2025 ADAM F. FANAKI COMPETITION LAW MOOT/ CONCOURS DE PLAIDOIRIE ADAM F. FANAKI 2025

COMPETITION APPEAL TRIBUNAL [ON APPEAL FROM THE COMPETITION TRIBUNAL]

Between:

KINGSLAND INC., DRAGONRIDER PICTURES AND TALLTURRET STUDIOS

Appellants

AND

COMMISSIONER OF COMPETITION

Respondent

FACTUM OF THE APPELLANTS

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Overview

[1] The modern age of film consumption places the power of choice in the hands of consumers. Each time someone decides to watch a movie, that power allows them to choose between attending a theatre or enjoying the convenience and comfort of streaming from home. For most Canadians, they have chosen streaming as their preferred option. At the same time, independent theatres are seeing increased interest as major theatre chains face reputational challenges.

[2] The shift in consumer behavior has compelled both movie studios and movie theatres to adapt or risk obsolescence. In response to this evolving landscape, Kingsland Inc. ("**Kingsland**"), a film distributor to independent theatres, and Lion House Cinemas ("**Lion House**"), an independent movie theatre chain entered into an exclusive supply agreement (the "**Agreement**"). Under this arrangement, Lion House theatres play movies supplied by Kingsland. It ensures a steady stream for it to attract customers and compete with the major movie theatre chains.

[3] The Competition Tribunal (the "**Tribunal**") improperly characterized this arrangement as an abuse of dominance. Its order prohibiting Kingsland from implementing the exclusivity provisions should be overturned by the Competition Appeal Tribunal (the "**CAT**")

[4] The *Competition Act*'s (the "**Act**") abuse of dominance provision intends to prevent dominant firms from using their market power to suppress competition in a relevant market, not to penalize those that can efficiently supply goods and services to consumers and take steps to adapt to changing demands in the marketplace.

> *Competition Act,* RSC 1985, c C-34, s 79(1) [*Act*].

Part I: Statement of Facts

Dragonrider, Tallturret, and Kingsland's Partnership with Lion House

[5] Dragonrider Pictures ("**Dragonrider**") and Tallturret Studios ("**Tallturret**") are Canadian movie studios that compete against each other for

viewers of their movies. Their movies can be watched in major and independent theatres as well as on their respective streaming platforms or on HealerFlix, a popular streaming platform that carries movies made by all Canadian studios and many foreign studios.

[6] Dragonrider and Tallturret established Kingsland in 2019, a 50/50 joint venture, to efficiently distribute their films to independent theatres and reduce the costs of distribution of films produced by their studios.

[7] Lion House Cinemas ("**Lion House**") is an operator of independent movie theatre chains in Canada. On December 16, 2023, Lion House and Kingsland announced their agreement (the "**Agreement**"). Under the Agreement, Lion House theatres would feature movies supplied by Kingsland, guaranteeing a reliable and cost-efficient stream of content for its audiences to choose from.

[8] Despite the Agreement between Kingsland and Lion House, Dragonrider and Tallturret continue to compete to attract moviegoers to watch their respective films within Lion House. They also remain competitors in distributing their films to all theatres and streaming platforms, except within the scope of their Kingsland joint venture.

[9] Dragonrider and Tallturret's combined share for the distribution of films to all theatres is at most 63% and approximately 35% when including streaming services. Each of these combined shares is below the 65% threshold set out in the Abuse of Dominance – Enforcement Guidelines published by the Competition Bureau ("**Guidelines**").

Canada's Movie Industry

[10] Canada's movie industry consists of major studios, such as Saltwater Serpent Pictures, as well as independent studios like Wolf House Films ("**Wolf House**"). They distribute their movies to end consumers through three primary channels for viewing: large "multi-plex" theatres with at least 15 screens per theatre, smaller independent theatres, and streaming platforms.

[11] In terms of movie theatres, ValePlex and StreamVision are major chains, representing a combined 75% of total movie theatre screens in Canada. The remaining screens are operated by numerous national and regional independent theatre chains, including Lion House, which represents just over 10% of the total movie theatre screens in Canada.

[12] In terms of online streaming, HealerFlix is the most popular streaming platform and carries movies made by all Canadian studios and many foreign studios. Additionally, major studios operate their own streaming platforms. Since the introduction of online streaming, consumers have increasingly chosen to utilize streaming platforms to access movies, with over 90% of Canadians reporting usage of streaming services.

