THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Vol. 37 | 2024 | Nº 1

CANADIAN COMPETITION LAW REVIEW

REVUE CANADIENNE DU DROIT DE LA CONCURRENCE

THE CANADIAN
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ISSN 1929-6851 (Online) / ISSN 1929-6843 (Print)

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DEDICATION TO GORDON KAISER

Editorial Board

The Canadian Competition Law Review's Editorial Board would like to dedicate this edition to Gordon Kaiser. Gordon served on the Editorial Board from 2022 until his untimely death in May 2024. We remember him as a significant contributor to the development of competition law in Canada, an avid entrepreneur, and a public interest advocate. More recently, Gordon dedicated his time and talents to energy policy and arbitration but remained steadfastly devoted to academic scholarship and writing. We truly appreciate his service and contributions to both the Canadian Competition Law Review and the shape of Canadian competition law and policy.

HOMMAGE À GORDON KAISER

Comité de rédaction

Le comité de rédaction de la *Revue canadienne du droit de la concurrence* souhaite dédier ce numéro à feu Gordon Kaiser. Me Kaiser a siégé au comité de rédaction de 2022 jusqu'à son décès prématuré en mai 2024. Le souvenir qu'il nous laisse est celui d'un contributeur important au développement du droit de la concurrence au Canada, d'un entrepreneur passionné et d'un défenseur de l'intérêt public. Plus récemment, Me Kaiser a consacré son temps et ses talents à la politique énergétique et à l'arbitrage, tout en restant fermement attaché à la recherche universitaire et à la rédaction. Nous lui sommes reconnaissants des précieuses contributions et des maints services qu'il a rendus à la *Revue canadienne du droit de la concurrence* et à l'évolution du droit et de la politique de la concurrence au Canada.

2023 YEAR IN REVIEW

Kevin Wright and Reba Nauth[1]

2023 saw an overhaul of the competition regime in Canada and has given us reason to believe there are many more changes to come. Canada's competitive intensity was on the forefront of Canadian's minds and, accordingly, became a high priority for its politicians. Our legislation has seen extensive changes impacting virtually every major facet of the Act: the loss of efficiencies defence impacts merger review, the civil collaborations provisions have expanded to include "non-competitors", the abuse of dominance test has been wholly restructured, and the effects of the criminalization of wage-fixing and no-poaching agreements are being realized. The Bureau has become much more litigious, appealing the Rogers/Shaw decision and successfully arguing to uphold the Tribunal's decision in Secure. Competition law has become increasingly swayed by public discourse, with the Bureau publishing market studies in areas such as the grocery industry, telecoms, financial services, and cannabis. The legislature, aligned with the Bureau, clearly intends to continue modernizing the Act to intensify competition in Canada. As competition becomes increasingly embedded in—and shaped by—popular discourse, it is important to ensure that stakeholders use their voices to ensure reform is balanced against commercial interests and the appropriate checks and balances against government authority. We can expect vigorous debate as we learn to maneuver our new competition regime and drive toward pro-competitive outcomes.

En 2023, le régime de la concurrence au Canada a connu une refonte majeure, laissant entrevoir de nombreux autres changements à venir. L'intensité concurrentielle du Canada s'est imposée dans l'esprit des Canadiens, devenant ainsi une priorité majeure pour ses politiciens. Nos dispositions législatives ont subi des changements substantiels impactant pratiquement tous les aspects majeurs de la Loi sur la concurrence : l'élimination de la défense fondée sur les gains en efficience dans le cadre de fusionnements, l'élargissement des dispositions sur les collaborations civiles pour inclure les « non-concurrents », la restructuration entière du critère de fond pour l'abus de position dominante, et la concrétisation des effets de la criminalisation des accords de fixation des salaires et de non-débauchage. Le Bureau de la concurrence est devenu beaucoup plus litigieux, en faisant appel de la décision Rogers/Shaw et en plaidant avec succès pour maintenir la décision du Tribunal dans l'affaire Secure. La Loi sur la concurrence est de plus en plus influencée par le discours public, le Bureau ayant publié des études de marché dans des secteurs tels que les épiceries, les télécommunications, les services financiers, et le cannabis. Le

législateur, partageant la même vision du Bureau, a clairement l'intention de continuer à moderniser la loi pour intensifier la concurrence au Canada. À mesure que la concurrence s'ancre de plus en plus dans le discours populaire, et qu'elle en est façonnée, il est crucial de s'assurer que les parties prenantes utilisent leur voix pour garantir que la réforme soit équilibrée par rapport aux intérêts commerciaux et qu'elle dispose des freins et contrepoids appropriés contre l'autorité gouvernementale. Nous pouvons nous attendre à un débat vigoureux alors que nous apprenons à manœuvrer dans notre nouveau régime de concurrence et à progresser vers des résultats proconcurrentiels.

Authors would like to thank Jasnit Pabla and Valeska Rebello of Osler, Hoskin & Harcourt LLP for their contributions to this article.

Overview

2023 was a blockbuster year for competition law and policy reform in Canada, with key developments including:

- In January, the Federal Court of Appeal dismissed the Commissioner of Competition's appeal of the Competition Tribunal's decision not to block the sale of Shaw Communications Inc. to Rogers Communications Inc.
- In May, the Competition Bureau published the final wage-fixing and no-poaching enforcement guidelines after a public consultation on draft guidance earlier in the year.
- Also in May, the Bureau entered into a consent agreement with Superior Plus Corp. with respect to its proposed acquisition of Certarus Ltd. and filed an application with the Tribunal alleging that Cineplex engaged in a practice of drip pricing in the online sale movie theatre tickets.
- In June, the new criminal provisions addressing wage-fixing and no-poaching agreements came into effect. The Bureau also made a series of recommendations to foster greater competition in the grocery sector, in a report entitled "Canada Needs More Grocery Competition."
- Also in June, the Ontario Superior Court levied the highest fine imposed by a Canadian court for conspiracy or bid-rigging to date: Canada Bread Company, Limited was fined $50 million for its participation in a criminal price-fixing arrangement in respect of packaged bread.

- In August, the Federal Court of Appeal dismissed Secure Energy Services Inc.'s ("**Secure**") appeal of the Competition Tribunal's decision in favour of the Commissioner of Competition's challenge of Secure's acquisition of Tervita Corporation in March.

- In September, the department of Innovation, Science and Economic Development Canada published a report, titled "Consultation on the Future of Canada's Competition Policy," summarizing "what it heard" from responses to its public consultation that had run from November 2022 until March 2023 to support and inform continued overhaul of the *Competition Act*.

- Also in September, critical changes to the *Competition Act* were introduced to Parliament through Bill C-56, just days after private member Bill C-352 was introduced by NDP leader Jagmeet Singh.

- In November, significant further reform to the *Competition Act* was introduced in Bill C-59. Bill C-59 appeared to contain the final set of changes resulting from the federal government's modernization project that had been commenced with Bills C-19 in 2022 and C-56. Also in November, significant additions to Bill C-56, concerning the abuse of dominance provisions, were added at the Committee stage.

- In December, Bill C-56 received Royal Assent, notably repealing Canada's section 96 mergers efficiencies defence, empowering formal market studies by the Commissioner and reformulating important aspects of the abuse of dominance provisions.

- Also in December, the Competition Bureau published its "Guide to the December 2023 amendments to the *Competition Act*".

I. Amending the *Competition Act*: A Study, Bills and an Enactment

2023 saw a continuation of the modernization of Canadian competition law initiated in February 2022 by the Minister of Innovation, Science and Economic Development (the "**Minister**")[2] and which led to the first wave of amendments passed in June 2022 under Bill C-19, the *Budget Implementation Act, 2022, No. 1*. New criminal provisions addressing wage-fixing and no-poaching agreements came into effect one year later, on June 23, 2023. On November 17, 2022, Innovation, Science and Economic Development Canada ("**ISED**") opened a public consultation to support and inform continued overhaul of the *Competition Act* (the "**Act**"),[3] titled "Consultation on the Future of Canada's Competition Policy."[4] The consultation period

ran from November 2022 until March 31, 2023. Three further bills proposing amendments to the Act were tabled in 2023: Bill C-56, introduced on September 21, 2023 which ultimately received Royal Assent on December 15, 2023;[5] the 2023 Fall Economic Statement Implementation Bill, Bill C-59, introduced on November 21, 2023;[6] and Bill C-352 a private member's bill introduced by NDP leader Jagmeet Singh on September 18, 2023.[7] The latter two bills did not progress beyond first readings by the year end, but have since significantly advanced.

a. Results of Future of Competition Policy in Canada study

On September 20, ISED published a report summarizing "what it heard" from the responses to its public consultation. There was significant engagement: 130 submissions were received from stakeholders (including academics, practitioners, public interest groups, business associations, government associations the Competition Bureau ("**Bureau**") itself[8]), together with over 400 responses from members of the general public. The report provides general feedback as well as comments on specific reform proposals posed in the November 2022 discussion paper.

ISED reported that the public largely believed the Act was ineffective at preventing monopolies and oligopolies in various industries, thereby resulting in higher costs, decreased innovation, and increased political power for large corporations. Additionally, the public generally found enforcement to be lacklustre, permitting large corporations to control too much of, and essential services within, the "market." Many participants called for the Bureau to have more enforcement authority. Others called for greater transparency, education, and public input for the Bureau to make informed decisions that promote competition.

As to merger reform, ISED reported that participants in the consultation were split in their support for greater oversight and scrutiny of mergers, versus fear of a chilling effect from overreach. ISED discussed adoption of a more nuanced model than the "one-size-fits-all" legal test, creating infrastructure for parties to receive certainty around non-intervention by the Bureau in exchange for cooperation, the use of "temporary safeguards" before interim injunctions are issued, and a "more flexible system" than the Substantial Lessening or Prevention of Competition ("**SLPC**") standard. With some notable opposition, most stakeholders called for the repeal of the efficiencies defence in section 96.

The commentary on unilateral conduct noted a split between consumers and small businesses who expressed concerns of being marginalized, and

concerns that a "big is bad" approach would result in protecting competitors rather than competition. The report indicated that many participants felt the requirement that the Commissioner proves that an anticompetitive act from a firm with a dominant position resulted in an SLPC in order to establish an abuse of dominance was "unduly strict."

With respect to the collaborations provisions, participants "overwhelmingly called for caution" when deeming or inferring collaboration in the age of algorithmic activity and artificial intelligence. Stakeholders were evenly split on whether to expand section 90.1 to address vertical collaborations. ISED reported that a "significant majority" of participants opposed the introduction of a criminal *per se* offence for buy-side collusion, beyond the prohibition of wage-fixing and no-poaching already enacted.

There was support for measures addressing greenwashing claims. Suggested reforms included the introduction of recognizable, rigorous environmental standards and specific regulations for greenwashing, and increased penalties for deceptive marketing "that leads to environmental impact." ISED pointed to efforts by the government to "review all levers available to it to protect and promote environmental sustainability."

With respect to the administration and enforcement of the law, ISED reported significant interest in market study powers. Many participants reported on missing incentives for private applicants (*i.e.*, ability to claim monetary relief for abuse of dominance). Amongst a wide diversity of suggestions ranging from elimination of the Competition Tribunal ("**Tribunal**") to a move toward decriminalization, participants suggested greater transparency on the part of the Bureau through annual reporting, public participation, or more detailed reports on its decisions.

b. Bill C-56

The Honourable Chrystia Freeland, Minister of Finance, sponsored Bill C-56, "An Act to amend the *Excise Tax Act* and the *Competition Act*" with the telling title "Affordable Housing and Groceries Act." Bill C-56 was tabled in the House of Commons on September 21st and received Royal Assent on December 15th after significant additions were introduced at committee in late November.

i. Repeal of Efficiencies Defences/Exceptions

The section 96 mergers efficiencies defence was repealed, effective December 15, 2023, subject to a transition provision for transactions notified prior

to that date. The efficiencies exception (section 90.1(4) to (6)) under the civil conspiracy provision will be repealed effective December 15, 2024. Despite many commentators recommending that efficiencies be explicitly listed as a factor to consider when determining the anti-competitive effect of a proposed merger, that change was not made, leaving somewhat ambiguous the status of efficiencies in merger review in Canada.

ii. Market Studies

A longstanding source of controversy has been whether a Commissioner can (through mandate and authority) and should conduct market studies.[9] While Commissioners have undertaken market studies, they have done so without the ability to compel information and records or testimony under oath, relying instead on voluntary disclosures by market participants. Bill C-56 addresses these issues by formally authorizing market studies and extending section 11 to permit the Commissioner to secure orders compelling information, records and testimony to support market studies (search and seizure was excluded). The Commissioner must consult with persons who are required to provide information in response to a section 11 order by providing them with a complete or partial draft report so that they may address factual inaccuracies and disclosure of confidential information prior to publication of the final report. However, they will only have three working days to respond.

A market study can be commenced if:[10] (i) the Commissioner consults with the Minister and the Minister believes the market study would be in the public interest, or (ii) if the Minister directs the Commissioner to conduct an inquiry and the Minister consults with the Commissioner and determines that the inquiry is feasible, including with regard to cost.[11] Accounting for practical viability to avoid wasting both Bureau resources and the efforts of businesses and market participants attempting to comply with an order, while factoring in the opinion of the Minister responsible for the economy.

The procedural rules impose transparency obligations.[12] The Commissioner is required to publish draft terms of references for the inquiry and invite public comment for a period not less than 15 days. Following consideration of any resulting comments, the Commissioner must submit to Minister the final terms of reference and publish them online.[13] The entire duration of the inquiry is not to exceed 18 months, subject to extensions of up to three month periods at the discretion of the Minister.

As market studies are by nature speculative, it remains to be seen if there will be cognizable benefits taking into account the expenditure of Bureau

resources and the significant burden placed on businesses to comply with the process. There is also a question of whether in advancing policy dialogue, the Bureau has an unfair advantage by controlling the subject and scope of these studies, even with Ministerial oversight. Given that the Bureau can use information gathered as a basis to commence or further investigations into violations of the Act, there is a further issue of the extent to which the market study powers may become a pretext for enforcement activity where the Commissioner otherwise lacks the grounds to commence an inquiry under section 10.[14]

Based on the voluntary market studies conducted by the Bureau and its expressed enforcement priorities, the Bureau may seek to supplement its previous findings with information obtained through its newfound powers. In 2023, the Bureau published a market study into the grocery sector,[15] issued a report on the financial services industry to inform the Minister of Finance's review of the Royal Bank of Canada's acquisition of HSBC,[16] and analyzed the state of competition in wholesale high-speed internet access in a submission to the Canadian Radio-television and Telecommunications Commission ("**CRTC**").[17] Additionally, the Bureau made a submission to Health Canada in May 2023 on improving competition in the cannabis industry.[18]

The Bureau is expected to update its Market Studies Information Bulletin in light of Bill C-56.[19]

iii. Civil Arrangements and Agreements

Section 90.1(1) is a civil, reviewable matter provision currently addressing existing or proposed agreements or arrangements involving competitors. Where competition is (or is likely to be) lessened or prevented substantially, the Tribunal may issue an order prohibiting the enforcement of such agreements or arrangements (the Tribunal may make other orders on consent of the parties).

Commencing December 15th, 2024 (one year after the enactment of Bill C-56), the regime is to be expanded through the introduction of section 90.1(1.1), the effect of which is to permit orders be made under section 90.1(1) in respect of agreements even if none of the parties are competitors with one another, provided that a "significant purpose" of the agreement/arrangement or part thereof, is to lessen or prevent competition in a market. As such, Section 90.1(1) could apply to restrictive covenants in vertical agreements between a landlord and tenant, for example. Indeed, one of the apparent motivations for the amendment is property controls placed at the

behest of grocery stores which inhibit current and future use of properties or which are inserted in leases of other tenants in shopping centres in which a grocery store operates.[20]

The scope of section 90(1.1) is unclear, particularly given that the expression "significant purpose" is not defined or commonly used in legislation and given that the purpose assessment could be applied to "part" of the agreement as opposed to evaluating a restrictive covenant in the context of the agreement as a whole. At a minimum, the inclusion of a restrictive covenant in an ordinary course agreement will demand attention. As a matter of due diligence, parties who negotiate such arrangement may be faced with the sometimes difficult and resource-consuming exercise of evaluating a potential substantial effect on competition including the exercise of market power and the economic analysis often inherent in such analysis - or risk that the term may be unenforceable. As a matter of drafting, some have questioned whether as constructed, it is clear that where section 90(1.1) applies, an order under section 90.1(1) may not be made unless all elements other that the competitor criterion are satisfied.[21]

An update of the Bureau's Competitor Collaboration Guidelines would help clarify the uncertainty introduced by section 90.1(1).[22]

iv. Abuse of Dominance

At the committee stage in late November 2023, Bill C-56 was amended to introduce significant changes to the scope and function of the abuse of dominance provisions of the Act. The amended Bill C-56 passed unanimously on Third Reading in early December.

