

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

**IN THE 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 RESPONDENT**

Team No. 25110

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## Overview

[1] In the dynamic movie industry in Canada, theatre viewing is a distinct and important way studios share their films with consumers. This case is about consumer choice and an exclusionary agreement that effectively foreclosed all but two movie studios from showing their films in one of the largest and fastest growing independent theatre chains.

[2] The Tribunal made no errors in finding: the relevant market to be the distribution of films to all movie theatres in Canada, that Dragonrider Pictures (“**Dragonrider**”) and Tallturret Studios (“**Tallturret**”) are jointly dominant in this market, and that the Agreement (“**Agreement**”) constitutes a practice of anti-competitive act. The Tribunal also made no error in rejecting the Appellants’ business justification argument.

[3] The Tribunal’s remedy furthers the objectives of the *Competition Act* (the “*Act*”) which include providing small and medium-sized enterprises with equitable opportunities to participate and to provide consumers with more choices. The remedy does this by allowing all studios to access a major distribution channel in the market.

*Competition Act*, RSC 1985, c C-34, s 1.1.

[4] This is the first time the Tribunal has been called upon to apply the recent amendments to the *Act*, making this case of critical importance to the future of competition law in Canada. The Tribunal correctly understood the new test, which allows abuse of dominance to be found where there is an anti-competitive practice or a substantial lessening or prevention of competition (“**SLPC**”). The remedy to prohibit a clearly exclusionary agreement is consistent with Parliament’s purpose of promoting competition and making it possible to find an abuse of dominance where a dominant firm acts in an exclusionary fashion, even in the absence of a SLPC.

[5] The Respondent submits that the Tribunal made a reviewable error in not finding the anti-competitive act also to be conduct likely to result in a significant lessening or prevention of competition.

## Part I—Statement of Facts

### Canada’s Movie Industry

[6] The movie industry is dominated by three major movie studios which control 80% of all films distributed in Canada: Dragonrider, Tallturret, and Saltwater Serpent Pictures (*Tribunal Decision*). Films are distributed through

large “multi-plex” theatres, smaller independent theatres, and streaming platforms (*Tribunal Decision*). While streaming is a popular option, theatres remain an important and distinct way in which Canadians view films. Even within the movie theatre market evidence indicates that Canadians’ preferences are skewing towards independent movie theatres due to the declining reputation of large multiplex theatres, which are viewed as unfriendly to consumers due to hidden fees being imposed (*Tribunal Decision*). Businesses are taking advantage of this demand by opening more independent theatres in Canada (*Tribunal Decision*).

*Commissioner of Competition v Kingsland Inc, Dragonrider Pictures & Tallturret Studios* at paras 14-16 (CACT) [*Tribunal Decision*].

[7] Kingsland is a joint venture between Dragonrider and Tallturret created to distribute Dragonrider and Tallturret films exclusively to independent theatres, including Lion House. Lion House is one of Canada’s largest and fastest-growing independent theatre chains, accounting for 50% of Canada’s independent theatre screens. Lion House is expanding aggressively and its market share is expected to grow even further (*Tribunal Decision*).

*Tribunal Decision, supra* para 6 at para 11.

### **The Anti-Competitive Agreement**

[8] On December 16, 2023, Kingsland and Lion House entered into an Agreement, pursuant to which Kingsland is the exclusive supplier of movies to Lion House theatres. As a direct result, Lion House immediately terminated existing contracts in place with all other movie studios (*Tribunal Decision*).

*Tribunal Decision, supra* para 6 at para 20.

[9] The Agreement has the effect of foreclosing all other competing studios from half of Canada’s independent theatre screens. Following the implementation of the Agreement, Dragonrider and Tallturret’s joint market share increased from 60% to 63% of all films in Canada, and is expected to rise further as long as the Agreement remains in effect (*Tribunal Decision*). As a result, consumer choice is and will continue to be limited by limiting films available for viewing at independent theatres and lessening competition in film distribution.

*Tribunal Decision, supra* para 6 at para 28.