[13] On October 31, 2024, the Tribunal granted the Commissioner's ("the **Commissioner**") section 79 application and ordered Kingsland not to implement the exclusivity provisions contained in its Agreement with Lion House (the "**Decision**").

Part II: Statement of Points In Issue

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

1) The proper market definition is distribution of films to theatres and streaming services in Canada.

2) In this market, Kingsland is not dominant and Dragonrider and Tallturret are not jointly dominant.

3) The Tribunal incorrectly found the Agreement constituted a "practice of anti- competitive acts" and correctly found no substantial lessening or prevention of competition.

4) If all elements had been met, then the appropriate remedy would have been to prohibit the exclusivity provisions only where there is an adverse local impact.

The Standard of Review

[15] The Tribunal's decisions are subject to a statutory right of appeal (*Vavilov; Competition Tribunal Act*). Accordingly, where an issue on appeal concerns a question of law, the appropriate standard of review is correctness; where an issue on appeal concerns a matter of fact or mixed fact and law, the applicable standard of review will be palpable and overriding error. Where a question of mixed fact and law contains an extricable issue of law, then the standard of review is correctness (Housen).

> *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 at para 39.
> *Competition Tribunal Act,* RSC 1985, c 19 (2nd Supp), s 13(1).
> *Housen v Nikolaisen,* 2002 SCC 33 at para 36 [*Housen*].

Part III: Statement of Submissions

ISSUE 1. The proper market definition is the distribution of films to all theatres and streaming services in Canada

[16] The Tribunal failed to consider substitutability factors critical for determining the relevant market. Ignoring evidence is an error of law (*Southam*) and a correctness standard applies. The relevant market is the distribution of films to all theatres and streaming services in Canada because of product end-use, industry behaviour, the constraining power of streaming services, and that movie studios compete on a national scale to distribute movies.

> *Canada (Director of Investigation and Research) v Southam Inc.,* 1997 CanLII 385 (SCC) at paras 38– 39 [*Southam SCC*].

[17] The first step in defining the market is to determine the relevant product and geographic market. The chapeau language of section 79 of the Act requires "one or more persons who substantially or completely control" a relevant market. A relevant market consists of (i) "a class or species of business" (ii) "throughout Canada or any thereof", which are the product and geographic markets respectively (*Tele-Direct*).

> *Canada (Director of Investigation & Research) v Tele-Direct (Publications) Inc.,* 1997 CarswellNat 3120 at para 71, [1997] CCTD No 8.

[18] When determining both the relevant product and geographic market, the Tribunal considers substitutability: whether there exist sufficiently close substitutes to the product at issue, such that the market for that product includes those substitutes (*Southam*). Products will be close substitutes if buyers are willing to switch from one product to another in response to a relative change in price (*Southam*). Substitutability can be proven either by direct evidence or by indirect evidence. Indirect evidence includes factors such as buyers and industry behaviour, functional interchangeability in end-use, switching costs, and the constraining power of an alleged substitute (*TREB CT; Canada Pipe CT*).

> *Canada (Director of Investigation and Research) v Southam Inc.,* 1995 CarswellNat 1312 at 79, [1995] 3 FC 557 (CA) [*Southam FCA*].
> *Commissioner of Competition v Toronto Real Estate Board* (28 April 2016), CT-2011-003, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462979/index.do> at para 130 [*TREB CT*]. *Canada (Commissioner of Competition) v Canada Pipe Co.* (3 February 2005),

CT-2002-006, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/464214/index.do> at para 70 [*Canada Pipe CT*].

a) The Tribunal incorrectly assessed the product market by ignoring critical evidence of substitutability and correctly found that films are distributed nationally, not locally

[19] The Tribunal ignored evidence that the three channels are functionally interchangeable in end use, that industry views streaming as critical to their distribution, and that exerting competitive pressure on a market is an indicator of substitutability. Instead, it focused on indirect indicators such as "switching costs and buyer behaviour" (*Tribunal Decision*). Had the Tribunal done a correct analysis, they would have found that the relevant market is the distribution of films to all theatres and streaming services in Canada.

Commissioner of Competition v Kingsland Inc., Dragonrider Pictures & Tallturret Studios (31 October 2024) at para 60 [*Tribunal Decision*].