Background—June 2022 Amendments

The 2022 amendments under Bill C-19 had created a private right of action for contravention of the abuse of dominance provisions (through sections 103.1 and 79(1)). These amendments also expanded the definition at section 78 of an anti-competitive act to include any act "intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or have an adverse effect on a competitor or on competition."[23] The non-exhaustive list included at section 78 added a "selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into expansion in a market." In addition to the expanded definition, the administrative monetary penalties ("**AMPs**") set out at section 79(3.1) were increased to the greater of $10 million ($15 million for subsequent orders) and three times the value of the

benefit derived from the anti-competitive practice or 3% of the person's annual worldwide gross revenues if the amount could not reasonably be determined, where they formerly were either $10 million in the first instance or $15 million for subsequent orders. This represented a significant increase of potential penalties. Lastly, the 2022 amendments introduced new factors to be considered to determine whether a practice has or is likely to have the effect of preventing or lessening competition substantially in a market: network effects, entrenchment of leading incumbents' market position, the nature and extent of change and innovation in a relevant market, and any other factor relevant to competition in the market.

Changes to the Abuse of Dominance Test

Bill C-56 restructured the abuse of dominance test at section 79(1), when a prohibition order is sought. It formerly required three elements to be established in order for a prohibition order to be granted: dominance, anti-competitive intent, and anti-competitive effects. The new section 79(1) has two alternative branches: the first requires only dominance and anti-competitive intent, while the second requires dominance and anti—competitive effects that are not the result of a superior competitive performance. In either case, the Tribunal would be empowered to issue a prohibition order. In its "Guide to the December 2023 amendments to the *Competition Act*" published December 15, 2023 ("**Guide**"),[24] the Bureau explains that the purpose of the amended structure is to stop conduct by a dominant firm which has either subverted competition in the marketplace or was intended to do so. For clarity, AMPs and other remedies, including divestiture (and the disgorgement of profits to private litigants once Bill C-59 passes), are only available where dominance and both anti-competitive intent and likely anti-competitive market effects are established.

Under the "effects" branch of the new section 79(1) test, the prohibition order may be made where the "conduct" of the dominant person(s) is likely to lessen or prevent competition substantially in a market in which they have a "plausible competitive interest," and where the effect is not a result of "superior competitive performance;" the latter consideration being transposed from the former section 79(4) of the Act.[25] One consequence of this change is that the an order may now be made under section 79(1) under the "intent" branch without consideration of whether the conduct in question is a function of superior competitive performance. Similarly, another impact of the amendments is that it is no longer clear whether and how under the "effects" branch the Tribunal will take into account legitimate business justifications which can be used to negate the presumed anti-competitive

intent arising from a practice of anti-competitive acts. After all, orders under section 79(1) are discretionary. The question is how, in exercising its discretion, the Tribunal will take account of the reasons a dominant firm (with a plausible competitive interest in a market) may engage in conduct which has the likely effect of lessening or preventing competition.

In addition to modifying the test, Bill C-56 adds section 78(k) to indicate that "anti-competitive act" includes "directly or indirectly impos[ing] excessive and unfair selling prices", without further elaboration on what should be considered excessive or unfair. The provision may find its inspiration in Article 102(a) of the TFEU in Europe.[26] However, this change was not advocated by the Bureau and is controversial in that Canadian and US abuse and monopolization laws have traditionally been directed at conduct which creates, enhances or preserves market power as opposed to the exploitation of that power. As a matter of legislative drafting, the inclusive example of an anti-competitive act set out at section 78(k) does not sit well with the chapeau portion of section 78, because imposing high prices would typically not have a negative effect on a competitor nor an adverse effect on competition as such (as opposed to an adverse effect on customers).

Penalties

Building on the significant increase to the quantum of AMPs seen in the 2022 amendments to section 79(3.1), Bill C-56 further increased the minimum amount to $25 million on first instance ($35 million for subsequent occurrences) and preserved the alternative formulation based on the derived benefit or 3% of gross worldwide revenues.

2. Bill C-59

On November 21, 2023, Parliament tabled Bill C-59, what appears to contain the final comprehensive changes resulting from ISED's modernization project that had been commenced with Bills C-19 and C-56. Bill C-59 touches on many aspects of the legislation from merger review, notification and injunctive practice; relaxation of the leave standard for private applications to the Tribunal under section 103.1; allowing private applications for enforcement of section 74.1 and 90.1; addition of a "right to repair" under the section 75 refusal to deal provision; a disgorgement remedy akin to damages for private applications under Part VIII; provision for the Commissioner to challenge private settlements of Tribunal proceedings; greenwashing provisions; a defence to criminal and conspiracy provisions for agreements designed to protect the environment or mitigate the effects of climate change; a limitation on costs that may be imposed against the

Commissioner in Tribunal proceedings; further whistle-blower protections in the form of a prohibition on "reprisal actions" (subject to AMPs and other remedies); and penalties for non-compliance with consent agreements.

The authors leave a more fulsome description of Bill C-59 to a future year-in-review article to consider the legislation as it may be enacted.

3. Bill C-352

Private member Bill C-352 was introduced mere days before the government Bill C-56. There is significant overlap between the two.

a. Formal Market Studies Power

Bill C-352, like Bill C-56, would introduce a market study power for the Bureau, but its formulation lacks many of the safeguards built into Bill C-56. For example, consultation with the Minister is not required to commence a market study, public consultation is not required, the duration of the market study is not limited, and there is no fact-checking mechanism. Structurally, Bill C-352 situates the market study power under section 10(1)(b), which describes inquiries that the Commissioner can make when "it has reason to believe" prescribed circumstances exist. Bill C-352 would allow the Commissioner to commence an inquiry if he has reason to believe an inquiry on market conditions would "provide insight into factors that are relevant to competition". This evidently would afford the Bureau greater latitude to commence inquiries at its discretion than does the market study power as passed in Bill C-56.

b. Increased penalties for cartel offences and abuse of dominance

Bill C-352 would increase the penalty for criminal conspiracy (including wage-fixing and no poach agreements) to a fine capped at the greater of a $25 million ($35 million for subsequent occurrences) and three times the value of the benefit derived, or 10% (rather than 3%) of the person's gross annual worldwide revenues if the benefit derived cannot be reasonably determined.

Additionally, the NDP bill proposes to increase penalties for agreements or arrangements between banks or authorized foreign banks with respect to interest rates, charges for services, loans, services, and customers. It proposes to increase the maximum fines for such agreements to $25 million (currently $10 million), and increase the maximum term of imprisonment

to up to 14 years (currently five years), which would bring it in line with the current section 45 general cartel provision.

c. Abuse of dominance

The NDP bill would also amend the abuse of dominance test at section 79, allowing applicants to seek a prohibition order if there is dominance and a practice of anti-competitive acts. This is similar to one branch of Bill C-56 as enacted. As with Bill C-56, Bill C-352 retains a requirement to establish actual or likely market effects if other remedies were sought.

d. Merger Review Provisions

Like Bill C-56, the NDP bill also repeals the efficiencies defence at section 96, but unlike Bill C-56. would explicitly add "gains in efficiency" as a factor to be considered when determining whether an agreement or arrangement would substantially lessen or prevent competition in a market. The NDP bill situates consideration of efficiencies within the factor "nature and extent of change and innovation in any relevant market". Akin to Bill C-56, the proposed bill would repeal the standalone consideration of gains in efficiencies at section 90.1(4), but makes a point to include language on efficiencies rather than housing it, as Bill C-56 did, within the catchall "any other factor that is relevant to competition in the market" at section 90.1(h).

Potentially the most controversial amendment advanced by Bill C-352 is a bright line (non-rebuttable) presumption of anti-competitive effect for mergers which result in a greater than 60% combined market share (a so-called "structural presumption"). The Commissioner may apply to the Tribunal for an order to dissolve or block a merger which results in a greater than 60% share, under the new proposed section 91.1(1). Under a new section 91.2, mergers resulting in between a 30% and 60% combined share would also be subject to such orders on application by the Commissioner, but in such cases the bright line presumption can be rebutted if the parties establish that the parties to the transaction can prove that the merger results, or is likely to result in, "substantial procompetitive outcomes." Examples of "substantial procompetitive outcomes" include price reductions, increased quality, increased consumer choice and consumer protection, as well as labour-side effects including increased wages. Including increased wages and consumer protection as examples of pro-competitive outcomes indicates that a broad array of considerations would be taken into account when rebutting the presumption. As noted, Bill C-59 was also amended in committee in early 2024, to itself include the statutory adoption of a "structural

presumption" for mergers that meet certain structural tests, but in all cases the presumption would be rebuttable.

Bill C-352 would increase the limitation period to make applications under section 92 to three years after the completion of the merger rather than one year.

In an amendment to the *Competition Tribunal Act*, the NDP bill would repeal the ability of the Tribunal to award costs of proceedings in respect of reviewable matters under the Act.

4. Competition Bureau Enforcement Activity

a. Mergers

i. Federal Court of Appeal Ends the Rogers/Shaw Saga

On January 24th, 2023,[27] the Federal Court of Appeal dismissed an appeal of the Tribunal's decision against the Commissioner's application to block the sale of Shaw Communications Inc. ("**Shaw**") to Rogers Communications Inc. ("**Rogers**"). The Bureau had applied to the Tribunal seeking a full block of the proposed acquisition in May 2022. On December 29th, the Tribunal issued an Information Note stating that it intended to dismiss the application and that the proposed transaction and divestiture were not likely to prevent or lessen competition substantially.[28] Specifically, it found that the merger—as modified by the parties after the Tribunal application had been filed in order to incorporate a sale of Shaw's discount Freedom Mobile business to a third-party, Vidéotron, with no presence in the provinces of principal concern - would not result in materially higher prices relative to the counterfactual, nor would it materially lower levels of non-price dimensions of competition. The Commissioner appealed the Tribunal's decision on December 30th, 2022.

On January 24th, the Federal Court of Appeal ("**FCA**") heard and unanimously dismissed the appeal. The FCA determined that the transaction (as modified by the sale of Freedom Mobile) would not be likely to prevent or lessen competition substantially, and, in *obiter*, stated that in some key aspects of the transaction would "actually promote competition."

The primary argument advanced by the Commissioner was that the Tribunal should have considered the merger of Rogers and Shaw without the divestiture of Freedom Mobile to Vidéotron, because (amongst other reasons), the merging parties had proposed the divestiture after his application had been filed, and the Tribunal should therefore consider only

whether the original transaction would likely be anti-competitive. He argued further that any consideration by the Tribunal of the divestiture as a remedy to a pre-closing challenge would, under the statute,[29] require the Commissioner's consent. In any event, if the Tribunal did consider the divestiture as relevant to the proceedings, he argued that the merging parties should bear the burden of proving that the divestiture would ameliorate any substantial lessening or prevention of competition ("**SLPC**") shown by the Commissioner.

As noted above, the Tribunal decided to consider only the merger subject to the simultaneous closing of the divestiture, and whether that modified transaction would likely cause an SLPC, finding that there was no possibility of the original transaction closing, and that the Commissioner had had enough warning and information that his ability to argue in the alternative that the modified transaction itself was anti-competitive had not been compromised. It also noted in obiter that in any event, even if it had considered the burden to be on the merging parties to prove the sufficiency of the divestiture as a "remedy" to the original transaction, that burden had been satisfied.

The FCA agreed with the Tribunal and stated that the burden of proof would only matter where a case is "so close that a make-weight or tie-breaker is needed" or if procedural unfairness would result otherwise, neither of which the FCA found to be true in the case at hand.[30] The FCA considered the Act's purpose of "efficiency" in its decision, stating that a pro-competitive transaction should not be delayed or potentially extinguished by reopening the Bureau's study and assessment of the transaction. In its reasons, the FCA did acknowledge that a change in a transaction could hypothetically be so significant that the consideration by the Tribunal of the modified transaction (i.e., closing subject to the simultaneous closing of the divestiture or other "fix") was no longer fair.

The FCA also dismissed the Commissioner's additional arguments and relied on the Tribunal's reasoning. Firstly, the Commissioner relied on *Canada (Director of Investigation and Research) v Southam Inc*[31] to assert that the respondents were required to demonstrate that the divestiture would restore competition such that the merger's anti-competitive effects would no longer be substantial.[32] To distinguish the present case, the Tribunal had noted that in *Southam*, the merger had already closed and the Tribunal could therefore order a divestiture. Further, in *Southam*, the Commissioner had already discharged his burden of demonstrating that the merger had substantially lessened competition. In the present case, the

parties had only proposed the merger and the Commissioner's assertions regarding the anti-competitive effects of the transaction had yet to be demonstrated to the Tribunal.

For a second ground of appeal, the Commissioner alleged that the Tribunal should have followed certain United States cases, which the FCA dismissed on the grounds that such cases were foreign and, further, are factually distinguishable. Thirdly, the Commissioner argued that the Tribunal had not "holistically" considered the factors of the magnitude, duration, and scope of any adverse effect on price or non-price competition under section 92 of the Act. The FCA rejected this argument as well, and again pointed to the Tribunals' reasons. The Tribunal typically considers whether material price or non-price effects would likely occur, in a material part of the relevant market for a material volume of sales, for approximately two years or more.[33] The Tribunal found that Alberta and British Columbia were the only geographic markets at issue and concluded that, after the merger, four "strong competitors" would remain in those wireless markets: Bell, Telus, Rogers and Vidéotron and Freedom. Lastly, the Commissioner argued that the Tribunal had contravened section 92(1)(f)(iii)(B), the Tribunal's remedial jurisdiction, by considering the network access agreements and pricing commitments agreed to by Vidéotron, without the Commissioner's consent. The FCA pointed out that the Tribunal had not found that there was an SLPC, such that section 92(1)(f), dealing with the remedies it could order for pre-closing challenges, was not engaged.

ii. Bureau reaches Consent Agreement with Sika AG regarding its Acquisition of MBCC Group

In February, the Bureau entered into a consent agreement with Sika AG to resolve competition concerns arising from its review of Sika AG's proposed acquisition of MBCC Group.[34] The proposed transaction concerned the combination of the two largest suppliers of admixture systems, and who also supply construction systems in Canada.[35] The Bureau found that the proposed transaction was likely to substantially lessen competition in Canada because the rivalry between these two admixture suppliers was highly beneficial to consumers in Canada.

The consent agreement required Sika AG to identify a suitable divestiture buyer who would operate at arms length from Sika AG and had no interest in the divested assets, which comprised: three production plants in Canada, ten production plants and a research and development centre in the U.S., and a global research and development centre in Germany. Under

the consent agreement, Sika AG and MBCC were required to divest further businesses as part of a broader international remedy. In the event that the divestiture is not appropriately concluded, the consent agreement gave the Commissioner powers to seek orders to complete the sale, or seek further orders as needed to ensure that the transaction is not likely to prevent or lessen competition substantially.[36]

iii. Bureau reaches Consent Agreement with Superior Plus Corp. regarding its Acquisition of Certarus Ltd.

In May, 2023[37] the Bureau entered into a consent agreement with Superior Plus Corp. ("**Superior**") with respect to its proposed acquisition of Certarus Ltd. ("**Certarus**"). Superior is an over-the-road distributor of natural gas to residential, commercial, and industrial customers. Superior uses: (i) propane distribution hubs and (ii) a fleet of smaller propane tanks that lease to retail customers for onsite storage. Certarus distributes compressed natural gas to industrial retail customers that do not have access to a natural gas pipeline. In Canada, Certarus owns six natural gas compression hubs with each tied to a third-party natural gas pipeline. At the time of closing, Superior's and Certarus' services overlapped in over-the-road supply of portable heating chemicals (i.e., propane and natural gas) to industrial customers in Northern Ontario that lack direct pipeline access, including mining, construction and forestry customers.