## Part II—Statement of Points in Issue

[10] The central issue to this appeal is whether the Tribunal made any reviewable errors that warrant the Competition Appeal Tribunal (“CAT”) to interfere with the Tribunal’s decision to prohibit the exclusivity provisions of the Agreement. It is submitted on the issues before the CAT:

- 1) The Tribunal made no reviewable error in defining the relevant market as the distribution of films to all movie theatres in Canada.
- 2) The Tribunal made no reviewable error in finding that Dragonrider and Tallturret are jointly dominant in the market for film distribution to all movie theatres in Canada.
- 3) The Tribunal did not err in finding that the implementation of the Agreement constitutes a practice of anti-competitive acts by Dragonrider and Tallturret. However, the Tribunal committed a palpable and overriding error in its SLPC analysis.
- 4) The Tribunal erred by not ordering an administrative monetary penalty (AMP) pursuant to section 79(3.1) of the *Act*, in addition to a prohibition on the exclusionary provisions of the Agreement.

## Part III—Statement of Submissions

### Standard of Review

[11] The standard of review for issues on appeal to the CAT is (i) correctness for questions of law, and (ii) palpable and overriding error for questions of mixed fact and law (*Fanaki Moot Rules*). A palpable and overriding error is an error in law that is obvious and significant enough to affect the outcome of the decision (*Vavilov*). This is a deferential standard (*Vavilov*; *Southam*). The correctness standard operates without deference. Instead, where an issue of law is raised, the CAT must make its own determination of the correct outcome (*Vavilov*).

*Adam F Fanaki Competition Law Moot Rules, Academic Year 2024-25* at 7, online <[fanakimoot.org/officialrules](http://fanakimoot.org/officialrules)> [*Moot Rules*].

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

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

## ISSUE 1—Defining the Relevant Market

[12] The first step to establishing abuse of dominance is to define the relevant market (*TREB*). The relevant market must be defined in two dimensions, by product and geography (*Competition Act; D&B*). The relevant market need not and typically cannot be determined with exact precision, but rather is an exercise in judgement (*TREB*).

*The Commissioner of Competition v The Toronto Real Estate Board*, 2016 CACT 7 at paras 11, 132 [*TREB*].

*Competition Act*, *supra* para 3, s 79(1).

*Canada (Director of Investigation and Research) v D&B Companies of Canada Ltd*, 1995 CanLII 8 at para 39 (CACT) [*D&B*].

[13] In interpreting the chapeau of section 79(1) of the *Competition Act*, the Tribunal has established that a “class or species of business” is synonymous with a product market (*NutraSweet*). The Tribunal held that the distribution of films to the broader movie theatre market, including major multi-screen movie theatres within Canada, constitutes a “class or species of business (*Tribunal Decision*).” Through this finding, the Tribunal defined the product market as “the distribution of films to movie theatres” and defined the geographic market as “within Canada.”

*Competition Act*, *supra* para 3 at s 79(1).

*Canada (Director of Investigation and Research) v NutraSweet Co* (1990), 32 CPR (3d) 1 at 32, 1990 CanLII 13729 (CACT) [*NutraSweet*].

*Tribunal Decision*, *supra* para 6 at para 7.

### **(1) The Tribunal Made No Reviewable Error in Defining the Relevant Market.**

[14] The Tribunal did not err in law when it found the relevant market to be the distribution of films to all theatres in Canada (*Tribunal Decision*). The Tribunal properly weighed relevant factors for determining the product market and analyzed the practical indicia including switching costs and the behaviours of buyers (*Tribunal Decision*). It engaged in a fact-dependent assessment which is subject to deference (*Southam*).

*Tribunal Decision*, *supra* para 6 at paras 7, 60.

*TREB*, *supra* para 12 at para 11.

*Southam*, *supra* para 11.

### (a) Product Market

[15] To identify the product market, one must begin by analyzing the product at issue and whether close substitutes exist for that product. This analysis must focus on the demand responses of consumers within that given market (*TREB*).

*TREB*, *supra* para 12 at para 124.

[16] The relevant product market can be determined by direct or indirect evidence of substitutability (*Southam*). Direct evidence of substitutability includes statistical evidence of buyer price sensitivity and anecdotal evidence. Indirect evidence of substitutability focuses on practical indicia such as switching costs and buyer behaviour (*Southam*). Direct evidence of substitutability is often difficult to obtain, making practical indicia an important part of assessing substitutability to build an accurate market definition.