[20] Functional interchangeability in end-use, is a "critical element of the [substitutability] analysis" (*Canada Pipe CT*). End-use is critical because it speaks to the underlying "relevant purpose" that justifies grouping products into the same relevant product market (*Southam SCC*). It is about what you use the products for.

Canada Pipe CT, supra para 18 at para 84.
Southam SCC, supra para 16 at para 72.

[21] Here, the end-use of all independent and multi-plex theatres and streaming is film consumption. The Tribunal did not ever discuss *any* end-use.

TREB CT, supra para 18 at paras 144–145.

[22] As such, the Tribunal makes no distinction in end-use between theatres and streaming to explain why they are, or are not, functionally interchangeable. All three channels have the same end-use: film consumption. This conclusion is reflected in the Tribunal's reasoning; the Tribunal cited film choice and switching costs as reasons not to differentiate between independent and multi-plex theatres (*Tribunal Decision*). This reasoning applies equally to streaming services because switching costs are minimal and the same films are available on streaming services (*Tribunal Decision*).

Tribunal Decision, supra para 19 at paras 61, 18.

[23] The Tribunal ignored industry behaviour—evidence that the film industry behaves as if streaming is a critical part of their distribution strategy. All major movie producers in Canada have their own streaming platform to compete in the highly competitive streaming distribution channel (*Tribunal Decision*). This is a clear pattern of uniform industry behaviour, indicating a widely held belief that streaming is a vital part of the film distribution market.

> *Tribunal Decision, supra* para 19 at para 17.

[24] The above industry view can explain why the Tribunal found streaming services to exert a "competitive pressure" on the film distribution market (*Tribunal Decision*). In *Canada Pipe CT* whether one product constrains the price movements of another (i.e., exerts competitive pressure) was an indicator that they belong in the same relevant market (*Canada Pipe CT*). This is precisely what the Tribunal found to be happening here, strongly suggesting that streaming is in the same relevant market as theatres.

> *Tribunal Decision, supra* para 19 at para 63.
> *Canada Pipe CT, supra* para 18 at paras 94–95.

[25] The Tribunal correctly found that the geographic dimension of competition for the distribution of films is national. In *Laidlaw*, the geographic market analysis defined the boundaries of the geographic area within which competitors must operate to be effective competitors. The Tribunal correctly concluded that film distributors, regardless of their location in Canada, provide effective competition for film consumption nationwide. It follows then, that streaming services, which provide effective competition for film consumption nationally and compete to meet the same consumer demand for film content, should also be included in the market definition.

> *Canada (Director of Investigation and Research, Competition Act) v Laidlaw Waste Systems Ltd,* 1992 CarswellNat 1628 at para 66, [1992] CCTD No 1 [*Laidlaw*].
> *Tribunal Decision, supra* para 19 at para 7.

[26] For the reasons set out above, the correctly defined relevant market is the distribution of films to all theatres and streaming services in Canada.

ISSUE 2. The market for the distribution of films to theatres and streaming services in Canada is neither dominated by Kingsland nor jointly by Dragonrider and Tallturret

[27] The Tribunal correctly found that Kingsland is not dominant in the "all-theatres" market but erred when finding Dragonrider and Tallturret are jointly dominant. This error applies regardless of whether an all-theatre or theatre-and-streaming relevant market is used.

[28] Market power is a required element in abuse of dominance. It arises from the word "control" in section 79(1) of the Act which requires "one or more persons who *control or substantially control*" a relevant market. In *TREB CT* "control" was defined as requiring a "substantial degree of market power" which means a "degree of market power that confers...considerable latitude to...determine price or non-price dimensions of competition in a market". Market shares is a primary measure of market power; more than a 50% market share will be a *prima facie* finding of a substantial degree of market power (*TREB*).

TREB CT, supra para 18 at paras 174, 193–194.

a) The Tribunal appropriately recognized Kingsland's lack of market power

[29] The Tribunal appropriately recognized that Kingsland's 10% share (*Tribunal Decision*) in the "all-theatre" market does not constitute a substantial degree of market power, given that it does not meet the 50% threshold. Where the relevant market includes streaming services, Kingsland's market share would be even lower, at 1–2%. (*Tribunal Decision*). The Tribunal appropriately identified and applied the dominance test to the facts of the case. There is no palpable and overriding error that would justify disturbing the Tribunal's finding.

