB FCA* at para 87; *Canada (Commissioner of Competition) v Canada Pipe Company Ltd*, 2006 FCA 233 at para 46).
- 86) The Tribunal finds that the Commissioner has not discharged their burden of proof with respect to paragraph 79(1)(b) of the Act. While it is possible that the Commissioner's portrayal of the “but for” world has some basis in fact, it cannot be argued that the effects of the Agreement could be felt outside of the independent theatre channel within the relevant market. The Commissioner has led no other sufficiently clear and convincing evidence to demonstrate that any effects are substantial.
- 87) Having regard to the fact that the independent theatre channel is a small albeit growing portion of the relevant market, the Tribunal finds that the Commissioner has not proven on a balance of probabilities that any effects would be substantial.
- 88) As a result, the Tribunal finds that the practice of anti-competitive acts is not resulting in a substantial lessening or prevention of competition in the relevant market, nor is it likely to do so.

Remedy

- 89) The Commissioner seeks an order requiring that the Agreement be dissolved. This is the first time the Tribunal has been called upon to consider a remedy under section 79 following the amendments that provided it with the discretion to make an order without a finding of an SLPC.
- 90) In determining an appropriate remedy, the Tribunal considers that it must still be guided by relevant jurisprudence. Accordingly, any order

must only go as far as the Tribunal considers necessary in order to restore competition in the relevant market (*Canada (Director of Investigation & Research) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289 (Comp. Trib.)

- 91) Accordingly, the Tribunal finds that the appropriate remedy is not to require that the Agreement be dissolved. Rather, the appropriate remedy is to prohibit the implementation of the exclusivity provisions in the Agreement. The Commissioner has not led any evidence to support the ending of the entire commercial relationship between Kingsland and Lion House.
- 92) The Tribunal pauses to note that, as Kingsland is a wholly-owned joint venture by Tallturret and Dragonrider, the remedy being ordered will have the requisite effect of restoring competition in the relevant market, as the Agreement is the contractual mechanism through which Tallturret and Dragonrider are abusing their jointly dominant position in the relevant market.

VI. Order

- 93) For these reasons, the application brought by the Commissioner is granted.
- 94) Kingsland shall not implement the exclusivity provisions contained in the Agreement.

DATED at Ottawa, this 31st day of October 2024.

SIGNED on behalf of the Tribunal by the Panel Members.