The Bureau determined that the proposed transaction, valued at approximately $1.05 billion, would likely result in a substantial lessening of competition for the retail supply of portable heating fuels for industrial customers in Northern Ontario. The consent agreement requires that Superior sell eight (of a total of 14) propane distribution hubs in Northern Ontario, including associated customer contracts and operating assets. In coming to its decision, the Bureau considered the limited number of portable heating fuel suppliers in Northern Ontario as well as the market's high barrier to entry.

iv. Federal Court of Appeal Upholds *Secure* Decision

In August, 2023,[38] the FCA dismissed Secure Energy Services Inc.'s ("**Secure**") appeal of the Tribunal's decision in favour of the Commissioner's challenge of Secure's acquisition of Tervita Corporation ("**Tervita**"). Before their merger closed on July 2nd, 2021, Secure and Tervita had been the two largest suppliers of oilfield waste services in the Western Canadian Sedimentary Basin (which houses large reserves of petroleum and natural gas) and had a close rivalry for customers. In its March 2023 decision, the

Tribunal had ordered the divestiture of 29 of Secure's facilities to resolve the substantial lessening of competition found in 136 markets.39 In its decision, the Tribunal had found that Secure had not "met its burden of establishing sufficient gains in efficiency" to meet the efficiencies defence and thus exempt Secure from a section 92 divestiture order.[40]

The FCA rejected all of Secure's arguments and primarily dealt with its interpretation of the now-repealed efficiencies defence. The FCA upheld the Tribunal's "order-driven approach" to section 96, under which the Tribunal recognized only the gains in efficiencies that would not likely be obtained if the remedial order was made (i.e., the "foregone efficiencies"), and those foregone efficiencies are weighed against all of the anti-competitive effects that would arise from the merger.[41] Secure had argued that the "order-driven" approach results in an asymmetrical calculus, whereby only a subset of gains brought by the merger (i.e., those that would not occur but for the merger and which are made impossible to achieve by the remedial order) are weighed against all of the anti-competitive effects of the merger. Secure argued in favour of weighing all of the efficiency gains made possible by the merger against all of the anti-competitive effects. In the alternative and if the order-driven approach was taken, Secure argued that gains in efficiency should be weighed against anti-competitive effects over the same time period and in the same geographic market. The FCA stated that section 96(1) could have been worded more clearly to capture this intent, and ruled against Secure on this argument as well.

v. Bureau Issues a Report regarding the Royal Bank of Canada's proposed acquisition of HSBC Canada

In September, 2023[42] the Bureau issued its findings with respect to the potential competitive effects of Royal Bank of Canada's ("**RBC**") proposed acquisition of HSBC Bank Canada ("**HSBC Canada**"). Its findings were provided in a report to the Minister of Finance as part of the Minister's ongoing review administered by the Office of the Superintendent of Financial Institutions.[43] The Bureau determined that the merger would result in a "loss of rivalry between Canada's largest and seventh-largest bank" but that this loss of rivalry was not likely to result in a substantial lessening or prevention of competition. The Bureau's findings showed that while there was some evidence HSBC Canada was a material rival to RBC in certain markets, its competitive discipline was limited relative to other, larger players. Its analysis demonstrated that the post-merger shares in most relevant markets fell below levels typically sufficient for Bureau scrutiny. The Bureau's review of "hundreds of thousands of documents" showed that

HSBC Canada had limited market penetration in most financial services and found there would continue to be effective competitors post-merger.

However, the Bureau's findings did characterize the relevant financial services market as highly concentrated, with high barriers to entry and expansion in many of the relevant markets, and that there were conditions in some markets that may facilitate coordinated behaviour amongst competitors.[44]

vi. Bureau reaches a Consent Agreement with Global Fuels Inc. regarding its proposed acquisition of Greenergy's Canadian retail fuel business

In October, 2023,[45] the Bureau entered a consent agreement with Global Fuels Inc. and its affiliates ("**Global Fuels**") related to its proposed acquisition of Greenergy's Canadian retail fuel business. Global Fuels is a nationwide fuel (gasoline and diesel) distributor of fuel brands including Esso, and Mobil. Greenergy is a British supplier and distributor of petrol and diesel which operates in the U.K., Ireland, and Canada. The Commissioner's study of the transaction concluded that the proposed transaction would likely result in a substantial lessening of competition in the supply of diesel and gasoline to retail customers in Chatham, Ontario, and Picton, Ontario, respectively.[46] Through the consent agreement, the Commission required Global Fuels to assign certain motor fuel supply agreements in the contested areas to an approved divestiture buyer or buyers.

b. Abuse of Dominance

vii. Quebec Professional Association for Real Estate Brokers

In February, 2023,[47] the Bureau successfully obtained a court order for the production of records in relation to its investigation into certain conduct of the Quebec Professional Association for Real Estate Brokers ("**QPAREB**") which it alleged may be contrary to the abuse of dominance and restrictive trade practices of the Act. QPAREB operates the multiple listing service (MLS) that real estate brokers rely upon for real estate transaction data. The Bureau's investigation concerns some of QPAREB's practices related to real estate data sharing restrictions which may have harmed competition in the real estate brokerage services market or prevented the development of innovative online brokerage services in Quebec.

viii. Isologic Innovative Radiopharmaceuticals Inc.

In March, 2023,[48] the Bureau entered into a consent agreement with Isologic Innovative Radiopharmaceuticals Inc. ("**Isologic**") regarding certain of its contracting practices found to contravene the abuse of dominance provisions of the Act. Isologic is a dominant player in the supply of radiopharmaceuticals used for imaging scans called single photon emission computed tomography (also known as "SPECT") in Canada. The consent agreement follows the Bureau's investigation into Isologic's contractual practices of requiring customers to purchase products exclusively from Isologic, as well as requiring minimum purchases, automatic renewals, and termination fees.[49] The Bureau first launched its investigation into Isologic's contracting practices in 2021, interviewing stakeholders such as hospitals, health clinics, and hospital buying groups. Per the consent agreement, Isologic agreed to cease using terms that require the customer to purchase products exclusively from Isologic. The consent agreement also requires Isologic to include a clause allowing a customer to terminate any contract that is longer than one year prior to its expiry.

ix. Dominion Lending Centres

In May, 2023,[50] the Bureau obtained a court order in relation to its investigation into Dominion Lending Centres Inc. ("**DLC**"). DLC is a service provider to mortgage brokers in Canada which specializes in technology and support services. The Bureau's investigation concerned DLC's alleged anti-competitive conduct contrary to the restrictive trade practices and abuse of dominance provisions of the *Act*. DLC's impugned practices concern limiting mortgage brokers from using other technology services. The court order required DLC to produce records and written information relevant to the investigation.

c. Bid-Rigging and Conspiracy

The Bureau has continued to investigate and pursue bid-rigging and conspiracy charges (sections 47 and 45). It also introduced a pro-active risk assessment tool for procurement agents in June 2023. The user responds to a brief questionnaire and receives a "collusion risk score" based on their project. The tool provides recommendations on how to minimize collusion risk and directs users to reporting mechanisms for suspected wrongdoing.

x. BPR-Infrastructure Inc.

In March, 2023,[51] the Superior Court of Québec ordered BPR-Instructure Inc., an engineering firm, to pay $485,000 for engaging in bid-rigging related to consulting engineering services for municipal infrastructure contracts in Québec. The order was part of a settlement that required BPR-Infrastructure Inc. to follow a compliance program and implement control procedures. The BPR-Infrastructure Inc. settlement was the seventh and final such settlement following the Bureau's investigation into a bid-rigging scheme targeting municipal infrastructure contracts, which involved settlement payments of a total of $12,535,000 from CIMA+, Dessau, Genivar (now WSP Canada), Roche Ltée, Groupe-conseil (now Norda Stelo Inc.), SNC-Lavalin, and Génius Conseil Inc.

xi. Canada Bread

In June, 2023,[52] the Ontario Superior Court fined Canada Bread Company, Limited ("**Canada Bread**") $50 million for its participation in a criminal price-fixing arrangement—the highest fine imposed by a Canadian court for conspiracy or bid-rigging. The arrangement raised the wholesale price of fresh commercial bread in 2007 and again in 2011. Canada Bread pleaded guilty to four counts of conspiracy, admitting to an arrangement with competitor Weston Foods (Canada) Inc. (Weston) to increase the prices of commercial bread. Due to its cooperation with the Bureau's investigation, the Bureau recommended that Canada Bread receive leniency in sentencing, in accordance with the Bureau's leniency program and in light of its ongoing cooperation with the Bureau investigation. The investigation into alleged conspiracy by other companies such as Metro Inc., Sobeys Inc., Wal-Mart Canada Corporation, Giant Tiger Stores Limited and Maple Leaf Foods Inc., is ongoing.

The Bureau initiated its investigation in 2015. Weston and Loblaw Companies Limited (Loblaw) received immunity from prosecution for first reporting the arrangement to the Bureau and their ongoing cooperation. In December of 2017, Weston and Loblaw publicly announced their participation in the price-fixing arrangement.

xii. Nippon Yusen Kabushiki Kaisha and Kawasaki Kisen Kaisha, Ltd.

In August, 2023,[53] the Ontario Superior Court fined two Japanese shipping companies for participating in an international conspiracy resulting in a reduction in the shipment of vehicles to Canada. Nippon Yusen Kabushiki

Kaisha ("**NYK**") and Kawasaki Kisen Kaisha, Ltd. ("**K"-Line**") were respectively fined $1.5 million and $460,000. NYK and "K"-Line admitted to increasing base freight rates for certain suppliers. "K"-Line also admitted to entering a bid-rigging agreement involving a General Motors tender for the supply of cargo shipping services to Canada between 2011 to 2012. Due to their cooperation with the Bureau's investigation, NYK and "K"-Line received leniency in their sentencing.

xiii. Paving Contracts Awarded by the ministère des Transports du Québec

In September, 2023, [54] two executives were criminally charged in connection with bid-rigging for paving contracts. The Bureau's evidence suggests that Marcel Roireau, former Vice President of Operations for Construction DLJ Inc. and Serge Daunais, former Vice President, Secretary and General Manager for Pavages Maska Inc. participated in an illegal agreement with competitors. The agreement involved submitting cover bids in response to tender requests issued by the ministère des Transports du Québec for the Montérégie region in 2008.

xiv. Inter-Cité Construction Ltée

In October, 2023,[55] Inter-Cité Construction Ltée (Inter-Cité) was required to pay $150,000 for allocating territories for paving contracts awarded by the ministère des Transports du Québec with a competitor. As part of the settlement between Inter-Cité and the Public Prosecution Service of Canada, Inter-Cité implemented a corporate compliance program to prevent employees from participating in anti-competitive activities.

xv. Engineering firm Teknika HBA Inc. (now Les Services EXP Inc.)

In October, 2023,[56] Teknika HBA Inc. ("**Teknika**"), now Les Services EXP Inc., was ordered to pay $200,000 as part of its settlement with the Public Prosecution Service of Canada. This is the eighth settlement agreement reached related to the Bureau's ongoing investigation of a bid-rigging scheme targeting municipal infrastructure contracts between 2004 and 2011 in Québec City and Montréal, for a total of $12,735,000. The fine comprises part of a settlement reached between the Public Prosecution Service of Canada and Teknika. The settlement also requires the engineering firm to follow a compliance program and implement control procedures to monitor the program's effectiveness.

xvi. Richard Dionne and Richard Labelle

In October, 2023,[57] two individuals were criminally charged in connection with big-rigging on public road and culvert work on Guy-Lafleur Highway (then Highway 50), in Gatineau, Québec. The Bureau said that its evidence suggests that Richard Dionne, former General Manager of Sales for Québec and Ontario for the Coco Asphalt division of Coco Paving Inc., and Richard Labelle, former Sales Manager for Québec for Coco Asphalt, agreed to rig bids submitted in response to tender requests from the ministère des Transports du Québec.

xvii. Quebec City infrastructure contracts

In November, 2023,[58] two individuals were criminally charged in connection with an alleged bid-rigging conspiracy for Québec City infrastructure contracts between September 2006 and November 2010. The Bureau said that its evidence suggests that Patrice Mathieu, former Vice President of Tecsult Inc. (now Consultants AECOM Inc.), and André Côté, former Vice President of Roche Ltée, Groupe-conseil (now Norda Stelco Inc.), participated in a bid-rigging scheme that divided municipal infrastructure contracts among their respective consulting engineering firms.

d. Deceptive Marketing & Misleading Representation

i. Cineplex

In May, 2023,[59] the Bureau filed an application with the Tribunal alleging that Cineplex engaged in a practice of drip pricing in the online sale of movie theatre tickets. This is the first application since the 2022 amendments which deemed drip pricing to be false or misleading representations. The Bureau contends that online purchasers on the Cineplex website and application encountered a mandatory "online booking fee" that was added to ticket purchases without adequate disclosure and that Cineplex had generated significant revenues since introducing this fee in June, 2022. The Bureau's application sought to: (1) stop Cineplex from continuing its deceptive advertising conduct; (2) impose on Cineplex an administrative monetary penalty; and (3) pay restitution to affected customers who purchased tickets from Cineplex online.

ii. Dufresne Group

In September, 2023,[60] the Bureau concluded an investigation into marketing practices used by The Dufresne Group Inc. and its affiliates ("**TDG**")

in their retail brand stores to suggest significant savings to consumers. The Bureau concluded that TDG stores listed products at inflated regular prices enabling them to advertise actual prices as discounted to consumers. The Bureau concluded these practices gave a false or misleading impression to consumers that these "discounted" prices would not be available after a certain time. TDG employed these tactics on their websites, in-store and in various other advertising channels. TDG cooperated and settled with the Bureau, agreeing to: (1) pay a $3.25 million penalty and $100,000 towards the Bureau's costs; (2) commit to marketing practices which comply with the Act; and (3) establish and maintain a corporate compliance program.

iii. Online business directories case

In April, 2023,[61] the Bureau concluded its investigation into Terry Croteau's use of deceptive telemarketing and false or misleading statements to convince Canadians to sign up for an online directory scam. Terry Croteau was sentenced under the deceptive marketing provisions of the Act for promoting his business directories through misleading statements. Croteau made misleading statements which misrepresented the identity of the caller, the purpose of the call, and the price of the services offered. He pled guilty on October 25, 2022, in the Ontario Superior Court of Justice Croteau was concurrently sentenced under the *Criminal Code of Canada* for defrauding Canadians, to 30 months in prison and the payment of a $1.28 million fine in restitution, as well as a fine in lieu of forfeiture of $12,466. Croteau is also prohibited from being involved in telemarketing or marketing by mail in the future.

iv. TicketNetwork

In November, 2023,[62] the Bureau reached an agreement with TicketNetwork following its investigation into TicketNetwork's alleged practices in its online event ticket resale business. The Bureau's investigation concluded that TicketNetwork engaged in drip pricing for event tickets, by charging mandatory fees in addition to the advertised price, adding 38% on average and up to 52% to the advertised price. Secondly, the Bureau found that TicketNetwork advertised unobtainable discounts, and advertised (but did not clarify) that ticket prices to Canadian events were in U.S. dollars rather than Canadian currency. Thirdly, the Bureau found that TicketNetwork used misleading digital content to imply the tickets were sold directly from the venue, artist, or sports team rather than for resale.

As part of the agreement, TicketNetwork agreed to: (1) pay a $825,500 penalty; (2) not engage in the impugned practices, and (3) establish a

compliance program, implementing new procedures to comply with the law and prevent further advertising issues in the future.

v. Rogers—Telecom services

In December, 2023,[63] the Bureau obtained a court order from the Federal Court of Canada to advance a civil deceptive marketing investigation investigation into alleged marketing practices undertaken by Rogers Communications Inc. and its subsidiary, Rogers Communications Canada (together, "**Rogers**"). The order requires Rogers to produce records and information relating to claims Rogers made when promoting its Infinite wireless phone plans. The Bureau is specifically concerned about allegations that the unlimited data plans were coupled with reductions in data speed after a subscriber reached a certain data cap, a practice known as throttling, without adequate disclosure.

vi. Mobile Music App

In December, 2023,[64] the Bureau reached an agreement with Amp Me Inc., a mobile application operating in Canada and the U.S., to address the Bureau's concerns about false and misleading claims made to the public regarding the price of the application and its reviews. Individuals can use Amp Me Inc. to synchronize and play music from multiple devices to amplify the sound. The Bureau's investigation revealed that the company allegedly purchased positive reviews from third-parties between 2019 and 2022, creating a false or misleading general impression among the public and influencing the application's overall ranking among other applications. Secondly, some claims created the false impression that the app was available free of charge, when it was in fact subject to a free trial, with charges after the trial ended.

As part of the settlement, Amp Me Inc. agreed to: (1) pay a partial penalty of $310,000 upon signing the agreement in satisfaction of an imposed penalty of $1,500,000 (the Bureau considered the company's limited ability to pay a penalty); (2) pay $40,000 to cover the Bureau's investigation costs; (3) agree to ensure their marketing practices are compliant with the *Act*, and (4) establish and maintain a corporation compliance program.

5. New Guidelines and Bulletins

a. Enforcement Guidelines on Wage-fixing and No-poaching Agreements

The criminalization of wage-fixing and no-poaching agreements was passed in Bill C-19 in June of 2022 and came into force on June 23rd, 2023. The amendment made it *per se* illegal for unaffiliated employers to enter into an agreement to fix, maintain, decrease or control wages or terms of conditions of employment, or to solicit or hire each other's employees. Contravention of the criminal conspiracy provision is subject to imprisonment for up to 14 years or to an uncapped fine determined at the discretion of the court. Agreements entered into, on, or after June 23rd, 2023 and conduct which reaffirms or implements older agreements are both caught by the new criminalization provision.