Tribunal Decision, supra para 19 at paras 64, 34.

b) The Tribunal incorrectly found Dragonrider and Tallturret are jointly dominant in the relevant market

[30] The Tribunal endorsed and applied the Guidelines on joint dominance (*Tribunal Decision*). The Guidelines provide a threshold combined market share of 65% as indicative of joint dominance (*Guidelines*). It also sets out other indicators of joint dominance: the level of competition (or lack

thereof) both inside and outside the allegedly dominant group, innovation, and barriers to entry (*Guidelines*).

> *Tribunal Decision, supra* para 19 at paras 67, 53.
> Canada, Competition Bureau Canada, *Abuse of Dominance Enforcement Guidelines* (Ottawa: CBC, 2024) online: <https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/abuse-dominance-enforcement-guidelines> at paras 45, 47–49 [*Guidelines*].

[31] However, the Tribunal misapplied the joint dominance Guidelines as applying to a hypothetical state of events. While the Guidelines are not binding, the Tribunal must apply the correct test if it explicitly endorses that test (*Tribunal Decision*). Applying the wrong legal standard is an error of law (*Housen*). As an error of law, a correctness standard applies (*Housen*).

> *Tribunal Decision, supra* para 19 at paras 53, 67.
> *Housen, supra* para 15 at para 36.

i. The legal standard for joint dominance is present evidence of dominance, not hypotheticals

[32] The Tribunal used the wrong legal standard to find Dragonrider and Tallturret jointly dominant. The Tribunal found Dragonrider and Tallturret to be jointly dominant by speculating that they would *eventually* meet the joint dominance indicators. The Tribunal speculated a world that has never existed: Dragonrider and Tallturret have never met the 65% threshold of combined market share (*Tribunal Decision*)—whether the relevant market is all-theatres or includes streaming. Additionally ignored, were the indicators that Dragonrider and Tallturret are in vigorous competition. Had the Tribunal applied the Guidelines correctly, they would not have been able to make a finding of joint dominance.

> *Tribunal Decision, supra* para 19 at paras 70, 72.
> *Housen, supra* para 15 at para 36.

[33] The Tribunal's finding of joint "control" over the relevant market based on future anticipated events contradicts the meaning and intent of 79(1). In *Direct Energy*, the Tribunal found the words "one or more persons substantially or completely control" in section 79(1)(a) of the Act (as it read in 2015) to mean that the allegedly dominant firm(s) must be in a position of dominance "*at the time of the alleged anti-competitive practice*". The Tribunal rejected Direct Energy's argument that section 79(1) was forward-looking and found that it applies in the present tense.

> *Commissioner of Competition v Direct Energy Marketing Limited* (26 March 2015), CT-2012-003, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463127/index.do> at para 40.

[34] The Tribunal incorrectly adopted a "forward-looking" definition of "control" in the chapeau language of section 79 and found that Dragonrider and Tallturret were jointly dominant based on speculation that Dragonrider and Tallturret's market share will eventually reach the 65% threshold set out in the Guidelines (Tribunal Decision).

> *Tribunal Decision, supra* para 19 at para 70.

[35] This prediction has no basis in reality. At this present time, within the narrowly defined "all-theatres" market, Dragonrider and Tallturret do not meet the 65% threshold in the Guidelines. This is doubly more so when the relevant market appropriately includes streaming—Dragonrider and Tallturret's combined market share of film distribution would be 35% (*Tribunal Decision*).

> *Tribunal Decision, supra* para 19 at para 35.

[36] The Tribunal's speculative "forward-looking" approach led to overlooking two additional indicators—innovation and competition within the allegedly dominant group—which demonstrate Dragonrider and Tallturret's vigorously competitive relationship.

[37] Innovation continues in the film distribution market, which has been transformed by streaming services. Competition is fierce between Dragonrider and Tallturret because both parties attempt to use streaming services to leapfrog past each other, establishing their own respective streaming platforms. They attempt to solicit each other's customers in all channels—through Healerflix and even within Lion House theatres—to watch their respective films (*Tribunal Decision*).

> *Tribunal Decision, supra* para 19 at para 17.