*Southam*, *supra* para 11 at para 16.

[17] In the absence of direct evidence on substitutability the Tribunal properly examined practical indicia of switching costs and buyer behaviour (*Southam*; *ADEGs*).

*Southam*, *supra* para 11 at para 16.

Canada, Competition Bureau, *Abuse of Dominance Enforcement Guidelines* (7 March 2019) at paras 6, 7, 12, online: <[competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/abuse-dominance-enforcement-guidelines](http://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/abuse-dominance-enforcement-guidelines)> [*ADEGs*].

[18] The Tribunal determined that independent theatres and larger-chain theatres form part of the same product market by assessing the switching costs between independent theatres and larger-chain Theatres (*Tribunal Decision*).

*Tribunal Decision*, *supra* para 6 at para 61.

[19] The Tribunal found the switching costs between independent theatres and larger movie theatre chains to be *de minimis* (*Tribunal Decision*). *De*

*minimis* switching costs indicate that consumers view two products as alternatives for each other (*Tele-Direct*). When consumers consider products as alternatives for each other that serves as an indicator that the products are substitutable and therefore form part of the same product market (*TREB*).

*Tribunal Decision, supra* para 6 at para 61.

*Director of Investigation and Research v Tele-Direct Inc*, 1997 CanLII 11 at para 130 (CACT) [*Tele-Direct*].

*TREB, supra* para 12 at paras 117-118.

### (i) Streaming Services

[20] The Tribunal made no reviewable error in finding streaming services are not part of the product market.

[21] The Tribunal correctly analyzed buyer behaviour to conclude that streaming services are complementary to movie theatres and therefore exist outside of the relevant market.

[22] In analyzing the buyer behaviour of streaming services the Tribunal held that 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 consider switching from viewing a movie in a theatre to streaming it at home in response to a SSNIP imposed by a hypothetical monopolist (*Tribunal Decision*). However, it properly concluded this did not elevate streaming services to being in the same product market as theatres given the other factors showing the distinct nature of the latter.

*Tribunal Decision, supra* para 6 at para 63.

[23] The evidence before the Tribunal showed that films released in theatres perform much better over their lifetime and drive up subscriptions to the studio's streaming platforms, where the films are released following their run in theatres (*Tribunal Decision; Amazon MGM*). This shows the distinct character of these products.

*Tribunal Decision, supra* para 6 at para 15.

EU, Directorate-General for Competition, *Case M.10349—Amazon/MGM*, [2022] OJ, C 1723 at paras 95, 88, online: <[ec.europa.eu/](http://ec.europa.eu/)>

competition/mergers/cases1/202250/M\_10349\_8691929\_626\_3.pdf>  
[*Amazon MGM*].

[24] The ability of streaming services to exercise competitive pressure on distribution of movies in theatres indicates that consumers view streaming services and theatres as complements rather than alternatives (*Clarke*). Products consumers view as complements to the product at issue must be classified as a separate relevant market (*Clarke*).

*R v Clarke Transport Canada Inc*, 1995 CanLII 7327 at para 130 (ONSC).

[25] In summary, by properly analyzing the practical indicia of switching costs and buyer behaviours, the Tribunal was able to identify a relevant product market without committing a palpable or overriding error.

### **(b) Geographic Market**

[26] Notably, the geographic market is not at issue in this appeal. The Tribunal identified the relevant market as the distribution of films to movie theatres within Canada (*Tribunal Decision*). The movie theatre industry comprises different levels: upstream, intermediate, and downstream (*Amazon MGM*). Distribution of films from movie studios and distributors to movie theatres is part of the downstream level (*Amazon MGM*). The focus on the distribution aspect means that as long as a firm distributes films to movie theatres throughout Canada their products (films) can be included as part of the relevant market (*ADEGs*).

*Amazon MGM*, *supra* para 23 at paras 7-9.

*Tribunal Decision*, *supra* para 6 at para 7.

*ADEGs*, *supra* para 17 at para 13.

## **ISSUE 2—The Tribunal made no reviewable error in finding that Dragonrider and Tallturret are jointly dominant in the market for film distribution to all movie theatres in Canada.**

[27] The Tribunal did not err in mixed fact and law when it found Dragonrider and Tallturret are jointly dominant in the relevant market of film distribution to all movie theatres in Canada.