On January 18th, 2023, the Bureau released draft enforcement guidance for public consultation until March 24th.[65] The enforcement guidelines were published on May 30th with minimal changes.[66] The guidelines clearly state that the criminal provisions target "naked restraints" on competition, as well as clarify some ambiguities in the new provision. Namely, "terms and conditions" are defined as terms and conditions that could affect a person's decision to enter or remain in an employment contract, a broad concept which could include job descriptions, non-monetary compensation, and return-to-office policies, amongst other things. "Employer" and "employee" are not defined under the Act. The guidelines define "employers" as "directors, officers, as well as agents or employees, such as human resource professionals." Additionally, the guidelines indicate that determining whether an employer-employee relationship exists will be a question of fact and law. The application of the wage-fixing and no-poaching provisions will show whether a degree of seniority, or ability to affect personnel decisions, is required to establish a person's status as an "employer."

The guidelines also provide hypothetical scenarios to clarify the impugned conduct. Amongst other things, the examples illustrate that the Bureau considers that the provision only applies to reciprocal agreements between employers not to solicit or not to hire: a one-way no poach agreement is not *per se* illegal. For example, Company A can legally commit to not hire employees seconded from Company B, if Company B does not put an agreement in place to prevent hiring employees from Company A.

The guidelines clearly state that the ancillary restraints defence (*i.e.*, the restraint is directly related to, and reasonably necessary for giving effect to,

the objective of the broader or separate agreement) also applies to wage-fixing or no-poach agreements. "Other legal defenses," notably the regulated conduct defence (*i.e.*, the action in question is required or authorized by law), are also potentially available.

b. Draft Bulletin regarding 2022 Amendments to Abuse of Dominance Provisions

The Bureau published a draft "Bulletin on Amendments to the Abuse of Dominance Provisions" on October 25, 2023[67] for open consultation until December 2023. The Bulletin provides guidance on the June 2022 amendments to the abuse of dominance provisions. Amongst other things, the Bulletin explains that an "anti-competitive act" is any act intended to (i) have a negative predatory, exclusionary, or disciplinary effect on a competitor, or (ii) harm competition. The Bureau lists the following types of conduct that it views as potentially intended to harm competition as opposed to competitors: certain agreements with competitors, sharing competitively sensitive information, contracts that reference rivals such as most-favoured nation clauses, and serial acquisitions. The Bulletin provides a set of "hypothetical examples" to illustrate how the Bureau will apply the amended law to these types of conduct.

The consultation period for the Draft Bulletin was marked by the significant changes to the abuse of dominance provisions pursuant to Bill C-56 introduced in late November and enacted by mid-December. It remains to be seen whether the Bureau will reintroduce or replace the Draft Bulletin with a guidance document encompassing the 2022 and 2023 (and possibly additional) amendments to the abuse of dominance regime.

6. Bureau Submissions and Reports

a. 2023–2024 Annual Plan: Driving Competition Forward

In April, 2023, the Commissioner released the Bureau's Annual Plan for 2023–2024, titled "Driving competition forward for all Canadians."[68] The Bureau's strategic objectives for the year included taking timely action on issues important to Canadians, increasing proactive enforcement (including being ready to bring cases to court), and leading the gathering and analysis of data and digital evidence, using the expertise of the Digital Enforcement and Intelligence Branch. Its last articulated strategic vision objective ties into its formal market study power received toward the end of the year. In its annual report, the Bureau stated that it would encourage policymakers and

regulators to adopt pro-competitive policies, including by hosting a Competition Policy Summit. The Summit was held on October 5th, 2023.

Other priorities highlighted by the Bureau included creating and deepening international and domestic relationships to facilitate enforcement and share intelligence.

b. Submission to Health Canada re. stronger competition in the cannabis industry

In May, 2023, the Bureau published the results of its review of competition in Canada's cannabis industry (commenced in the fall of 2022).[69] Health Canada undertook a review of the *Cannabis Act*, which has as one of its objectives the "establishment of a diverse and competitive legal industry made up of small and large players to displace the illicit market."[70] As this is a shared objective with the Bureau's mandate, the Bureau undertook a corresponding review to better understand the competitive dynamics of Canada's cannabis industry, identify any aspects of the *Cannabis Act* which may impede competition, innovation, and choice, and propose recommendations to Health Canada to strengthen competition in the cannabis industry. The scope of the Bureau's recommendations and review was limited to federal matters under mandates of the Minister of Health and Minister of Health and Addictions.

The Bureau recommended Health Canada review the cannabis licensing process and compliance costs. Secondly, it recommended that Health Canada should consider adjusting THC limits on edible products to create better product substitution between the legal and illegal cannabis markets. Thirdly, the Bureau suggested that Health Canada ease restrictions on the marketing of cannabis products to provide greater information to consumers.

The Bureau's findings drew from public information as well as confidential information shared with the Bureau by industry stakeholders through interviews with the Bureau.

c. Submission to CRTC on wholesale high-speed Internet access service framework

In June 2022, the Commissioner intervened in the proceeding initiated by Telecom Notice of Consultation CRTC 2023-56.[71] The CRTC had invited responses to questions on topics related to the existing wholesale high-speed access (HSA) framework. The Bureau responded under its mandate

to advocate for the benefits of a competitive marketplace. The Bureau provided considerations for the design of the framework and identified ways to boost competition amongst Internet providers.

Per its submission, the Bureau views wholesale access as a means to promote competition in the provision of telecommunications services across Canada. The Bureau provided a suggested approach to assess the level of competitive intensity in the Canadian telecoms industry, through the comparison of price, network quality and deployment. The Bureau responded to certain questions of the CRTC on the wholesale HSA framework and provided its analysis of the impact on competition of mandating aggregate access to fibre-to-the-premises ("**FTTP**") facilities, which the CRTC had put forward as its preliminary view.

Further, the Bureau suggested to the CRTC's consideration other means of intensifying competition for fixed Internet services, namely, to minimize switching costs. The Bureau asserted that the CRTC should first update its wholesale HSA framework before shifting to retail regulation in the interests of maintaining competition.

d. Grocery Study Market Report

In its market study report titled "*Canada Needs More Grocery Competition*" dated June 27, 2023, the Bureau made a number of recommendations designed to foster greater competition in the grocery sector.[72] The Bureau asserted that there is room for more vigorous competition because profit margins for grocers has increased by 1-2% since 2017, which represents appreciable increase of approximately $1 billion in gross profit based on the size of the overall grocery industry (approximately $110 billion per year).[73] In its study, the Bureau provided a summary of consolidation in Canada's grocery sector, including its own involvement through merger review. Notably, eight large grocery chains operated in Canada in 1986 relative to the five major chains operating in 2023. The Bureau stated that it had reviewed fifteen mergers in the sector between 1986 and 2023 and had required remedies including the sale of certain stores to independent grocery sellers, the divestiture of warehouses, and had prohibited a buyer from entering into certain agreements with suppliers for a prescribed time period.

The Bureau drew conclusions about the patterns in Canadian's purchasing habits, namely that proximity of grocery stores to a shopper's home mattered, greater choice was available in urban areas, online grocery shopping was increasing in popularity, and loyalty programs drove consumer choice. It made four key recommendations, firstly suggesting provincial,

territorial, and federal governments each adopt a "Grocery Innovation Strategy" to support entry by new and international grocery competitors and the growth of independent grocers, by modernizing regulatory requirements which currently present obstacles. The Bureau suggested the government also create grants and incentive programs for independent grocers, entrants, and discount stores to compete with the "grocery giants." Thirdly, the Bureau suggested harmonizing unit pricing across provincial and territorial stores to encourage consumers to more easily compare prices. Lastly, the Bureau suggested limiting or banning outright existing property controls which can, it alleged, make it difficult for grocery stores to lease space close to a competitor. For example, an incumbent grocery retailer may lease the anchor store of a shopping centre and prohibit the centre's landlord from leasing space to other grocery stores. The recently passed expansion to the civil collaborations provision to include non-competitors was meant in part to target such restrictive covenants imposed by landlords.

The Bureau made commitments to promoting competition in the Canadian grocery industry, namely, to take special care when dealing with the industry, supporting the implementation of Canada's Grocery Code of Conduct (currently under development), and revisiting the study in three years from its publication to check progress on implementation.

e. Competition in Canada from 2000 to 2020: An Economy at a Crossroads

In October 2023, the Bureau released a report on trends in competition in Canada over the past two decades.[74] Its overarching conclusion was that Canada's competitive intensity had declined over this period, highlighting its support for amendments to Canada's competition laws. This report was released just shy of one month after the first reading of Bill C-56 and set the stage to usher in the new amendments.

The Bureau drew four major conclusions from its study of the Canadian economy between 2000 and 2020. Firstly, it concluded that concentration levels in the most concentrated industries had increased over the two past two decades and that more industries had become highly concentrated. Secondly, it found that rank stability had increased, concluding that top players were being decreasingly challenged by competitors. In support of this contention, it found that fewer firms had entered and exited markets, and survival rates had increased. Lower entry means industries are less dynamic, such that incumbent players are not required to innovate or compete on price as much in order to remain secure in the market. The Bureau found

that there was a slight reduction in economies of scale, indicating that larger firms were not as efficient as smaller ones. Lastly, profits, profit elasticity, and markups all rose over the period, indicating to the Bureau that there is room for greater competition on price to limit profits.

7. Private Applications and Actions

On September 29, 2023, Apotex Inc. ("**Apotex**") brought the first private application for leave to seek an order under the abuse of dominance provisions. As of the 2022 amendments, the Tribunal may grant leave to commence an application under section 79 if the Tribunal has reason to believe that the applicant would be "directly and substantially affected" in its business by the conduct at issue.

Apotex planned to manufacture and supply a generic version of a branded leukemia treatment. Health Canada approval for generic drugs requires demonstration that they are a bioequivalent to an approved branded product, proof of which requires that the generic have access to samples of the branded product. The Bureau has previously identified that tactical delays or denial of the provision of drug samples to a generic company may raise issues under section 79. Apotex alleged that the respondents, including Takeda Pharmaceutical U.S.A. Inc. and its Canadian distributor, Paladin Labs Inc., had repeatedly refused to provide Apotex the required samples of their branded leukemia treatment by contending there was insufficient market supply, and that they required Apotex to apply to Paladin for a line of credit.

In its leave application, Apotex confronted Tribunal decisions outside of the section 79 context that held that the necessary "substantial effect" on a business must be measured in the context of the entire business and not with respect to the effect on a product line or segment. Ultimately, this issue was not determined as Apotex discontinued its application on October 13, 2023, apparently because it had secured the supply of the required samples from one of the respondents. Of note, amendments proposed under Bill C-59 would relax the leave standard by allowing applicants to demonstrate a substantial effect on the whole *or part* of a business and alternatively, granting leave where to do so is in the public interest.

8. Conclusion

2023 witnessed the continued overhaul of the competition regime in Canada, with significant further changes expected to be enacted in 2024. With high interest rates and inflation, Canada's competitive intensity was

on the forefront of Canadian's minds and, accordingly, became a high priority for its politicians. The *Competition Act* has, as a result, seen extensive changes impacting virtually every major facet of the Act: the loss of the efficiencies defence impacts merger review, the civil collaborations provisions have expanded to include agreements between "non-competitors,", the abuse of dominance test has been wholly restructured, and the effects of the criminalization of wage-fixing and no-poaching agreements are being realized in the marketplace. The Bureau has arguably become more litigious, appealing the Rogers/Shaw decision and successfully arguing to uphold the Tribunal's decision in Secure. Without a doubt, competition law has become increasingly swayed by public discourse, with the Bureau publishing market studies in areas such as the grocery industry, telecoms, financial services, and cannabis. Parliament, aligned with the Bureau, clearly intends to continue modernizing the Act to facilitate enforcement actions by the Commissioner. As competition law becomes increasingly embedded in—and shaped by—popular discourse, it is important to ensure that stakeholders use their voices to ensure reform is balanced against commercial interests and that appropriate checks and balances against the arbitrary use of government authority are retained. We can expect vigorous debate as we learn to maneuver our new competition regime and drive toward pro-competitive outcomes.

ENDNOTES

[1] Kevin Wright is a partner with DLAPiper LLP and Reba Nauth is an associate with Osler, Hoskin & Harcourt LLP. The views expressed are those of the authors alone.

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[14] Under section 10(b), the Commissioner may commence an inquiry where he has "reason to believe" that a crime has been or is about to be committed, that there are grounds for making of an order under Parts VII.1 or VIII or that an order under the Act has been contravened.

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[25] Shuli Rodal et al., "Important changes to the Competition Act, including the abuse of dominance provisions, now in effect" (18 December 2023), online: <https://www.osler.com/en/resources/regulations/2023/

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[26] Article 102 of the Treaty on the Functioning of the European Union provides that "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantive part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in, (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; …"

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[28] Competition Tribunal, "Rogers-Shaw—Summary of Decision" (29 December 2022), online (information note): <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/521164/index.do>.

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[30] *Canada (Commissioner of Competition) v Rogers Communications Inc.*, 2023 FCA 16 at para 14 [*Rogers*].

[31] *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748 [*Southam*].

[32] *Ibid* at para 20.

[33] *Rogers, supra* note 31 at paras 136-139.

[34] Competition Bureau Canada, "Competition Bureau reaches agreement with Sika AG to preserve competition in Canada's admixture systems market" (23 February 2023), online (news release): <https://www.canada.ca/en/competition-bureau/news/2023/02/competition-bureau-reaches-agreement-with-sika-ag-to-preserve-competition-in-canadas-admixture-systems-market.html>.

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[39] *Canada (Commissioner of Competition) v Secure Energy Services Inc.* (3 March 2023), 2023 Comp Trib 2 (Order and Reasons for Order (Public)) at para 1.

[40] *Secure Energy Services Inc. v Canada (Commissioner of Competition)*, 2023 FCA 172 at para 4.

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[44] Competition Bureau Canada, "Report to the Minister of Finance Regarding the Proposed Acquisition of HSBC Bank Canada by Royal Bank of Canada" (1 September 2023), online (report): <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/report-minister-finance-regarding-proposed-acquisition-hsbc-bank-canada-royal-bank-canada#sec000>.

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will consider submissions made by the parties in support of the applicability of the ancillary restraints defence, and specifically references the regulated conduct defence to the "Other exemptions, exceptions, and legal defences" section.

Additionally, the Bureau added an example on the "Scope of restraints" which clarifies the Bureau's review of a no-poaching agreement potentially subject to the ancillary restraints defence, and clarified its example regarding franchise agreements.

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EMPOWERING PRIVATE ATTORNEYS GENERAL UNDER BILL C-59: DISEQUILIBRIUM PERSISTS IN CANADIAN COMPETITION LAW

Saro Turner and Andrea Roulet

This article considers whether the amendments to the Competition Act introduced by Bill C-59 go far enough to allow access to justice for everyday consumers who incur real losses because of anti-competitive conduct. Through a corrective justice lens, the authors conduct this analysis on the premise that when the law fails to make compensatory damages available to a class of persons who suffered loss because of unlawful anti-competitive conduct, then there is disequilibrium in law. From this perspective, the authors conclude that the amendments of Bill C-59 fail to provide practical access to repair financial losses and do not go far enough to empower or incentivize the "private attorneys general" to enforce Canada's competition laws through private class action litigation.

Les auteurs de cet article s'interrogent sur la question de savoir si les modifications proposées à la Loi sur la concurrence dans le projet de loi C-59 vont assez loin pour rendre la justice accessible au plus grand nombre de consommateurs, à qui les actions anticoncurrentielles causent des pertes bien réelles. Sous l'angle de la justice commutative, les auteurs mènent cette analyse en partant de la prémisse suivante : si le droit ferme la porte aux dommages-intérêts compensatoires pour un groupe de personnes ayant subi des pertes du fait d'une conduite déloyale et anticoncurrentielle, il y a alors un déséquilibre dans le droit. De ce point de vue, ils concluent que dans la pratique les modifications proposées par le projet de loi C-59 ne permettent pas de compenser les pertes financières, et ne vont pas assez loin pour encourager ou outiller les « procureurs privés » lorsque des actions collectives privées sont envisagées pour faire respecter le droit de la concurrence au Canada.

Introduction

1. On June 20, 2024, the amendments to the *Competition Act,* R.S.C., 1985, c. C-34 (the "*Act*") included in the *Fall Economic Statement Implementation Act* (hereinafter "Bill C-59") received royal assent. [1] This paper analyzes the amendments to the *Act* regarding private legal access to remedies for unlawful conduct using class action litigation through a corrective justice lens.

2. Corrective justice is the notion underlying private law that individuals may obtain compensation for their losses from the person whose

unlawful conduct caused them harm.[2] The class action procedure augments private citizens' access to justice where the losses are relatively small because correcting an unlawful transaction is only economically viable when individual claims are bundled together.[3] In prosecuting private class action competition law claims, the entrepreneurial plaintiffs' bar—the so-called "private attorneys general"—may breathe life into substantive rights. This paper argues that when the law fails to make compensatory damages available to a class of persons who incurred loss because of unlawful anti-competitive conduct, including conduct subject to the *Act,* then there is disequilibrium in law. From this perspective, the Bill C-59 amendments fail to provide practical access for corrective justice to repair financial losses and have not gone far enough to empower the "private attorneys general" to breathe life into the newly accessible substantive rights.