[38] Had the Tribunal considered the Guideline's indicators in the present tense, they could not have found Dragonrider and Tallturret to have "control" in any relevant market, be it all-theatres or theatres-and-streaming.

ISSUE 3. The Tribunal incorrectly found the Agreement constituted a "practice of anti- competitive acts" and correctly found no SLPC

[39] The Tribunal made a palpable and overriding error by finding that the agreement was a "practice of anti-competitive acts" under section 79(1) of the *Act* because it improperly applied the legal test to assess anti-competitive "purpose." However, the Tribunal committed no reviewable error when it correctly applied the legal test to assess substantial lessening or prevention of competition ("**SLPC**").

a) The Tribunal misapplied the legal test to find the Agreement constituted a "practice of anti- competitive acts" in the relevant market

[40] The legal test for a "practice of anti-competitive acts" contemplated by section 79(1) was outlined in *Canada Pipe FCA* and *TREB CT*. For conduct to be found "anti-competitive," it must satisfy two different and distinct elements in the relevant market: (i) it must be a "practice" and (ii) it must have been done for the *purpose of achieving an intended negative effect* on a competitor that is predatory, exclusionary, or disciplinary.

> *TREB CT, supra* para 18 at paras 272–273.
> *Canada (Commissioner of Competition) v Canada Pipe Co.,* 2006 FCA 233 at paras 67–72, 77 [*Canada Pipe FCA*].

[41] The Tribunal committed two errors to reach its finding that the Agreement constituted a "practice of anti-competitive acts." First, the Tribunal incorrectly found the Agreement constitutes a "practice." Second, the Tribunal also made a palpable and overriding error when it focused its analysis of the Agreement's effects on a distribution channel rather than the relevant market.

b) The Tribunal incorrectly found the Agreement constituted a "practice"

[42] The Tribunal incorrectly found that the Agreement constituted a "practice" because the Agreement's effects were isolated to the independent theatre channel. The Tribunal concluded the Agreement constituted a practice when it reasoned that "Dragonrider and Tallturret…are the sole owners of Kingsland and the Agreement relates directly to the exclusive distribution of their films in Lion House theatres." The Tribunal's reasoning does not accord with the jurisprudence because a "practice" cannot be found when an act is isolated from the relevant market.

Tribunal Decision, supra para 19 at paras 86, 53.

[43] For an act to constitute a "practice," it must be more than an isolated act. A single occurrence must be "sustained and systemic," or have a "lasting impact on competition" on the relevant market (*Canada Pipe FCA*). *TREB FCA* and *TREB CT* together established that analyses into conduct contemplated by sections 78(1) and 79(1) must be conducted in relation to the relevant market and not an isolated channel within it.

Canada Pipe FCA, supra para 40 at para 60.
Canada (Commissioner of Competition) v Toronto Real Estate Board, 2014 FCA 29 at paras 17–20 [*TREB FCA*].
TREB CT, supra para 18 at para 277.

[44] Canada Pipe FCA applied this approach when it found the Stocking Distributor Program ("**SDP**") constituted a practice because "[t]he various components of the [SDP] *add up to a practice.*" This demonstrates that the SDP's various components—rebates, discounts, purchase requirements, and renewal conditions—did not individually constitute a "practice" because they were isolated acts. However, the SDP was found to be "sustained and systemic" and had a "lasting effect on competition" once its components were *added together* to form the SDP, at which point they were found to constitute a "practice."

Canada Pipe FCA, supra para 40 at para 60.

[45] The exclusivity agreement before the Tribunal was entirely different from the facts of *Canada Pipe FCA*. Both cases involved an agreement structure designed to facilitate a preferential relationship with another party. However, the SDP was found to constitute a practice because it contained numerous provisions that applied across the entire relevant market. The present case involved a single exclusivity agreement arranged with a single distributor and did not apply to 98–99% of the relevant market that includes streaming services (*Tribunal Decision*). The same can be said if the relevant market consists only of all theatres in Canada as the Agreement would not apply to 90% of the market (*Tribunal Decision*).

Canada Pipe FCA, supra para 40 at para 60.
Tribunal Decision, supra para 19 at paras 34, 11.

c) The Tribunal did not properly weigh evidence of intent to assess the Agreement's "purpose"

[46] For conduct to have an "anti-competitive purpose," it must have been to create an "intended negative effect on a competitor" *(Canada Pipe FCA*). *TREB CT* clarifies that the word "competitor" contemplated by this analysis, is "a person who competes … in the relevant market."