[28] The Tribunal did not err in finding that Dragonrider and Tallturret are jointly dominant because it properly analyzed the factors of joint dominance

and evaluated the relevant indicia for determining their collective market power.

### **(1) Factors of Joint Dominance**

[29] Establishing a finding of joint dominance requires a twofold legal analysis. First it must be established that the firms in question jointly control a class or species of business. Second it needs to be established that the firms in question collectively hold a substantial degree of market power (*ADEGs*). Indicia of market power includes a high market share, a small number of competitors, ability to impose commercial leverage, and high barriers to entry.

*ADEGs, supra* para 17 at para 46.

[30] The tribunal found the Agreement to be a part of a business strategy on behalf of these firms to utilize their market power to foreclose competitors from participating in a growing portion of the theatre market.

[31] As two of the three largest film studios in Canada, Dragonrider and Tallturret have a substantial degree of market power within the broader theatre market. The tribunal discussed how recent consumer trends away from larger movie theatres have led to a growth in the independent movie theatre market (*Tribunal Decision*). Therefore, the growth of this subset of the market brings with it the prospect of increased profits for any firms that are already engaged in the broader movie theatre market.

[32] Kingsland is a joint venture between Dragonrider and Tallturret that was created to distribute Dragonrider and Tallturret films to independent movie theatres across Canada. The Agreement is linked to the two firms' significant commercial leverage and illustrates the ability of Tallturret and Dragonrider to exclude competitors from displaying their films through a growing part of the relevant market.

[33] The Tribunal determined that expected growth in independent theatres would increase their ability to exercise joint dominance over time (*Tribunal Decision*).

*Tribunal Decision, supra* para 6 at para 72.

### **(2) Indicia of Market Power**

[34] The Agreement is a demonstration of the ability of Tallturret and Dragonrider to exclude competitors in an industry with high barriers to entry (*Tribunal Decision*).

*Tribunal Decision, supra* para 6 at para 70.

[35] Entry into the movie theatre studio industry has high barriers to entry. New entrants into the market must seek and acquire the rights to produce films that are projected to make a profitable return on their investment when displayed in theatres. Which films will perform well is unpredictable and therefore newer film studios will likely suffer sunk financial costs within their first few years of entering the market.

### ISSUE 3—Practice of Anti-Competitive Acts and SLPC

[36] Pursuant to the recent amendments to the *Act*, abuse of dominance can be established by a finding either of a practice of anti-competitive acts or conduct that results or is likely to result in a SLPC (*Competition Act*). This amendment reflects Parliament's intention to make it easier to establish abuse of dominance by only requiring one of the tests under section 79(1) to be met.

*Competition Act, supra* para 3, s 79.

#### (1) Practice of Anti-Competitive Acts

[37] The Tribunal made no reviewable error in finding that the Agreement constitutes a practice of anti-competitive act by Dragonrider and Tallturret. The Tribunal correctly interpreted and applied the test for anti-competitive acts under section 79(1)(a) of the *Act*.

[38] Under section 79 of the *Act*, abuse of dominance can be established by finding that the dominant player engaged either in a practice of anti-competitive acts, or in conduct resulting in or likely to result in a SLPC. An anti-competitive act, in addition to the examples listed in subsections 78(1) (a)-(k) of the *Act*, is defined as “any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition” (*Competition Act*).

*Competition Act, supra* para 3, ss 78-79.

[39] In assessing a practice of anti-competitive acts, the Tribunal must determine the overall character of the conduct by weighing all relevant factors

(*TREB*). These factors include the reasonably foreseeable or expected objective effects of the conduct, with the party being deemed to have intended the effects of its actions (*Canada Pipe*).

*TREB*, *supra* para 12 at para 274.

*Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233 at paras 67-70 [*Canada Pipe*].