3. Part I sets out the conceptual framework for the analysis of the amendments to the *Act* adopted in June 2024. This section first discusses the legal theory of corrective justice before setting out basic principles underlying class action litigation and concludes with an explanation of the concept of the "private attorneys general".

4. Part II reviews private access for causes of action in the *Act* before Bill C-59 through an access to justice perspective for Canadian consumers who suffer loss caused by anti-competitive conduct. Before the amendments, consumers could seek to recover restitutionary damages for causes of action found in Part VI of the *Act,* which the authors contend represents a point of equilibrium between the reasonable expectations of private parties and the law's ability to resolve their differences. The same cannot be said for the causes of action found outside Part VI of the *Act*, for which a select few allowed for private action at the Competition Tribunal (the "Tribunal"), but those injunctive remedies provided nothing more than window dressing.

5. Part III describes the amendments of Bill C-59 that engage a consumer's ability to access justice before the Tribunal. Now that these amendments are law, private parties may seek an order from the Tribunal for two different class monetary awards: the gain-based disgorgement remedy for conduct contrary to sections 75, 76, 77, 79 or 90.1, found in Part VIII of the *Act*, and restitutionary damages for conduct contrary to section 74.01(1)(a), found in Part VII.1 of the *Act*. The changes omit procedural rules governing how class actions will proceed before the Tribunal. There are also new "right to repair" and "greenwashing" causes of action. In addition, the legal test for a private party to bring an application before the Tribunal has been lowered in that leave may be granted where only part of an applicant's business has

been affected (previously, leave was only granted where the whole of the applicant's business was affected) or if it is in the "public interest" to do so.

6. Part IV concludes that Bill C-59 is a missed opportunity. While the amendments advance the rights of private litigants, the changes keep Canadian competition law in a state of disequilibrium. Private persons, in particular consumers, will only obtain meaningful access to justice, through class procedure litigation, when they can pursue causes of action outside Part VI through the section 36 damages provision.

I—Breathing Life Into Substantive Rights

7. Before diving into substantive competition law, we provide preliminary comments on three notions that will arise throughout this paper: the legal theory of corrective justice, class action basics, and the concept of Private Attorneys General.

A) Corrective Justice

8. Grounded in the theory of corrective justice, private law is a mechanism to arm individuals with legal power to demand and hold others accountable.[4] Private law refers to the "rights and duties of individuals and private entities as they relate to one another."[5] The corrective justice legal theory contends that private law embodies a regime of correlative rights and duties with causation of harm by the defendant upon the plaintiffs at its centre.[6] The reason to grant the plaintiffs a remedy for the wrong suffered is the same reason that requires the defendant to make good the harm.[7] Practically, private law involves a plaintiff filing a legal action against a defendant to retroactively affirm the rights and duties of each party, which manifest by way of compensation for violation of those rights and duties.[8]

9. In Canadian competition law, the section 36 damages provision[9] allows plaintiffs to enforce their rights for unlawful conduct under certain causes of action found in Part VI of the *Act*, broadly, conspiracies and bid rigging, as well as certain deceptive or misleading marketing practices. Professors Roach and Trebilcock note that "… section 36 …can be interpreted as a recognition of the compensation rather than deterrence rational for private enforcement of our competition laws—most plausibly on a corrective justice basis."[10] Where there is no legal right or practical ability for a private party to recover losses caused by unlawful anti-competitive conduct, then there is disequilibrium between private persons' losses and competition law's ability to remedy their differences.

B) Class Action Basics

10. For a consumer who pays unlawfully inflated prices for a product, it is often economically irrational to go to Court individually to recover their loss because the cost of litigation would far exceed the damages suffered by any single individual. Notwithstanding it may be economically irrational for consumers to pursue legal action individually, assuming there is unlawful conduct, they still have a loss. Not only that, but the actors who caused the loss would derive a benefit from the consumer's inaction. Individually, the loss might be minor, but across millions of purchasers—it may be enormous. This is where the class action comes in.

11. The class action procedure has three underlying principles: (1) to serve judicial economy by aggregating otherwise individual claims to avoid duplication in fact-finding and legal analysis; (2) to promote access to justice by making economical the prosecution of claims that would otherwise be too costly to pursue individually; and (3) to serve efficiency of justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public and modify behaviour deemed to be wrongful.[11] With respect to access to justice specifically, whether it is in the field of competition law or otherwise, the Supreme Court of Canada has observed that class actions overcome barriers to access to justice by "providing a procedural means to a substantive end. (…) [A] class procedure has the potential to 'breath[e] new life into substantive rights'…".[12]

C) Private Attorneys General

12. The *Act* serves the dual purpose of providing compensation for those impacted by anti-competitive conduct, and incentivizing "private attorneys general" to assist public agencies with enforcement of Canada's competition laws through private litigation.[13] By prosecuting private class action claims, an entrepreneurial plaintiffs' bar—the so-called "private attorneys general"—breathe life into substantive rights when they deliver private citizens access to justice. The premise of incentivizing so-called "private attorneys general" with monetary remedies for causes of action in the *Act* is that these claims may become economically viable. Lawyers prosecuting a class action case generally work on a contingency fee basis for a "representative plaintiff", who instructs counsel in the best interest of the class, where no class member could or would otherwise retain counsel on an hourly basis because the economic imperative render individual action non-viable. Where class actions are available, class counsel generally assume the risk of not recovering anything and the opportunity for potentially lucrative fees.

This business model has led to claims where counsel, in many cases, theorize the case and then find a client, via advertisement or otherwise.

13. The Québec Court of Appeal observed that "it is best to recognize that lawyer-initiated proceedings are not just inevitable, given the costs involved, but can also represent a social good in the consumer class action setting."[14] Along the same vein, the Federal Court remarked that "the viability of class actions depends on entrepreneurial lawyers who are willing to take on these cases."[15] The Ontario Superior Court has commented that "the entrepreneurial nature of a class proceeding can be a good thing because it may be the vehicle for access to justice, judicial economy, and behaviour modification, which are all the driving policy goals of the *Class Proceedings Act, 1992*."[16]

14. As will be set out in the following pages, two conditions must be met in order for the *Act* to provide equilibrium for the common losses shared by a class resulting from anti-competitive conduct: (1) private rights to seek damages for breaches of competition law must exist: and (2) there needs to be a meaningful procedural vehicle that will incentivise class action lawyers to take these cases on.

II—Disequilibrium—*Act* Provides Narrow Enforcement of Private Rights

15. Prior to the Bill C-59 amendments, the *Act* provided access to justice for losses resulting from anti-competitive conduct described in causes of action found in Part VI (broadly, conspiracies and bid rigging, as well as certain deceptive or misleading marketing practices), but not for anti-competitive conduct set out in causes of action found in Parts VII.1 and VIII (including abuse of dominance, price maintenance, and others).

16. While the average consumer could have sought injunctive relief at the Federal Court, a provincial superior court, or at the Tribunal for unlawful conduct under Parts VII.1 and VIII of the *Act*[17] there was disequilibrium because a consumer had no ability to seek a monetary remedy to recover their losses. Indeed, without the ability to seek monetary compensation, plaintiffs would be unlikely to bring any case, including one seeking an injunction, in the first place.

A) Section 36 Damages—Equilibrium for Anti-Competitive Conduct in Part VI

17. The *Act* allows private litigation for damages under section 36(1)(a), which says "[a]ny person who has suffered loss or damages as a result of conduct that is contrary to any provision of Part VI (…) may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct (…) an amount equal to the loss or damage proved to have been suffered by him".[18]

18. Due to the criminal law origins of the *Act*, the language of the legislation and regular competition law jargon describe the causes of action in Part VI as criminal provisions, or criminal matters. Indeed, each of the causes of action found in Part VI "Offenses in Relation to Competition," is an indictable offense whereby violators may be liable to conviction of imprisonment (see s. 45(2) as an example). The nature of labelling these provisions as "criminal provisions" stems back to pre-private access to damages under section 36, when enforcement of the *Act* was only performed by the Commissioner. The distinction between parallel conduct found in both Part VI and elsewhere, such as conspiracy which is found at both s. 45 and s. 90.1, permitted the Commissioner to choose whether to pursue conduct under the criminal or civil track, depending on the outcome of their investigation and the severity of the conduct.

19. From a corrective justice perspective, when used in a private claim for damages through section 36, the provisions found in Part VI are arguably better conceptualized as civil statutory causes of action—like any other private cause of action grounded for example in contract or tort—under which one private person may seek compensation from another private person by demonstrating each of the cause of actions' essential elements on the well-known balance of probability civil standard of proof. This means that while a plaintiff must demonstrate, for example, that the defendant carried out the *actus reus* to fix prices, the statutory elements must only be demonstrated on a balance of probabilities.[19]

20. More specifically, the average consumer can seek damages under section 36 of the *Act* at the Federal Court or a provincial superior court for a set of causes of action in relation to competition located in Part VI, which include:

- conspiracies to fix prices, allocate markets, or control product output (section 45);

- bid rigging (section 47);
- conspiracies related to professional sport (section 48);
- agreements between federal financial institutions (section 49);
- deceptive or misleading practices (section 52);
- drip-pricing (section 52(1.3);
- deceptive notice of winning a prize (section 53);
- double ticketing (section 54);
- multi-level marketing schemes (section 55); and
- pyramid selling (section 55.1).

21. In practice, the class action vehicle is the dominant method by which natural persons—i.e. consumers—seek private damages from an alleged wrongdoer under the *Act*.[20] Price-fixing claims brought under the section 45 conspiracy statutory cause of action, typically pleading a concurrent common law conspiracy cause of action (i.e., a tort), are well-suited for the class action mechanism.[21] Section 52 false or misleading representation claims, which is another statutory cause of action in Part VI, often concurrently plead breaches of similar false or misleading representation causes of action found in provincial consumer protection statutes.[22] The "price-dripping" amendments introduced in 2022 found in section 52 have been the subject of recent uptick in filings.[23]

22. Since a private litigant may commence an action for damages in "any court of competent jurisdiction," private litigants advance claims in the Federal Court of Canada or any provincial superior court.[24] Claims at the Federal Court may only assert causes of action allegedly in breach of federal statutes (i.e., no concurrent tort, contract, or provincial statute cause of action allegations),[25] while the provincial superior courts are courts of general jurisdiction that may hear non-federal statute-based causes of action. The Class Action Laboratory at the University of Montreal found that approximately 8% of all class action filings in Quebec Superior Court over a 25 year period asserted a cause of action grounded in the *Act,* while in Ontario, based on a sample size of 970 cases, the number was 15%.[26] Consumers do not advance claims at the Tribunal as it does not have jurisdiction over conduct set out in Part VI.[27]

23. In terms of the nature of damages, section 36 allows for traditional restitution, which is the value of the loss incurred by the victim. Again, the *Act* reads that a private party who has "suffered loss or damage as a result of…" may seek damages "equal to the loss or damage proven to be suffered by him."[28] The Supreme Court of Canada interprets this language to mean that *any person* who has suffered a loss or damage from conduct contrary to Part VI of the *Act* has standing to bring an action under section 36 regardless of whether they suffered this loss directly, as a direct purchaser, or indirectly, as an indirect purchaser.[29] In 2019, the Supreme Court of Canada clarified that an umbrella purchaser[30] can also assert damages under Part VI.[31]

24. While less frequently a matter of argument in private litigation, section 36 also allows a private litigant to assert damages caused by the "failure of any person to comply with an order of the Tribunal or another court under this Act" and to recover the costs of any investigation in connection with the matter and of proceedings.[32] The *Act,* including section 36, does not allow a private person to seek punitive damages for breach of the *Act*.

B) Window Dressing—No Private Damages via Section 103.1 Actions

25. Prior to Bill C-59's amendments, section 103.1 of the *Act* provided a statutory right for a private party to seek injunctive relief in an action for certain restrictive trade practices in Part VIII, namely refusal to deal (section 75), price maintenance (section 76), exclusive dealing, tied selling and market restriction (section 77), and abuse of dominance (section 79). These actions had to be filed at the Tribunal, and they required leave.[33] The Tribunal could refuse leave where the issue at the heart of the proposed application was the same subject matter of an ongoing inquiry, application or settlement led by the Commissioner.[34] Where the Tribunal considered the substantive leave application, a successful applicant had to demonstrate that their *entire* business was "directly and substantially" affected due to conduct found in one of the five causes of action in Part VIII: refusal to deal, exclusive dealing, tied selling, market restriction or abuse of dominance.[35] While for the price maintenance cause of action, the standard for leave was only proving the *entire* business was "directly affected" without the "substantially" requirement. [36] Courts have clarified that the burden of proof at this leave stage, like a class action certification or authorization hearing, is a lower standard than proof on a balance of probabilities.[37] Under the previous version of the *Act*, the applicant's onus at the leave stage was to present sufficient and credible evidence to satisfy the court on a standard lower than

a balance of probabilities that the "directly and substantially" or simply "directly" thresholds, per sections 103.1(7) or 103.1(7.1), were met.

26. The statutory language omitting the word "business" in the test for leave related to the price maintenance cause of action suggests that businesses and consumers (i.e., legal and natural persons) were able to seek leave from the Tribunal for that cause of action, whereas it appears only businesses (i.e., legal persons only) were able to seek leave for the other three causes of action.[38]

27. Previously, and going-forward after the Bill C-59 amendments, the Tribunal may award costs against unsuccessful private party applicants brought under section 103.1 of the *Act*.[39] Costs awards follow the *Federal Court Rules,* SOR/98-106, and they may be high.

28. As noted above, before Bill C-59 amendments to the *Act,* private litigants were not able to seek monetary relief for breach of the restrictive trade practice offences. Injunctive relief, or a request that the Tribunal administer a fine, were the only remedies.[40] It was also possible for the Tribunal to order a person to complete specific steps to restore competition.[41]

29. Given the scope of section 103.1 prior to the amendments, for natural persons with relatively small individual losses for wrongful conduct under any of the restrictive trade practices as defined in the *Act*, there was no ability to obtain financial compensation. Natural persons simply had no legal avenue—not at the Tribunal, or Federal or provincial courts—to claim monetary compensation for civil anti-competitive conduct like abuse of dominance, tied selling, and others. While consumers had a theoretical ability to bring a claim for deterrent relief in the case of price maintenance, they faced a practical brick wall because the value of their individual claim, and the cost-risk associated with pressing their rights, made an individual action economically irrational. Only a class action made sense, and the Tribunal had exclusive jurisdiction to hear these causes of action, but there was no class action procedure available at the Tribunal.

30. Even for businesses acting in an individual capacity, the test for leave was tough sledding. In theory, the standard of proof for the leave test of 103.1 was low with courts acknowledging that "the threshold for obtaining leave is not a difficult one to meet."[42] In practice, the Tribunal granted very few applications. In the 20 years since private access to the Tribunal has been available, only 28 applications for leave have been made under sections 75, 76 and 77 and none under section 79, of which eight were granted

leave (29% success rate).[43] Of the eight applications granted leave, all of them either settled before the hearing or were dismissed.[44]

31. The House of Commons Committee that studied the 2002 version of section 103.1 of the *Act* summed up the lack of access to justice concerns nicely where they observed that:

> The Committee believes that, with only injunctive relief as the carrot, private parties in most cases may only be exchanging the costs associated with the alleged anti-competitive conduct for litigation costs (hopefully less than $1 million per case on average with reforms in the tribunal processes). Indeed, if this scenario does in fact unfold over the next few years, it will very quickly become common knowledge across the business sector and Canada will be no further ahead. Rights with no value attached to them are but window dressing—something that, as many observers have described, has adorned Canada's antitrust Acts for too long.[45]
>
> [Underline added.]

32. The Bill C-59 amendments, adopted as law in June 2024, changed the trajectory of access to justice for private litigants. A closer look at these amendments follows in the next section.

III—In Pursuit of Equilibrium—Bill C-59

33. In broad strokes, Bill C-59 amended the *Act* by:

> 1) adding "disgorgement" as a monetary remedy available to private litigants for restrictive trade practice causes of action in Part VIII that proceed at the Tribunal;
>
> 2) extending private access to the Tribunal for additional deceptive marketing practices, and "arrangements-that-lessen-competition" claims in Parts VII.1 and VIII;
>
> 3) broadening existing causes of action to include "right to repair" and "greenwashing";
>
> 4) indicating a class action mechanism exists but without defining its procedure; and
>
> 5) lowering the burden for persons to obtain leave to proceed at the Tribunal.