> *Canada Pipe FCA, supra* para 40 at para 64.
> *TREB CT, supra* para 18 at para 277.

[47] For a "negative effect(s)" to be considered "intended," the Tribunal must evaluate whether the effects were objectively intended (reasonably foreseeable) and, where evidence is available, whether those effects were subjectively intended (*TREB CT*). Read together with the previous paragraph, "objectively intended" and "subjectively intended" effects must be on a person's ability to compete in the *relevant market*—not solely on a channel within it.

> *TREB CT, supra* para 18 at paras 274–275.

[48] The Tribunal did not properly consider evidence showing no objectively intended negative effects from the Agreement. The Tribunal incorrectly found that "the Agreement is reasonably foreseeable to exclude competitors from the market" from its reasoning that "[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."

> *Tribunal Decision, supra* para 19 at para 78.

[49] The Tribunal's reasoning departs significantly from *TREB CT*. In *TREB CT*, the finding that it was reasonably foreseeable that the anti-competitive act would negatively affect a competitor was *contingent* on its conclusion that the act *severely restricted* the competitor's ability to participate in the relevant market.

> *TREB CT, supra* para 18 at para 445.

[50] There was no evidence before the Tribunal that the Agreement would exclude a competitor from the relevant market. The extent of the Agreement's reasonably foreseeable "restrictions" would be limited to 1–2% of the relevant market that includes streaming services, with 98–99% remaining *entirely unrestricted* for a competitor to participate (*Tribunal Decision*). The same can be said if the relevant market consists only of all theatres in Canada as the Agreement would not apply to 90% of the market (*Tribunal Decision*).

Tribunal Decision, supra para 19 at paras 34, 11.

[51] The Tribunal acknowledged this when it determined that "it cannot be argued that the effects of the Agreement could be felt outside of the *independent theatre channel within the relevant market*" (*Tribunal Decision*). Accordingly, the Tribunal misapplied the legal test to find the Agreement was objectively intended to create negative effects on a competitor(s).

Tribunal Decision, supra para 19 at para 86.

[52] The Tribunal did not properly consider evidence showing no subjectively intended negative effects from the Agreement. In *TREB CT*, subjective intent was found because: (i) there was explicit evidence found in internal documents about an apprehended and emerging threat to traditional brokers; and (ii) a direct alignment between the apprehended threat and the impugned act. Here, there was no evidence before the Tribunal of any internal documents demonstrating either of these.

TREB CT, supra para 18 at paras 198, 253, 331.

[53] The Tribunal did not properly consider evidence that "independent movie studios, such as Wolf House, have grown in popularity through the expansion of streaming." There was no evidence before the Tribunal that Kingsland, in the four years since its establishment, had attempted to disrupt this critical channel of growth for independent films, despite the "distinct threat" they allegedly pose to Dragonrider and Tallturret (*Tribunal Decision*).

Tribunal Decision, supra para 19 at para 39.

[54] The Tribunal correctly observed that the Agreement was a response to a growing trend of viewing films in independent theatres. However, the Tribunal incorrectly *relies* on this observation to conclude that the Agreement was "specifically designed" with the *intention* to exclude independent films, rather than to make a rational business decision aimed at meeting their audiences' needs. For the reasons above, the Agreement was not "specifically designed" to exclude independent films, and at most, it incidentally affected Wolf House.

Tribunal Decision, supra para 19 at para 79.

[55] For the reasons above, the Tribunal incorrectly found that the Agreement was objectively and subjectively intended to create negative effects on a competitor.

d) The Tribunal improperly weighed evidence required to evaluate legitimate business justifications

[56] For the reasons above, the Tribunal incorrectly found that Dragonrider and Tallturret's legitimate business justifications did not outweigh the Agreement's objectively and subjectively intended negative effects—or lack thereof. *VAA CT* explicitly establishes "[t]he mere fact that a practice may be exclusionary is not a sufficient basis upon which to conclude that the practice has an overriding anti-competitive purpose or character." As such, the Tribunal's palpable and overriding error in assessing the Agreement's intent led to its conclusion that the Agreement's overall purpose was anti-competitive.