[40] Here, the Tribunal made no error in finding that the overall character of the Agreement is anti-competitive, in light of the clear and direct evidence of exclusionary effects on competitors. The Tribunal explicitly found that the Agreement is exclusionary (*Tribunal Decision*). The Agreement has clear exclusionary effects, with Lion House immediately ending its contracts with all other studios following the Agreement coming into effect (*Tribunal Decision*). As a result, competing studios were cut off from distributing their films to 50% of the independent movie theatre screens in Canada (*Tribunal Decision*). The effects of the Agreement on competitors were reasonably foreseeable and obvious given the nature of the exclusive supply Agreement (*Tribunal Decision*). Therefore Kingsland, Dragonrider, and Tallturret are deemed to have intended the exclusionary effects of the Agreement (*Canada Pipe*).

*Tribunal Decision*, *supra* para 6 at paras 78, 20, 11, 21, 20.

*Canada Pipe*, *supra* para 39 at paras 67–70.

[41] The Tribunal also made no error in holding the Agreement to be a “practice” of anti-competitive acts. A “practice” of anti-competitive acts includes conduct that is ongoing, sustained and systemic, or conduct that has a lasting impact on competition (*TREB*).

*TREB*, *supra* para 12 at para 273.

[42] The Agreement featured sustained, systemic, and exclusionary conduct. The Agreement has a sustained impact on competition, completely excluding all other studios from the main theatre chain in the popular and fast growing independent theatre stream. The Agreement also extends across the entire country. This means that every single competitor across the national market for film studios is excluded from distributing to Lion House except Dragonrider and Tallturret through Kingsland.

[43] The effects of the Agreement have already begun to affect competition with Dragonrider and Tallturret's market share of all films increasing from 60% to 63% after the Agreement went into effect (*Tribunal Decision*). There is also likely to be a lasting impact on competition overtime from the Agreement. There was no evidence before the Tribunal that the Agreement had any end date suggesting the Agreement could have a significant impact on competition in the long term (*Tribunal Decision*). This further supports the Tribunal's finding that the Agreement is a practice for the purpose of 79(1) (a).

*Tribunal Decision, supra* para 6 at paras 28, 20.

## (2) Business Justification

[44] The Tribunal made no reviewable error in finding that the Appellant had not established a valid business justification because it properly weighed the evidence of the alleged business justification against the overall exclusionary effects of the Agreement.

[45] A business justification is an alternative explanation for the purpose of conduct that is alleged to be anti-competitive (*Canada Pipe*). The justification must go beyond proof of some legitimate business purpose that is self-serving. It must provide a credible efficiency or pro-competitive rationale for the conduct that relates to and counterbalances the anti-competitive effects of the acts (*Canada Pipe*). Any business justification raised must be weighed against the predatory, exclusionary, or disciplinary effect the conduct has on competition (*D&B*). This is a holistic balancing exercise, with all known factors being taken into account (*D&B*). The burden of establishing the business justification rests solely on the alleged dominant party (*TREB*).

*Canada Pipe, supra* para 39 at para 73.

*D&B, supra* para 12 at paras 262, 265.

*TREB, supra* para 12 at para 144.

[46] At the Tribunal, the Appellants claimed that the Agreement is within the normal course of the studios' relations with movie theatres, such as Lion House, and that it would lead to efficiencies (*Tribunal Decision*). The Appellants even went as far as to claim that the Agreement was pro-competitive in guaranteeing distribution for independent films (*Tribunal Decision*). Despite these claims, the Appellants did not raise any tangible evidence of any pro-competitive or efficiency related justifications for the Agreement.

Specifically, the reasons from the Tribunal state, “they (Dragonrider and Tallturret) have not established to the requisite degree that the overall character or overriding purpose of the Agreement was not anti-competitive in nature (*Tribunal Decision*).”

*Tribunal Decision*, *supra* para 6 at paras 47-48, 80.

[47] The Tribunal properly balanced the evidence that was before it of the anti-competitive and exclusionary effects of the Agreement to find that no valid business justification was made out.

[48] The balancing of available evidence is a matter that is subject to deference from the CAT. The Appellants have shown no palpable or overriding error by the Tribunal in determining that the business justification raised by the Appellants did not outweigh the anti-competitive character of the Agreement.

### **(3) Parliamentary Intention Behind the Amendments to Section 79(1) of the Act**

[49] The Tribunal made no reviewable error in finding an abuse of dominance under section 79(1)(a), even though it did not find a SLPC, because the amendments to the *Act* allow this. The Tribunal’s decision is consistent with the Parliamentary intention behind the 2023 amendments to the *Act*.