A) Disgorgement—Class Monetary Remedy for Restrictive Trade Practices found in Part VIII

34. Bill C-59 introduces "disgorgement" as a monetary remedy that the Tribunal may order to a class for seven types of anti-competitive conduct found in sections 75 (refusal to deal), 76 (price maintenance), 77 (exclusive dealing, tied selling and market restriction), 79 (abuse of dominance), and 90.1 (agreements or arrangements that prevent or lessen competition substantially).[46]

35. Disgorgement means an order against wrongdoers in an amount "not more than the value of the benefit derived" from the prohibited conduct distributed to the party who brought the application and "any other person affected by the conduct."[47] The Supreme Court of Canada describes disgorgement as a gain-based remedy, which is available without proof of deprivation to the plaintiff, so long as the plaintiff satisfies all the constituent elements of a cause of action.[48] Thus, the Tribunal may award the disgorgement remedy for the causes of action found in sections 75, 76, 77, 79 and 90.1. This new disgorgement remedy is not available under the proposed amendments for violations of deceptive marketing provisions in section 74.1.[49] Based on the above, it appears a plaintiff may now seek leave at the Tribunal to prosecute seven causes of action with disgorgement as the monetary compensation remedy. Before Bill C-59, no monetary remedy was available.[50]

36. From a corrective justice perspective, the disgorgement remedy means that monetary compensation awarded to plaintiffs need not necessarily match the losses caused by the wrongdoing. Rather than the wrongdoer having to restore the value of the loss they caused to the victim, disgorgement focuses on the benefit gained by the defendant because of the unlawful conduct. This is in contrast, for example, to the unjust enrichment doctrine which requires a correspondence between the defendant's gain and the deprivation to the plaintiffs.[51] Indeed, with disgorgement, there may not be causation of damages at all, which is a necessary element for anti-competitive conduct in Part VI where section 36 restitutionary damages apply. While disgorgement may not align with corrective justice principles, its availability as a remedy offers some advantages in a class action claim.

37. First, with the objective of disgorgement being deterrence, it aligns with one of the three objectives of the class action procedure established by the Supreme Court of Canada in *Dutton*. While restitution's objective is to repair the plaintiffs' losses and thus aligns with corrective justice

underpinnings of private law, the objective of disgorgement is deterrence.[52] Disgorgement deters potential wrongdoers by sending a message that should their unlawful behaviour result in ill-gotten gains, the Tribunal may order those away. In copyright law, the rationale for disgorgement is to deter potential infringers from appropriating the benefits for themselves which in turn discourages development and disclosure of new inventions.[53] Applying this to competition law, risk of disgorgement can deter potential wrongdoers from appropriating profits of anti-competitive behaviour which in turn discourages innovation and competition.

38. Second, the disgorgement remedy may simplify common evidentiary hurdles class action plaintiffs face in competition law due to the challenging nature of proving individual losses downstream from the anti-competitive conduct. As an example, consider the section 45 conspiracy (price-fixing) cause of action, where plaintiffs have historically encountered evidentiary hurdles showing that an overcharge from upstream anti-competitive conduct has passed through the chain of commerce to the indirect purchasers.[54] Under disgorgement, so long as the plaintiffs can prove the elements of these seven newly-identified statutory causes of action, the monetary remedy need not correspond to causation of loss, but rather will be evaluated in relation to the notion of the maximum benefit derived by the wrongdoer. While the loss to class members may very well form an aspect of the benefit derived by a wrongdoer, the lens of inquiry throughout a case may be much different.

B) New Private Right of Access—Monetary Compensation for More Types of Anti-competitive Conduct

39. Due to the *Act*'s new amendments, private applicants may now seek leave to pursue a claim at the Tribunal for two new categories of wrongful conduct: 1) deceptive marketing practices found in section 74.01[55]; and 2) agreements or arrangements that prevent or lessen competition substantially as described in section 90.1.[56] Private parties can seek monetary compensation from the Tribunal in the form of restitution for generally misleading or deceptive representation contrary to section 74.01(1)(a), while disgorgement is available for agreements that prevent or lessen competition substantially contrary to section 90.1, as discussed above.

40. Prior to the amendments, it was already possible for the Tribunal to order restitution to a class for conduct contrary to the general prohibition against false and misleading representations found in section 74.01(1)(a) of the *Act*.[57] The language setting out the availability of restitution found in

section 74.1(1)(d) is collective in nature, providing that the court may order a person to pay an amount "not exceeding the total of the amounts paid to [them] for the products in respect of which the conduct was engaged in, to be *distributed among the persons to whom the products were sold*…". Such a remedy has been issued before, reportedly 12 times for cases before the Tribunal between 2005 and 2019.[58] In 2016, Bell Mobility Inc. agreed to pay an estimated amount of $11.82 million dollars in rebates to its current and former affected customers who were charged for text messaging services the Commissioner concluded were misleading or deceptive, up to a maximum varying between $30 and $60 per consumer, depending on the type of service they were charged.[59] What has changed with the amendments is that now private parties can pursue claims found in Part VII.1 at the Tribunal, while before only the Commissioner could pursue such claims.

41. Most of the deceptive marketing practices listed in the newly accessible section 74.01 in Part VII.1 are distinct from the types of deceptive marketing practices described in Part VI, for which the consumer may already claim section 36 damages under the *Act.* The deceptive marketing practices under Part VI is a narrow set of misrepresentations made "knowingly" or "recklessly" relative to the more fulsome list of deceptive marketing practices set out in Part VII.1, which incorporate the lower standard that a representation need only be false or misleading in a material respect "by any means whatever". There are three parallel types of deceptive marketing practices in both Parts VI and VII.1: general prohibition against false or misleading representations (at s. 52 and s. 74.01(1)(a)); drip pricing (at s. 52(1.3) and s. 74.01(1.1)); and false and misleading representations in electronic messages and web addresses (at s. 52.01 and 74.011)). Other than those three, all of the deceptive marketing practices found in Part VII.1 are distinct types of conduct not set out in Part VI, which include: performance claims not based on adequate tests (s. 74.01(1)(b)); warranties and guarantees (s. 74.01(1)(c)); ordinary selling price (s. 74.01(2) and (3)); use of tests and testimonials (s. 74.02); bait and switch (s. 74.04); and promotional contests (74.06).

42. Thus, at first glance, these amendments appear to breathe life into new substantive rights insofar as a private person may now access justice at the Tribunal for expanded causes of action. However, this is not the case as most of the conduct listed under Part VII.1 only allow for deterrent remedies, not monetary compensatory remedies. Notably, while section 74.1(1) of the *Act* provides a range of remedies, the remedy of restitution of 74.1(1)(d) is explicitly limited to conduct contrary to 74.01(1)(a) of the *Act,* the general prohibition against representations that are false and misleading in

a material aspect. As such, the *Act* provides that "in the case of *conduct that is reviewable under 74.01(1)(a)*", the Tribunal may order restitution (…)".[60] This explicit reference to conduct contrary to 74.01(1)(a), and not conduct found elsewhere, suggests that restitution may not be available for other marketing practices that are more accurately captured by the more specific conduct listed in the sections that follow 74.01(1)(a), including warranties and guarantees (s. 74.01(1)(c)), for example. The Competition Bureau appears to share this conclusion, where in 2023 the Bureau encouraged amending the *Act* to extend the restitution remedy to all deceptive marketing practices:

> (…) [I]n respect of restitution, paragraph 74.1(1)(d) of the Act limits its application to conduct that is reviewable under paragraph 74.01(1)(a), or the making of misleading representations to the public. Restitution should be made available to all other deceptive marketing practices (which would include, for instance, the provision that prohibits making unsubstantiated performance claims about a product). Such a change would enrich the courts' ability to promote compliance with the deceptive marketing practices provisions of the Act.[61]

43. In addition, insofar as section 74.01(1)(a) of the *Act* sets out the *general* prohibition against false and misleading representations and the following sections of the *Act* enumerate *specific* examples of misleading or deceptive marketing practices, it seems logical to infer that the subsequent examples of misleading practices, by their inherent nature as specific examples, constitute conduct that may also qualify as misleading under the general prohibition—as per the language of subsection 74.01(1)(a) of the *Act*. This point may apply to all subsequent causes of action, except for subsection 74.01(1)(b) as a performance claim can be accurate but nevertheless be unlawful if the statement regarding performance is not substantiated by adequate and proper testing. Except for performance claims set out in 74.01(1)(b), where any of the other specific qualify as inherently misleading conduct, then why would restitution not be available for those more specific misleading practices? Since there is a principle of statutory interpretation that the legislature does not intend to produce absurd consequences, including logical contradictions[62]—the limited application of restitution to the *general* prohibition when *specific* sub-sections are excluded is opportunity for clarification.

44. From a corrective justice perspective, this amendment is a disappointing micro-advancement. For all intents and purposes, it adds a new forum—the Tribunal—where consumers may seek redress for a cause of action that they could already access justice through other existing forums,

while declining to allow compensatory remedies at the Tribunal for the full suite of false and misleading representations, some but not all of which consumers may already pursue at the Federal Court and provincial superior courts under section 36.

45. Section 90.1 of the *Act* addresses anti-competitive agreements and arrangements. According to the Competition Bureau, typically this provision governs agreements between competitors that are not conspiracies within the meaning of section 45 or mergers within the meaning of section 92, such as agreements between federal financial institutions and "bid-rigging."[63] As an example, for the bank customer who may be harmed by an agreement between two banks to exchange pricing information on their banking products or to require that the sale of a financial product, like a line of credit or an insurance product, be made through a common sales agent[64], such a customer now has a private right of action to seek leave at the Tribunal and seek monetary compensation via the disgorgement remedy.

46. From a class action litigant perspective, the newly available private access to section 90.1 appears to open up a broader range of unlawful conduct to which consumers may seek monetary compensation at the Tribunal. Since this amendment will allow for claims related to agreements or arrangements not covered by section 45, it might allow for the "buy-side" or purchaser agreements currently excluded from section 45,[65] or other claims that initially sound in conspiracy but are not properly covered by section 45. Since section 90.1 opens up claims sounding in conspiracy, or generally similar in some respects, it is an open question whether consumers may attempt to press the limits of this section 90.1 cause of action to side-step the onerous evidentiary burden that is often required in proving causation of loss in a damages case under section 36, by preferring to prosecute a disgorgement-based claim at the Tribunal. In any event, there is now an additional cause of action that private litigants may access at the Tribunal.

C) New Causes of Action: Right to Repair and Greenwashing

47. Bill C-59's changes broadened two existing causes of action: 1) a "right to repair", which supplements the current refusal to deal provision of section 75; and 2) a "greenwashing" cause of action under the deceptive marketing provisions in section 74. While the addition of the "right to repair" may provide new terrain for competition law class actions, it is unlikely that the "greenwashing" cause of action will amount to anything more than window dressing.

48. A "right to repair" can be understood as the right for owners of a product to choose where to bring their product for repair and maintenance services. As everyday products become more software-based, including programmable fridges, smart phones, and cars with computers in their dashboards, when a problem arises, digital locks embedded in product software may force an owner to bring their product back to the manufacturer who sold it to them in the first place.[66]

49. The amendments to section 75 prohibit a manufacturer from refusing to provide a means of repair to products in an anti-competitive manner. The proposed language will deem it anti-competitive conduct for a manufacturer or supplier to refuse to provide a person with a "means of diagnosis or repair" in circumstances where the means of diagnosis can be readily supplied.[67] Without a right to repair, private users may be forced to pay higher repair costs or they may choose to replace products that could otherwise reasonably be repaired but for a manufacturer's anti-competitive conduct. Where independent repair shops can readily provide the repair or maintenance for a product, it is anti-competitive for a manufacturer to prohibit that. The end consumer who may suffer a loss—either equal to the inflated price to repair the product due to this refusal to supply or perhaps equal to the price of a new product that was unnecessarily acquired due to the refusal to supply—may pursue the disgorgement remedy at the Tribunal. While disgorgement may not be the best remedy from a corrective justice lens, this new cause of action will likely promote competition law class actions as it adds a method for consumers or small businesses to obtain a monetary remedy.

50. The amendments at new subsection 74.01(1)(b.1)—the so-called "greenwashing" provision—prohibits companies from making misleading representations about a product or service's "benefits for protecting the environment or mitigating the environmental and ecological effects of climate change" where such a representation is not based on an adequate or proper test. The language of this new provision was originally limited to misrepresentations related to a product or a service, thereby excluding deceptive marketing representations related to a company's misleading statements about their commitments to meet certain climate or environmental goals. But critics argued that the new provision did not go far enough to adequately address so-called "greenwashing" conduct.

51. As a result, new subsection 74.01(1)(b.2) was amended in Committee to also prohibit companies from making misleading representations "to the public with respect to the benefits of a business or business activity for

protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change" where such a representation is not based on an adequate or proper test. Therefore, extending the new provision to include misrepresentations about a business or a business activity. This prohibition would, for example, capture misleading representations by a company that publicly asserts they will be "net-zero" by a certain date or that they will be "carbon neutral" when in fact they have no practical plan in place to achieve those environmental commitments.[68]

52. While it is positive that the greenwashing cause of action was extended to include misrepresentations about a product or service, a business or a business activity, the failure of Bill C-59 is that these new causes of action do not incorporate monetary remedies for "greenwashing" at all. As discussed above, the restitution remedy for deceptive marketing practices does not appear to be available for the new greenwashing cause of action—as restitution damages are only available for the cause of action set out in subsection 74.01(1)(a). Consequently, victims of greenwashing may be limited to claiming injunctive relief at the Tribunal, which may attract new claims led by non-governmental organizations but provide little to no incentive to "private attorneys general" to assume the risk of advancing this kind of litigation.

D) Class Actions Available—Class Procedure Not Clear

53. The existence of a class action mechanism under Bill C-59 is not self-evident. The disgorgement remedy that private litigants may now access for conduct in Part VIII is available to "the applicant and any other person affected by the conduct"[69] While the already existing restitution remedy that private litigants may now access for deceptive marketing practices allows monies "to be *distributed among the persons to whom the products were sold*…". Readers may reasonably infer that this language now permits class action practice at the Tribunal led by private parties for conduct contrary 74.01(1)(a), 75, 76, 77, 79 or 90.1. Yet, Bill C-59 provided no procedural rules or criteria regarding how or under what conditions private representative actions will proceed before the Tribunal.

54. While it is perplexing that Parliament did not see fit to state more expressly the procedural rules applicable to class procedures, this does not mean the bench and bar are left with no guidance. The authors believe that the likely eventuality is that the *Federal Court Rules*—with their clear class action procedural guidance and developed body of jurisprudence—will apply at the Tribunal given the *Federal Court Rules* may fill any procedural

vacuum at the Tribunal. More specifically, section 34(1) of the *Competition Tribunal Rules,* which reads "[i]f, in the course of proceedings, a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the practice and procedure set out in the *Federal Court Rules* may be followed", will likely be interpreted to adopt the *Federal Court Rules* class action procedural mechanism into class action practice at the Tribunal. Interestingly, it is not novel for Parliament to consider a class action procedure by formal amendment to the *Act* as this practical solution has roots back to the mid-1970s.[70]

E) Burden to Obtain Leave Lowered: "Part" of a Business & Public Interest Criteria

55. Bill C-59 lowers the threshold for leave from the Tribunal for claims grounded in the causes of action found in sections 74.01, 75, 77, 79 and 90.1. Under the new amendments, the Tribunal may grant leave where it is satisfied that only a *part* of a company's business is affected by the anti-competitive conduct or it is in the public interest to do so. Likely because natural persons could already bring a claim grounded in price maintenance (section 76), applications for leave under that cause of action do not import the new 'public interest' consideration. For misleading or deceptive practices, leave may be granted if the Tribunal is satisfied that it is in the public interest to do so.[71]

56. Before Bill C-59, only businesses could seek leave for causes of action found in sections 75, 77 or 79 (i.e., refusal to deal, exclusive dealing, tied selling market restriction, and abuse of dominance). Before the amendments to the *Act,* applicants had to show that their *whole* business was substantially and directed affected by the conduct at issue.[72] With the amendments, the new test lowers this threshold by allowing the Tribunal to grant leave for applicants who can show that only *part* of their business has been impacted by anti-competitive conduct. More important to consumers, by adding an alternative public interest criteria for leave, this appears to indicate that, through a representative plaintiff who brings a claim in the "public interest", the Tribunal may grant leave to bring an application that seeks monetary compensation on behalf of a class resulting from unlawful anti-competitive conduct. But what does it mean for the Tribunal to be persuaded that it is in the "public interest" to hear a claim?