> *Commissioner of Competition v Vancouver Airport Authority* (17 October 2019), CT-2016-015, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/465215/index.do>, at paras 621-622 [*VAA CT*].

[57] The Agreement at issue enables Kingsland, Dragonrider, and Tallturret to compete more effectively with streaming services by reducing marginal costs, distribution costs, and ticket prices (*Tribunal Decision*). The Agreement also provides Lion House with a consistent supply of high- quality films to compete with larger multiplexes and streaming services. Overall, the Agreement supports the distribution of films to independent theatres to enhance their competitiveness and long-term viability, with any exclusion of competitors being an incidental effect rather than its primary purpose.

> *Tribunal Decision, supra* para 19 at paras 19, 48, 47, 80.

[58] Dragonrider and Tallturret's efficiency-enhancing and pro-competitive business justifications mirror those held to be valid in *VAA CT*, which are to: (i) improve end-consumer experience, (ii) improve the ability for numerous parties to compete in the relevant market, and (iii) improve the competitiveness of the party(ies) at issue.

> *VAA CT, supra* para 56 at para 621.

[59] Therefore, Dragonrider and Tallturret's efficiency-enhancing and pro-competitive business justifications surpass the weighing threshold set out in *VAA CT*. Unlike *VAA CT*, where competitors were excluded from 100% of the relevant market, the Agreement leaves 98–99% of the relevant market open for competition (*Tribunal Decision*). Unlike in *VAA CT*, where VAA explicitly admitted an intent to exclude competitors, there was no evidence

that the Agreement was subjectively intended to exclude competitors (*Tribunal Decision*). Despite this, the Tribunal in *VAA CT* still found that VAA's efficiency-enhancing and pro-competitive business justifications were sufficient to establish that there was no anti-competitive purpose; the same conclusion must follow the far less restrictive and similarly pro-competitive Agreement here.

> *VAA CT, supra* para 56 at paras 1, 626-628.
> *Tribunal Decision, supra* para 19 at para 34.

e) The Tribunal did not commit a reviewable error when it correctly applied the legal test to find no SLPC

[60] The Tribunal's finding that the Agreement does not lead to an SLPC should stand because it correctly applied all available evidence required by the legal test. Under section 79(1)(b) of the Act, determining SLPC involves applying a legal standard to factual findings, which are afforded significant deference and can only be overturned in cases of palpable and overriding error (*Housen*).

> *Housen, supra* para 15 at para 36.

[61] The Tribunal's reasoning applied both branches of section 79(1)(b) to all relevant facts. It assessed "the Commissioner's portrayal of the impugned conduct's effects in the 'but for' world," specifically whether the conduct facilitated previously unheld market power or preserved existing power by preventing competition that would have otherwise emerged (*Tribunal Decision*). The Tribunal sufficiently considered the trajectory and potential future state of competition in the market, noting the independent theatre channel as a "small albeit growing portion of the relevant market." It concluded that the Commissioner had not provided "sufficiently clear and convincing evidence to demonstrate that any effects are substantial" (*Tribunal Decision*). This demonstrates that the Tribunal assessed all evidence, including persistence and duration of effects. As such, its finding demonstrates no reviewable error and should be given deference. (*Tribunal Decision*).

> *Tribunal Decision, supra* para 19 at paras 86-87.
> *Housen, supra* para 15.

[62] For the reasons above, the elements of the abuse of dominance test under section 79(1) have not been satisfied. Neither Kingsland nor Dragonrider and Tallturret have: (i) "control" over the relevant market; (ii) engaged

in a practice of anti-competitive acts; or (iii) engaged in conduct likely to result in, or that has resulted in, an SLPC.

ISSUE 4. The proper remedy is to prohibit exclusivity only where there is an adverse effect on local competition

[63] For the reasons above, the Appellants' position is that no remedy is required.

[64] If the elements for demonstrating an abuse of dominance on a balance of probabilities was established by the Commissioner, then a proper remedy should prohibit exclusivity only in areas where there are no geographical substitutes for a Lion House theatre.

[65] The Tribunal did not consider local dimensions of competition to be important for the relevant product market. While the appellants agree with the Tribunal's conclusion that Canada is the relevant geographic market, the remedy should be appropriately tailored to where there is a local adverse effect to film distribution and theatre-goers.