[50] Following Bills C-59, C-19, and C-56, the *Act* has recently undergone its most comprehensive amendments since coming into effect in 1985 (Ross).

Thomas Ross, “The Dust Has Settled (For Now): Reviewing the Recent Amendments to the Canadian Competition Act” (19 November 2024), online: <[pymnts.com/cpi-posts/the-dust-has-settled-for-now-reviewing-the-recent-amendments-to-the-canadian-competition-act](https://pymnts.com/cpi-posts/the-dust-has-settled-for-now-reviewing-the-recent-amendments-to-the-canadian-competition-act)> [Ross].

[51] Notably, Bill C-56 amended section 79 of the *Act* to provide that a SLPC is no longer required to make an order prohibiting anti-competitive conduct.

*An Act to amend the Excise Tax Act and the Competition Act*, SC 2024, c C-56, s 5 [Bill C-56].

[52] The Tribunal, like all judicial bodies, must interpret and apply the law as set by Parliament. This includes the *Act*. Courts must first look to the plain meaning of the law, and where there is discrepancy or further interpretation

is needed, courts must take a purposive interpretation, considering the entire concept of the law and the mischief behind it (Sullivan). The Tribunal's application of the new test is consistent with the plain language of the amendments and the larger mischief behind the amendments.

Ruth Sullivan, "Statutory Interpretation in the Supreme Court of Canada" (1999) 30:2 Ottawa L Rev 175 at 187, 216 [Sullivan].

[53] By a plain language analysis there is an obvious and intentional change in the wording of section 79(1) from "and" to "or". This change opens the door for the Tribunal to find an abuse of dominance either where a person or persons is engaged in a practice of anti-competitive acts or conduct that is likely to result in a SLPC.

[54] The Tribunal's decision is also consistent with the larger context and mischief behind the amendments, further supporting the Commissioner's submission that no error in law was made in interpreting the amended Act. The amendments recognize that even where there is no finding of SLPC, there may still be substantial impacts on competition (FINA Committee). Parliament recognized that under the previous version of the Act, abuse of dominance was one of the more challenging provisions to enforce (FINA Committee). It was the intention of Parliament to create a lower threshold for the Tribunal to remedy anti-competitive conduct.

Canada, House of Commons, Standing Committee on Finance, *Evidence*, 44th Parl, 1st Sess (20 November 2023) at 18:42, 18:44 (Mark Schaan) [FINA Committee].

[55] The Tribunal's decision was aligned with the intention of Parliament. The Agreement restricted consumer choice and foreclosed all but two studios from distributing their movies to Lion House theatres (*Tribunal Decision*). This entrenched Dragonrider and Tallturret's dominant and controlling position in the Canadian film industry. It is clear that there were immediate anti-competitive effects from the Agreement on the supply for movies that needed to be addressed, even if they did not rise to an SLPC.

*Tribunal Decision*, *supra* para 6 at para 21.

[56] The Tribunal's decision is aligned with both the plain language and purposive intention behind the 2023 amendments. There is no reviewable error in the Tribunal's interpretation of the new amendments.

#### **(4) Substantial Lessening or Prevention of Competition (SLPC)**

[57] While it is open to the Tribunal to find an abuse of dominance without a finding of SLPC, the Tribunal erred in its analysis of SLPC. The Tribunal made an overriding and palpable error in mixed fact and law because it did not consider independent theatres as a material part of the market in its SLPC analysis.

### (a) The Test for SLPC

[58] The second way to find an abuse of dominance is through conduct that had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market that the person has a plausible competitive interest in (*Competition Act*). The effect of this conduct must not be a result of superior competitive performance (*Competition Act*). The jurisprudence is clear that where a prevention or lessening of competition does not extend throughout the entire relevant market, the Tribunal must also assess its scope and whether the impact extends through a material part of the market (*VAA*; *CCS*; *Parrish*). The term “material part of the market” refers to the scope of the adverse effect on price or non-price levels of competition arising from the conduct and asks whether these adverse effects touch a significant portion of the relevant market or in respect of a material volume of sales (*CCS*).

*Competition Act*, *supra* para 3, ss 79(1)(b)(i), 79(1)(b)(ii).