57. Acknowledging that claims commenced through section 103.1 will be pursued against private corporations, and not litigating the legality of government action, the legal test for public interest standing discussed by

the Supreme Court of Canada in *British Columbia (Attorney General) v. Council of Canadians with Disabilities* may provide insight into how the Tribunal will interpret the public interest test in the private law context of competition class action claims.[73] In *BC* v *CDD,* the Supreme Court of Canada held that a case is deemed to be in the "public interest" where its adjudication would transcend the interest held by the claimant themselves in that it also may provide access to justice for disadvantaged persons whose legal rights are affected.[74] The core principle that a claim will be in the "public interest" where its potential outcome will be of a collective benefit reaching beyond the private interest of the specific claimant whose name is attached to the claim is one that marries well to the purposes of competition class actions, which are filed for a class of persons across Canada suffering the same anti-competitive loss. The exact parameters of the new public interest test will take shape in the fullness of time.

58. With disgorgement and restitution as financial remedies available to private litigants for previously inaccessible causes of action, a class action procedure of some kind, a leave test that appears to be lower, the amendments in Bill C-59 take a step forward insofar as they provide private litigants, in particular consumers, a pathway to recover harms and losses where there is anti-competitive conduct set out in certain sections of Parts VII.1 and VIII of the *Act.* This new path to access to justice will occur at the Tribunal since there remains no compensatory legal remedy available for these causes of action in federal or provincial court. Notwithstanding this movement in pursuit of equilibrium, these amendments fall short of the mark, as will be discussed in the next section.

IV—Disequilibrium Persists—Bill C-59 Falls Short

59 From a corrective justice perspective, the reforms introduced by Bill C-59 represent a moderate advancement forward. Critically, there will be a class action mechanism, of some kind, albeit the details of what that will look like are unclear. Come what may procedurally, that consumers may seek monetary compensation for a sub-optimal gain-based remedy is a step toward equilibrium. That said, a better approach, one consistent with corrective justice principles, would be to also allow conduct contrary to Parts VII.1 and VIII to be pursued through a section 36 private damages action. Such an amendment would better optimize access to justice from a procedural and substantive perspective and would also serve the principles of behaviour modification and judicial economy.

A) Class Actions in the Competition Tribunal—Movement Forward, Come What May

60. Business lobby critics observed that Bill C-59 did not propose to add to the *Act* any of the safeguards normally included in Canadian class action statutes.[75] Lacking proper safeguards, they argue, section 103.1 "could be a cash cow for plaintiff lawyers, while using up the Competition Tribunal's staff time and resources, burdening businesses with abusive litigation and potentially resulting in consumers not receiving financial compensation to which they are entitled."[76] Not only is this criticism gratuitous and fantastical, it is inconsistent with literature that there was not a flood of unmeritorious claims at the Tribunal since the private action was first introduced.[77] For the business lobby, the appropriate safeguards would be that: 1) the evidentiary threshold for an applicant would be to provide "cogent evidence to demonstrate each of the elements required to make an [certification] order"; and 2) the preferability element of the certification test ought to include a superiority and predominance threshold consistent with Ontario's 2020 amendment to its *Class Proceeding Act, 1992* at s 5(1.1).[78]

61. A class action procedural leave test, as proposed by the business lobby, would make the standard for a class claim at the Tribunal the highest threshold of any judicial body anywhere in the country. The factual threshold of "cogent evidence to demonstrate each of the elements…" takes a merits-based lens and is higher than the existing "some basis in fact" threshold applicable in common law provinces and territories, which is a low purely procedural threshold best understood as being in contrast to no basis in fact.[79] Further, the superiority/predominance language imported from Ontario's statute is the strictest standard on the preferability criterion in the country.[80] With the exception of Prince Edward Island, no other common law jurisdiction in Canada, including cases filed in the Federal Court under the *Federal Court Rules*, has a certification test as strict as Ontario—while the Supreme Court of Canada has described Quebec's authorization test set out in article 575 of Quebec's Code of Civil Procedure ("*C.C.P.*") as the lowest in the country.[81] Practically speaking, where Bill C-59 seeks to expand access to justice for competition class actions, it would be contrary to the objectives of the *Act* to impose the strictest test in the country, given that a very high majority of all other Canadian class action statutes have a lower certification threshold. Might it be that the business lobby prefers the test be so strict that consumer class actions do not proceed at all?

62. Further, it is inaccurate to suggest that the *Act* must incorporate provisions consistent with the various class proceeding statutes to have

reasonable safeguards for class action practice. As discussed above, in the absence of any procedural rules in the *Act* or in the *Competition Tribunal Rules,* the procedures governing class actions as set out by the *Federal Court Rules* likely apply to class proceedings at the Tribunal. In the event there remains a void, the common law regulates class actions in the absence of specific procedural statutes.[82] The Tribunal adopting safeguards based on common law principles would not be the first administrative tribunal taking such an approach, as at least the BC Human Rights Tribunal has accommodated the class complaint procedure on common law principles for over 20 years.[83]

63. Notwithstanding the *Federal Court Rules* and common law provide safeguards, detailed class procedural rules are preferred over dealing with class actions based only on common law principles. From a corrective justice perspective, the authorization (certification) test in art. 575 of Quebec's *C.C.P.* is optimal to promote access to justice. Certainly, the *C.C.P.* has numerous reasonable safeguards, set out in articles 574-601, that ought to satisfy any objective observer. From a nation-wide federalist perspective, perhaps there is already a middle ground as section 34(1) of the *Competition Tribunal Rules* incorporate the *Federal Court Rules* on class actions, which, for all intents and purposes, are equal to the non-Ontario/PEI common law jurisdictions' tests as they include the "some basis in fact" evidentiary standard and do not include the superiority/predominance threshold. Using the *Federal Court Rules* is a national compromise, as it burdens Quebec-residents with a higher standard than what they would face at the Quebec Superior Court but lowers the test for Ontario and PEI residents relative to what they would otherwise face in their provincial courts while providing consistency on the certification standard to residents in the rest of Canada. In addition, as the Tribunal already uses the *Federal Court Rules* to guide its decisions on costs, using those rules for guidance on class action procedure seems like an intuitive solution.[84]

64. Come what may on the procedural rules of class action practice, the debate appears to center around how strict or permissive a certification test may be, not on the need for a class action mechanism. The inclusion of any class procedure is movement toward equilibrium.

B) Extend Section 36 Damages to Parts VII.1 & VIII Causes of Action

65. The disgorgement gain-based monetary remedy available to class members for the new causes of action does not accord with corrective justice

principles. The balance corrective justice teaches is that a victim receives what they lost, not more, and not less. The micro-advancement of allowing class restitution for misleading practices under subsection 74.01(1)(a), but not elsewhere, fails to provide monetary redress where wrongdoers cause losses for the broader suite of misleading and deceptive practices enumerated in Part VII.1.

66. Disgorgement is not an independent cause of action, but rather an alternative remedy for certain forms of wrongful conduct.[85] The Supreme Court of Canada noted in *Atlantic Lottery*—a case that discusses negligence, waiver of tort, breach of contract, and unjust enrichment—disgorgement is not available as a general proposition in negligence without proof of damages, and the key to the gains-based disgorgement remedy lies in "aligning the remedy with the injustice it corrects."[86] It is not clear, based on the newly available causes of action set out in Part VIII of the *Act,* why Bill C-59 seeks to quantify a monetary remedy only in relation to the defendant's gain while leaving out the traditional causation of damages corrective justice compensatory framework. Perhaps this stems from the public nature origins of the *Act,* which like other public law statutes—such as the *Criminal Code*—incorporates a deterrence objective. Or perhaps more practically this stems from the logistical challenges in identifying and quantifying downstream harms from anti-competitive behaviour while the harm to the market more generally is clear. It is odd that Parliament would deny private parties an ability to recover their own losses, limiting them to a remedy that is typically reserved for public deterrence. What about their individual losses, then? From an access to justice perspective, the preferred course is that both remedies would be available.

67. The solution to this conceptual difficulty is to bring future amendments to section 36(1)(a) to read: "conduct that is contrary to any provision of Parts VI, VII.1 or VIII, …". In other words, allow private parties access to pursue the losses they've suffered due to conduct under Parts VII.1 or VIII via the section 36 procedure in any court of competent jurisdiction. This would extend the restitutionary damages remedy to the newly accessible causes of action. This does away with the conceptual difficulty that may arise with amendments only permitting what is an alternative, gain-based remedy in disgorgement, where the remedy may result in monetary compensation that is higher or lower than the losses of the class members. Such an amendment would provide a greater range of monetary remedies available to potential plaintiffs, through a section 36 action in any court of competent jurisdiction, that will assist in matching the remedy to the harm wrongdoers cause.

68. A further benefit of extending section 36 damages would be greater availability of plaintiff counsel. The practical and geographic reality is that the Tribunal generally sits in Ottawa, albeit there are exceptions.[87] The plaintiffs bar, those that are experienced in class actions, are generally spread out around the country, and there is very little class litigation that is filed and advanced in Ottawa, and increasingly less in Ontario generally since Ontario's 2020 amendments. Simply put, if plaintiff counsel must travel to Ottawa for hearings over extended periods of time, the number of plaintiff-side lawyers that are willing and able to prosecute these new causes of action will decrease. But extending section 36 damages to the new causes of action would solve this problem because it would open the Federal Court as well as provincial and territorial superior courts, which of course are located in all major cities in each province, as forums of selection.

69. That the Tribunal has only five permanent judicial members is a practical concern, as an influx in cases may lead to serious delay. But the shortage of judicial resources, be it members at the Tribunal or at provincial and federal court, is not a reason to refuse to administer and deliver access to justice. Such judicial shortage considerations are important, but they are distinct from the principle of judicial economy, which seeks to aggregate claims where possible to avoid duplicative fact-finding and legal analysis. In the context of competition law class actions, there is a judicial economy concern given factually overlapping claims may be brought at both the Tribunal and at provincial and territorial superior courts, including possibly by competing plaintiff counsel.[88] Frequently plaintiff counsel plead multiple causes of action, in addition to *Competition Act* claims, that are often grounded in tort, or provincial or territorial consumer protection act statutory claims. It is not inconceivable that newly available causes of action—like the broader list of deceptive marketing practices, refusal to deal, price maintenance, or abuse of dominance—necessarily filed at the Tribunal may also see filings in provincial and territorial superior courts with similar or related factual conduct over a similar period of time but with legal liability grounded in causes of action other that those in Parts VII.1 and VIII of the *Act*. This is a judicial economy concern. And while it is beyond the scope of this paper to address filings in multiple or the same jurisdictions by competing firms that lead to carriage or inter-provincial stay applications, it may be unfair to defendants and the courts/tribunal when they are asked to address highly similar fact patterns filed by potentially different plaintiff counsel that allege different yet similar causes of action.

70. Critics may argue that extending section 36 damages to conduct found in Parts VII.1 and VIII runs contrary to the rationale for the Tribunal in the first place, which, being a specialized body composed of decision-makers with experience and knowledge necessary to hear competition cases, is particularly well-suited to hear competition law cases. That may well be true, but conduct grounded in conspiracy and false & misleading causes of action in Part VI of the *Act* have proceeded in superior courts for decades. Justices at provincial superior courts remain competent to hear claims under the *Act,* and frankly more options and flexibility in choice of forum enhances access to justice, behaviour modification and judicial economy. At minimum, adding the damages remedy as an option among the Tribunal's suite of remedies should be addressed without delay.

71. The purpose of the *Act* is to maintain and encourage competition in Canada in order to, among other things, provide consumers with competitive prices and product choices.[89] Not only does the class action process permit greater access to justice and promote judicial economy, but it is also a behavioural modification tool that maintains and encourages competition in Canada. Economic opinion dating back to the 1970s argues that class action compensatory remedies serve the interests of deterrence.[90] More contemporary writing underlines that providing access to justice for competition class action claims before the Tribunal allows everyday consumers the opportunity to hold actors of anti-competitive conduct accountable by forcing them to bear the costs of their anti-competitive conduct.[91] As scholar and lawyer Mathew Good put it: "if class actions force malefactors to pay for their wrongdoings, then defendants will either change their ways or be bankrupted."[92] In sum, extending the section 36 damages remedy to cover conduct under Parts VII.1 and VIII provides another important tool, a tool that will be more readily available, the whole serving the behaviour modification principle.

Conclusion

72. The amendments to the *Act* introduced by Bill C-59 represent an important and significant step forward. They fall short of equilibrium because consumers will absorb unlawfully caused harms and losses while the legal architecture in Canada cannot provide them redress. Broadening the damages remedy to Parts VII.1 and VIII of the *Act* coupled with a reasonable class action procedure finds equilibrium both in matching the quantum of damages to the causative element of wrongdoing and in the practical reality of the administration of legal services within a country that

has a rapidly growing population and the second-largest geographical land mass on the planet.

ENDNOTES

[1] *Competition Act,* R.S.C., 1985, c. C-34 [*Competition Act*]; Bill C-59, *An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament on March 28, 2023*, 1st Sess, 44th Parl, 2024 (received royal assent on June 20, 2024) [*Bill C-59*].

[2] *Rankin (Rankin's Garage & Sales) v J.J.*, 2018 SCC 19 at para 63; *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 189.

[3] *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46 at paras 27-29 [*Dutton*].

[4] John C. P. Goldberg, "Introduction: Pragmatism and Private Law" (2012) 125:7 Harv L Rev 1640 at 1662.

[5] Goldberg, *supra* note 4.

[6] Ernest J Wienrib, *The Idea of Private Law* (Oxford: Oxford University Press, 2012) at 9.

[7] Ross Grantham & Darryn Jensen, "The Proper Role of Policy in Private Law Adjudication" (2018) 68:2 UTLJ 187 at 199.

[8] Wienrib, *supra* note 6 at 9.

[9] *Competition Act, supra* note 1, s 36.

[10] Kent Roach & Michael Trebilcock, "Private Enforcement of Competition Laws" (1996) 34:4 Osgoode Hall LJ 461 at 496-497.

[11] *Dutton*, *supra* note 3 at paras 27-29.

[12] *AIC Limited v Fischer*, 2013 SCC 69 at para 34.

[13] Janet Walker, ed., *Class Actions in Canada: Cases, Notes and Materials*, 2nd ed (Toronto: Emond Publishing, 2018) at 524.

[14] *Sibiga c Fido Solutions inc.*, 2016 QCCA 1299 at para 102 (consumer fee case).

[15] *Condon v Canada*, 2018 FC 522 at para 91 (privacy data loss case).

[16] *Fantl v Transamerica Life Canada*, [2008] OJ No 1536 (ONSCJ) at para 49; For scholarly comment on this see: Jasminka Kalajdzic, "Self-Interest, Public Interest and the Interest of the Absent Client: Legal Ethics and Class Actions" (2011) 49 Osgoode Hall LJ 1 and Frank Iacobucci, "What is Access to Justice in the Context of Class Actions" (2011) 53 Sup. Ct L. Rev. (2d) 17.

[17] See John S. Tyhurst, *Canadian Competition Law and Policy* (Toronto: Irwin Law, 2021) at 44.

[18] *Competition Act, supra* note 1, s 36(1).

[19] *Watson* v *Bank of America Corp.,* 2015 BCCA 362 at para 72; *F.H.* v *McDougall,* 2008 SCC 53 at para 40.

[20] Tyhurst, *supra* note 17 at 55. Also see the 2013 Supreme Court of Canada "trilogy": *Pro-Sys Consultants Ltd. v Microsoft Corp.,* 2013 SCC 57 [*Pro-Sys*]; *Sun-Rype Products Ltd v Archer Daniels Midland Co.,* 2013 SCC 58 [*Sun-Rype*]; and *Option consommateurs* v *Infineon Technologies AG,* 2013 SCC 59 [*Infineon*], (collectively, the "2013 Trilogy").

[21] *Pro-Sys*, *supra* note 20; *Sun-Rype*, *supra* note 20; and *Infineon*, *supra* note 20.