[66] This remedy accords with the jurisprudence which states a remedy should only "go as far as necessary [to] restore competition in the relevant markets" (*Laidlaw*). The exclusivity agreement does not affect competition in areas where consumers have an abundance of choice because the theatre-going experience is inherently localized. Accordingly, the nationwide prohibition ordered by the Tribunal goes significantly further than necessary because it includes areas where it is not "necessary [to] restore competition" to begin with. It should be localized.[1]

> *Laidlaw, supra* para 25 at para 116.

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[1] This accords with the remedy recently taken by the Bureau, where it only removed an exclusive property leasing provision in a specific location (Crowsnest Pass, Alberta) rather than a prohibition on all-theatres in Canada as seen in the present case. This exclusivity provision was a business arrangement between a major player in the grocery industry and a commercial real estate owner. Similar to movie-going, the Bureau recognized that grocery shopping is an inherently localized experience. Accordingly, this remedy allows grocery stores to lease property and compete in an area where it was "necessary to restore competition" while respecting arrangements between private business in areas where it was not "necessary to restore competition." Canada, Competition Bureau Canada, *Competition Bureau takes action to protect competition in the grocery industry in an Alberta community (Ottawa: CBA, 2025), online: <canada.ca/en/competition-bureau/news>*.

[67] The present Agreement's exclusivity provision can be used in specific conditions without creating the need for remedy. A downtown Toronto theatre-goer is not traveling to Newmarket because a Lion House theatre lacks "differentiated movies"; they will simply choose another theatre nearby. In contrast, a theatre-goer in Crowsnest Pass, Alberta may have no choice but to travel long distances for alternative theatre-going experiences. A prohibition on all theatres in Canada does not reflect the diversity of choice in theatre markets nation-wide.

[68] For the above reasons, the Appellants submit that the appropriate remedy, if any, would be to prohibit the exclusivity clause in communities where "necessary to restore competition."

Part IV: Remedy Sought

[69] The appellants request that the Tribunal's order prohibiting Kingsland from implementing the exclusivity provisions be overturned.

APPENDIX A: TABLE OF AUTHORITIES

A. Legislation

Competition Act, RSC 1985, c C-34.

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

B. Jurisprudence

Canada (Commissioner of Competition) v Canada Pipe Co. (3 February 2005), CT-2002-006, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/464214/index.do>.

Canada (Commissioner of Competition) v Canada Pipe Co., 2006 FCA 233.

Canada (Commissioner of Competition) v Toronto Real Estate Board, 2014 FCA 29.

Canada (Director of Investigation & Research) v D&B Co. of Canada Ltd. 1995 CarswellNat 2684, [1995] CCTD No 20 (Comp Trib).

Canada (Director of Investigation & Research) v NutraSweet Co., [1990] CLD 1078, 1990 CarswellNat 1368 (Comp Trib).

Canada (Director of Investigation and Research) v Southam Inc., 1995 CanLII 3523 (FCA).

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

Canada (Director of Investigation & Research) v Tele-Direct (Publications) Inc., 1997 CarswellNat 3120, [1997] CCTD No 8 (Comp Trib).

Canada (Director of Investigation and Research, Competition Act) v Laidlaw Waste Systems Ltd., 1992 CarswellNat 1628, [1992] CCTD No 1, 40 CPR (3d) 289 (Comp Trib).

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65.

Commissioner of Competition v Direct Energy Marketing Limited (26 March 2015), CT-2012-003, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463127/index.do>.

Commissioner of Competition v Kingsland Inc., Dragonrider Pictures & Tallturret Studios (31 October 2024).

Commissioner of Competition v Toronto Real Estate Board (28 April 2016), CT-2011-003, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462979/index.do>.

Commissioner of Competition v Vancouver Airport Authority (17 October 2019), CT-2016-015, online: Competition Tribunal <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/465215/index.do>.

Housen v Nikolaisen, 2002 SCC 33.

C. Government Documents

Canada, Competition Bureau Canada, *Abuse of Dominance Enforcement Guidelines* (Ottawa: CBC, 2024), online: <https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/abuse-dominance-enforcement-guidelines>.

D. Secondary Sources

Canada, Competition Bureau Canada, Competition Bureau takes action to protect competition in the grocery industry in an Alberta community (Ottawa: CBA, 2025), online: <canada.ca/en/competition-bureau/news>.