*The Commissioner of Competition v Vancouver Airport Authority*, 2019 CACT 6 at para 640 [*VAA*].

*The Commissioner of Competition v CCS Corporation et al*, 2012 CACT 14 at paras 375, 378 [*CCS*].

*Canada (Commissioner of Competition) v Parrish & Heimbecker Ltd*, 2022 CanLII 106878 at para 474 (CACT) [*Parrish*].

### (b) The Tribunal’s Error

[59] The Tribunal erred in mixed fact and law by not considering independent theatres as a material part of the relevant market. The Tribunal conducted its analysis of SLPC in the market for all movie theatres and found that because independent movie theatres were a small channel of this market, the lessening and prevention in this channel was not significant to the overall market (*Tribunal Decision*). However, the test for SLPC requires the Tribunal to consider a material part of the relevant market where a

lessening or prevention of competition does not transcend the entire market (VAA).

*Tribunal Decision*, *supra* para 6 at para 86.

VAA, *supra* para 58 at para 640.

[60] Independent theatres are a material and rapidly-growing part of the relevant market. The evidence before the Tribunal shows the prominent and growing role independent theatres play. The preferences of consumers are skewing towards independent theatres because of the decline in reputation of major theatre chains (*Tribunal Decision*). In response to this increased demand, independent theatres are expanding across Canada (*Tribunal Decision*). Further, LionHouse, the theatre that all but two studios in the market are foreclosed from, is one of the fastest growing independent theatre chains in the country, already holding 50% of all independent theatre screens (*Tribunal Decision*). Independent theatres currently account for a quarter of the all theatre market and there is clear evidence that this part of the market is significantly growing (*Tribunal Decision*).

*Tribunal Decision*, *supra* para 6 at paras 16, 11.

[61] The materiality of independent theatres is bolstered by the forward looking approach to a SLPC analysis and jurisprudence such as *TREB*. It is therefore open to the Tribunal to consider evidence of independent theatre's likely growth in the market to support an argument that this sector of the market is material.

[62] Further, this case is analogous to *TREB* in dealing with a smaller but growing section of the market. In *TREB*, the lessening and prevention of competition arising from the data sharing restrictions disproportionately impacted new innovative brokers who operated virtual office websites ("VOWs") (*TREB*). While the effects of the conduct impacted the VOW brokers significantly more than traditional brokers, the Tribunal nonetheless held these effects to be substantial, pointing in part to the projected growth in the VOW sector (*TREB*). This is analogous to the current case. The Tribunal found that the effects of the Agreement are not likely to be felt beyond independent theatres. However, this does not mean that these effects are not substantial. The evidence before the Tribunal is that this sector is expected to grow rapidly, increasing its significance in the market and making it a material part of the market.

*TREB*, *supra* para 12 at paras 445, 665-673.

[63] The Tribunal's error of not considering independent theatres as a material part of the market is overriding, palpable, and on its face obvious. The Tribunal did not fully apply the SLPC test, skipping the analysis of a material part of the market. The jurisprudence is clear that where the effects of conduct may not transcend the entire market, the Tribunal's analysis must turn and ask if the scope of the effects impact a material part of the market (VAA). Skipping this step is a palpable error and is overriding because it led the Tribunal to not make a finding of an SLPC, despite the substantiality of the effects under the "material part of the market" test.

VAA, *supra* para 58 at para 640.

### **Part IV—Remedy Sought**

[64] The Tribunal erred in mixed fact and law on its analysis of SLPC, and thus did not impose an appropriate remedy under the *Act* as amended. The Tribunal erroneously found no SLPC, and therefore did not consider AMPs.

[65] The Commissioner requests that the CAT make the order that the Tribunal should have made, had it not erred in its analysis of SLPC. The proper remedy is a prohibition on the exclusivity provisions of the Agreement, and an AMP pursuant to section 79(3.1) of the *Act*.

[66] Section 79(3.1) of the *Act* provides that the Tribunal "may" impose additional AMPs where a finding of anti-competitive conduct is anchored in section 79(1)(b)(ii), and an SLPC has been established. The Commissioner submits that the CAT should exercise this judicial discretion and impose an AMP in this case.

[67] It is appropriate for the CAT to make this order under section 79(3.1) (a) of the *Act*, which provides for an AMP not exceeding \$25,000,000. Section 79(3.1)(b) of the *Act* cannot easily be ordered by the CAT in this case because the value of the benefit derived from the Agreement is not before the CAT.

[68] Furthermore, ordering an AMP under section 79(3.1)(a) would provide general deterrence for future anti-competitive acts, and further animate Parliament's intention of creating an abuse of dominance framework that can better respond to modern competition issues.

[69] In the alternative, should the CAT not find a SLPC to be established, the correct remedy is to maintain the prohibition on the exclusivity provisions made by the Tribunal. In which case, the Tribunal made no reviewable

error in holding that the appropriate remedy was to prohibit Kingsland from implementing the exclusivity provisions in the Agreement.

[70] In ordering a remedy, the Tribunal is to only go as far as necessary to restore competition in the relevant market (*Laidlaw*).

*Canada (Director of Investigation and Research, Competition Act) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289 at 351, 1992 CanLII 15378 (CACT) [*Laidlaw*].

[71] By prohibiting the exclusivity provisions in the Agreement, the Tribunal's remedy goes only as far as is necessary to accomplish the goal of ending the exclusionary anti-competitive practice by the Appellants. The remainder of the Agreement may still be allowed to stand. The Tribunal's remedy only addresses the provisions that were causing the exclusionary and anti-competitive effect. This is consistent with the jurisprudence on acceptable remedies.

**APPENDIX A—TABLE OF AUTHORITIES****Legislation**

*An Act to amend the Excise Tax Act and the Competition Act*, SC 2024, c C-56.

*Competition Act*, RSC 1985, c C-34.

**Jurisprudence**

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

*Canada (Commissioner of Competition) v Parrish & Heimbecker Ltd*, 2022 CanLII 106878 at para 474 (CACT).

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

*Canada (Director of Investigation and Research) v D&B Companies of Canada Ltd*, 1995 CanLII 8 (CACT).

*Canada (Director of Investigation and Research) v NutraSweet Co* (1990), 32 CPR (3d) 1, 1990 CanLII 13729 (CACT).

*Canada (Director of Investigation and Research, Competition Act) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289, 1992 CanLII 15378 (CACT).

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

*Commissioner of Competition v Kingsland Inc, Dragonrider Pictures & Tallturret Studios* (CACT).

*Director of Investigation and Research v Tele-Direct Inc*, 1997 CanLII 11 (CACT).

EU, Directorate-General for Competition, *Case M.10349 – Amazon / MGM*, [2022] OJ, C 1723 at paras 95, 88, online: <[ec.europa.eu/competition/mergers/cases1/202250/M\\_10349\\_8691929\\_626\\_3.pdf](https://ec.europa.eu/competition/mergers/cases1/202250/M_10349_8691929_626_3.pdf)>.

*R v Clarke Transport Canada Inc.*, 1995 CanLII 7327 (ONSC).

*The Commissioner of Competition v CCS Corporation et al*, 2012 CACT 14.

*The Commissioner of Competition v The Toronto Real Estate Board*, 2016 CACT 7.

*The Commissioner of Competition v Vancouver Airport Authority*, 2019 CACT 6.

### **Government Documents**

Canada, Competition Bureau, *Abuse of Dominance Enforcement Guidelines* (7 March 2019), online: <[competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/abuse-dominance-enforcement-guidelines](https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/abuse-dominance-enforcement-guidelines)>.

### **Secondary Material**

*Adam F Fanaki Competition Law Moot Rules, Academic Year 2024-25*, online <[fanakimoot.org/officialrules](https://fanakimoot.org/officialrules)>.

Canada, House of Commons, Standing Committee on Finance, *Evidence*, 44th Parl, 1st Sess.

Thomas Ross, “The Dust Has Settled (For Now): Reviewing the Recent Amendments to the Canadian Competition Act” (19 November 2024), online: <[pymnts.com/cpi-posts/the-dust-has-settled-for-now-reviewing-the-recent-amendments-to-the-canadian-competition-act](https://pymnts.com/cpi-posts/the-dust-has-settled-for-now-reviewing-the-recent-amendments-to-the-canadian-competition-act)>.