[22] *Rebuck v Ford Motor Company*, 2022 ONSC 2396, aff'd 2023 ONCA 121; *Gauthier c Johnson & Johnson Inc.*, 2020 QCCS 690, aff'd 2020 QCCA 1666.
[23] *Commissioner of Competition v Cineplex Inc.*, (Notice of Application pursuant to s. 74.01 filed on May 18, 2023) Ottawa CT-2023-003 (CT); *Ponton v Cineplex Inc. and Cineplex Entertainment Limited Partnership* (Application for Authorization filed January 19, 2024) Montreal 500-06-001291-240 (QCSC); *Bahrani v Cineplex inc. and Cineplex Entertainment LP* (Notice of Civil Claim filed January 22, 2024) Vancouver No. S-240406 (BCSC); *Sun v Bloomex Inc.* (Statement of Claim filed March 11, 2024) Vancouver Action No. T-545-24 (FC); *Commissioner of Competition v TicketNetwork, Inc.* (Registered Consent Agreement filed November 21, 2023) Ottawa CT-2023-009 (CT).
[24] *Competition Act, supra* note 1, ss. 36(1) and (3).
[25] *Federal Courts Act,* R.S.C. 1985, c F-7, ss 17 to 28 set out that jurisdiction is limited to matters identified in specific federal statutes, including class actions against the government or a federal ministry or Crown agency.
[26] Catherine Piché, *L'action collective: ses succès et ses défis,* (Montreal: Éditions Thémis, 2019) at 40-42, Tableau II - 3.2.1 & 3.2.2.
[27] *Competition Tribunal Act,* R.S.C., 1985, c. 19 (2nd Supp), s. 8(1) [*Tribunal Act*].
[28] *Competition Act*, *supra* note 1, s 36(1).
[29] *Pro-Sys, supra* note 20 at para 16: The Supreme Court of Canada defines "indirect purchasers" as "consumers who have not purchased a product directly from the alleged overcharger, but who have purchased it either from one of the overcharger's direct purchasers, or from some other intermediary in the chain of distribution."
[30] *Pioneer Corp v Godfrey,* 2019 SCC 42 at para 58: The Supreme Court of Canada used the term "umbrella purchasers" to describe purchasers who have suffered loss as result of "the defendant's anti-competitive cartel activity, creates an 'umbrella' of supra-competitive prices, causing non-cartel manufacturers to raise their prices" [*Godfrey*].
[31] *Godfrey, supra* note 30 at para 64.
[32] *Competition Act, supra* note 1, s 36(1)(b) and following.
[33] *Competition Act, supra* note 1, ss 103.1(1), (7) and (7.1).
[34] *Competition Act, supra* note 1, ss 103.1(4) and (5).
[35] *Competition Act, supra* note 1, s 103.1(7) reads: "The Tribunal may grant leave to make an application under section 75, 77 or 79 if it has reason to believe that the applicant is directly and substantially affected in the applicant's business by any practice referred to in one of those sections that could be subject to an order under that section." The Tribunal's case law has consistently held that the "substantial affect" on a business is measured in the context of the *entire* business, see *Sears Canada Inc. v Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.*, 2007 Comp Trib 6 at paras 20-21 where the Tribunal dismissed the application for leave because the matter at issue, prestige fragrances and cosmetics and accessories, did not represent the entirety of Sear's business, but only one of

the six destination categories of it's department stores and as a result the effect on Sear's department store business is not substantial.

[36] *Competition Act, supra* note 1, s 103.1(7.1) reads: "The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section.". See for example, *CarGurus, Inc v Trader Corporation*, 2016 Comp Trib 15 at para 60.

[37] *Symbol Technologies Canada ULC v Barcode Systems Inc,* 2004 FCA 339 at para 16, citing *National Capital News Canada v Canada (Speaker of the House of Commons),* 2002 Comp Trib 41 [*Symbol Technologies*].

[38] *Competition Act, supra* note 1, ss 103.1(7) and 103.1(7.1).

[39] *Tribunal Act, supra* note 27, s 8.1.

[40] *Competition Act,* supra note 1, for remedies for refusal to supply see s 75(1) para 2; for remedies for price maintenance see s 76(2); for remedies for exclusive dealing, market restriction or tied selling see ss 77(2) para 2, (3) and (3.1); for remedies for abuse of dominance see ss 79(2) and (3.1).

[41] For example, where the elements of refusal to supply under s 75(1) of the *Act* are met, then under s 75(1) para 2, the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms; In addition, where the elements of price maintenance under s 76(1) of the *Act*, then under s 76(2) the Tribunal may choose one of the following remedies: prohibit a supplier from continuing to engage in price resale maintenance; or order the supplier to accept a customer on usual trade terms. These remedies are positive in nature, differentiating from interim injunctions that typically order a defendant to *stop* or *cease* behaviour.

[42] *Symbol Technologies, supra* note 37 at para 17; *Safa Enterprises Inc v Imperial Tobacco Company Limited,* 2013 Comp Trib 19 at para 15; *Stargrove Entertainment Inc v Universal Music Publishing Group Canada,* 2015 Comp Trib 26, at paras 20-21.

[43] Laura Rowe, Tessa Martel & Zach Rudge, "Institutional Design and the Administration of Canadian Competition Law: Modernizing the Competition Tribunal" (2023) 36:2 Can Competition L Rev 53 at 56.

[44] *Ibid*.

[45] House of Commons, Standing Committee on Industry, Science and Technology, *Report: A Plan to Modernize Canada's Competition Regime*, 37th Parl, 1st Sess, (April 2002) at 33.

[46] As will discussed in the next sub-part, Bill C-59 expands the jurisdiction of the Tribunal, which includes the ability of the Tribunal to hear and adjudicate applications with leave for conduct contrary to s 90.1.

[47] *Bill C-59*, *supra* note 1, ss 244(2), 245(2), 246, 247(2), and 248(7).

[48] *Atlantic Lottery Corp. Inc. v Babstock,* 2020 SCC 19 at para 25 [*Atlantic Lottery*].

[49] *Competition Act, supra* note 1, s 74.1(1)(d) allows the Tribunal to award restitution for conduct contrary to the general prohibition against false and misleading practices set out in s 74.01(1)(a). For an example of restitution being

provided to consumers, see *Commissioner of Competition v Bell Mobility Inc* (27 May 2016), CT-2017-007 (Registered Consent Agreement), in which a Consent Agreement provided restitution to consumers who suffered financial loss as a result of allegedly deceptive marketing practices by Bell, Rogers, Telus and the Canadian Wireless Telecommunications Alliance regarding text messages services. As set out in the Consent Agreement, the companies agreed to make a total of $24 million available in rebates to consumers whereby current customers received an automatic credit in their account up to a maximum amount of $30 to $60 and former customers would be contacted and informed of their entitlement to the same rebate.

[50] *Competition Act*, *supra* note 1, see note 40 for remedies for ss 75, 76, 77 and 79. None of these provisions make damages available and some of them explicitly note that damages are *not* available, see s 77(3.1) for example.

[51] *Atlantic Lottery, supra* note 48 at para 24.

[52] *Nova Chemicals Corp. v Dow Chemical Co.*, 2022 SCC 43 at para 47.

[53] *Ibid*, at para 45.

[54] See *Pro-Sys*, *supra* note 20 at para 115 where the Supreme Court of Canada held that in indirect purchaser actions a methodology is required to "establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain."

[55] The anti-competitive marketing practices found in s 74.01 include the following: False or misleading representations (s 74.01(1)(a)); Warranties and guarantees (ss 74.01(1(b) and (c)) Drip pricing (s 74.01(1.1)); Ordinary selling price (ss 74.01(2) and (3)); Representations in electronic messages and web addresses (s 74.011); Use of tests and testimonials (s 74.02); Bait and switch (s 74.04); Sale above advertised price (s 74.05(1); Promotional contests (s 74.06); For descriptions of most of these practices and comparison of which ones also appear in Part VI of the Act, see Competition Bureau of Canada, "Misleading representations and deceptive marketing practices: Examples of conduct covered by the Competition Act" (January 2024), online (pdf): <https://ised-isde.canada.ca/site/competition-bureau-canada/en/deceptive-marketing-practices/types-deceptive-marketing-practices/misleading-representations-and-deceptive-marketing-practices#MisleadingRepresentations>

[56] Agreements or arrangements covered by s 90.1 include agreements between competitors that are not conspiracies within the meaning of s 45 or mergers within the meaning of s 92, such as agreements between federal financial institutions and "bid-rigging."

[57] *Competition Act, supra* note 1, s 74.1(1)(d).

[58] Paul-Erik Veel, "An Empirical Analysis of Cases at the Competition Tribunal" (9 September 2020), online (blog): <https://litigate.com/assets/uploads/20200909-105852-4324-An-Empirical-Analysis-of-Cases-at-the-Competition-Tribunal.pdf>.

[59] *The Commissioner of Competition v Bell Mobility Inc* (27 May 2016), CT-2016-007 (Registered Consent Agreement), at paras 3 and 4. The Commissioner

concluded that Bell Mobility Inc engaged in deceptive marketing practices contrary to s 74.01(1)(a) by charging its customers for third-party text messaging services they did not intend to purchase or for which they did not agree to pay.

[60] *Competition Act, supra* note 1, s 74.1(1)(d).

[61] Competition Bureau, "The Future of Competition Policy in Canada" (15 March 2023), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada>.

[62] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 27.

[63] Competition Bureau of Canada, *Competitor Collaboration Guidelines* (Ottawa: Innovation, Science and Economic Development Canada, 2021) at 10 [*Collaboration Guidelines*].

[64] *Ibid,* at 40 (joint selling agreements) and at 42 (information sharing agreements).

[65] *Mohr v National Hockey League,* 2022 FCA 145 at paras 39-42.

[66] In high-tech everyday devices, manufacturers embed what's called a technological protection measure (TPMs) that prevent consumers from getting their products repaired at the location of their choose. Rather, the consumer must go to the manufacture or the manufacture-authorized repair shop at where the designated repair person has the manufacturers digital key to proceed with the necessary repair or maintenance. In 2021, the Competition Bureau expressed their support against TPMs and how this practice negatively impacts competition in the Canadian markets: see Competition Bureau of Canada, "Competition Bureau Submission to the Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things—Unlocking Competition" (September 2021), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/competition-bureau-submission-consultation-modern-copyright-framework-artificial-intelligence-and>.

[67] *Bill C-59*, *supra* note 1, s 244.

[68] See for example the decision rendered recently by the Dutch Court of Amsterdam in *Fossielvrij NL v KLM*. In *Fossielvrij,* airline KLM's marketing breached the European Unfair Consumer Practices Directive (UCPD) by greenwashing their commitments to the Paris Climate Agreement and their commitment to "offset" the carbon footprint of their aviation activities. In essence, KLM was publicly advertising their commitment to the climate goals set out in the Paris Agreement without, according to the Dutch Court, ensuring that their claims were feasible or concrete. When filed, this was the first case in the world to challenge an airline industry for greenwashing over carbon offset products. See Dutch Court of Amsterdam, Amsterdam, 20 March 2024, *Fossielvrij NL v KLM,* File No. C/13/719848 / HA ZA 22-524.

[69] *Bill C-59*, *supra* note 1, ss 244(2), 245(2), 246, 247(2), and 248(7).

[70] The idea of adding a class procedural mechanism for causes of action set out

in the *Act* was raised back in 1975, before any provinces adopted class action legislation, during the enactment of the s 36's predecessor provision: see Neil J. Williams, *A Proposal for Class Actions Under Competition Policy Legislation, prepared for the Department of Consumer and Corporate Affairs* (Ottawa: Information Canada, 1976).

[71] *Bill C-59*, *supra* note 1, s 254(4) proposes to add s 103.1(6.1) to describe the legal test for granting leave for applications made under s 74.1: "(6.1) The Tribunal may grant leave to make an application under 74.1 if it is satisfied that it is in the public interest to do so."

[72] *Competition Act, supra* note 1, s 103.1(7).

[73] *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 at para 36 "Public interest standing provides an avenue to litigate the legality of government action in spite of social, economic or psychological barriers to access which may preclude individuals from pursuing their legal rights."

[74] *Ibid*, see para 55(2), and more generally paras 28-72.

[75] Canadian Chamber of Commerce, "Written Submission for the Study of Bill C-59, the Fall Economic Statement Implementation Act" (February 2024) at 6, online (pdf): <https://sencanada.ca/Content/Sen/Committee/441/NFFN/briefs/CanadianChamberofCommerce_e.pdf>. [*Canadian Chamber of Commerce*]

[76] *Ibid*.

[77] Paul Erik Veel, "Private Party Access to the Competition Tribunal: A Critical Evaluation of the Section 103.1 Experiment," (2009) 18 Dal J Leg Stud 1 at 4-5 after reviewing the statistics on the number of private applications for leave filed with the Tribunal between 2002 and December 2008 commented that "These figures, if taken alone, suggest mixed results from the Canadian experiment with private access. The anticipated flood of frivolous claims has not materialized, and with the possible exception of the two cases in which settlements were reached, private applications have not generally been successful, with the majority (68%) failing at the initial stage of seeking leave to bring an application. This lack of success by private applicants at the initial stage could indicate either that the claims were genuinely unmeritorious or that the rules governing private access prevented genuinely meritorious claims from being heard."

[78] *Canadian Chamber of Commerce*, *supra* note 75 at 7.

[79] *Nissan Canada Inc. v Mueller,* 2022 BCCA 338 at paras 134-137.

[80] *Banman v Ontario,* 2023 ONSC 6187 at paras 317-318, and *Underhill v Medtronic Canada,* 2023 ONSC 5919 at para 16.

[81] *L'Oratoire SaintJoseph du MontRoyal v J.J.*, 2019 SCC 35 at para 43 where the Supreme Court of Canada held that the test applied for commonality in "Quebec law appears to be less stringent than one the one that is applied in the common law provinces."; *Vivendi Canada Inc. v Dell'Aniello*, 2014 SCC 1 at para 57.

[82] *Dutton*, *supra* note 3 at paras 33-34.

[83] *UBCIC obo Indigenous persons v BC Ministry of Health and others,* 2020 BCHRT 144 at paras 5-8, 16; *Kirchmeier and others v University of British*

Columbia (No. 2), 2017 BCHRT 186 at paras 21-25; *Vorley v BC (Ministry of Solicitor General),* 2005 BCHRT 219 at paras 15-16, 24-33.

[84] *Tribunal Act, supra* note 27, s 8.1(1) reads: "The Tribunal may award costs of proceedings before it in respect of reviewable matters under Parts VII.1 and VIII of the *Competition Act* on a final or interim basis, in accordance with the provisions governing costs in the *Federal Court Rules, 1998*."

[85] *Atlantic Lottery, supra* note 48 at para 27.

[86] *Atlantic Lottery, supra* note 48 at para 32.

[87] Competition Tribunal, "Frequently Asked Questions", (20 March 2020), online: <https://www.ct-tc.gc.ca/en/procedure/faq.html#q10>.

[88] The Competition Bureau acknowledges the possibility, and even inevitability of overlap, for claims grounded in conspiracy-like conduct when they indicate in the *Collaboration Guidelines, supra* note 63 at 9: "in some cases, investigation under multiple provisions of the Act may be required until adequate facts are uncovered to determine which provision of the Act is most appropriate."

[89] *Competition Act, supra* note 1, s 1.1.

[90] Jennifer Whybrow*, The Case for Class Actions In Canadian Competition Policy: An Economist's Viewpoint*, *prepared for the Department of Consumer and Corporate Affairs* (Ottawa: Information Canada), at 208-214.

[91] Matthew Good, *Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions,* (2009) 47:1 Alta L Rev 185 at 211, citing *Dutton, supra* note 6 par. 29 and *Hollick v Toronto (City), 2001 SCC 68* at paras 15, 34-35.

[92] Good, *supra* note 91 at 219.

2024 ADAM F. FANAKI COMPETITION LAW MOOT— WINNING FACTA / CONCOURS DE PLAIDOIRIE ADAM F. FANAKI 2024

A. The Problem:

This year's Adam F. Fanaki Competition Law Moot problem required participants to grapple with the competitive effects of a proposed merger between two online dating companies, each with mobile dating applications. Find Your Robin Inc. ("FYR") proposed to both sign the draft agreement and acquire Penguin Ltd. upon the satisfaction of various conditions to closing, including clearance under the *Competition Act* (the "Act").

In the hypothetical problem posed to the moot participants, FYR's "Bat Signal" application is Canada's most popular dating app, with 2.5 million active users. Penguin's application, "The Hero You Deserve" ("HYD"), is available only in Toronto and is aimed at the elite in economic terms. Since its launch, HYD quickly built a loyal following among those deemed "worthy" of entry by its proprietary user admission and matchmaking algorithm, Emperor. The Commissioner of Competition brought an application under s.92 of the Act seeking an order that the parties not proceed with the proposed merger as she contended that it was likely to result in a substantial lessening or prevention of competition ("SLPC") in four cities across Canada, namely, Toronto, Montreal, Calgary and Vancouver (she maintained that expansion into those cities was likely despite the protestations of Penguin's CEO to the contrary).

Two days after the scheduling of the hearing before the Competition Tribunal, and with only weeks to go before the start of the hearing, the merging parties announced that Penguin had entered into a memorandum of understanding with Riddler Inc., a Waterloo based company, pursuant to which Penguin would license the Emperor source code to Riddler for five years, contingent upon, but prior to, the merger's closing (the "Divestiture"). The Commissioner continued to prosecute her case against the originally-proposed merger (not taking the proposed Divestiture into account), but invited the parties to present the proposed deal with Riddler to the Tribunal as a remedy.

The merging parties argued – as had the merging parties in the real-world Rogers/Shaw case – that the Tribunal should only consider the as-modified merger, while the Commissioner maintained that the Tribunal could only consider the Divestiture as a remedy once it had found that the originally-proposed merger would cause a SLPC. A key difference between the two approaches is who bears the burden of proof: must the Commissioner prove that the as-modified merger will cause a SLPC?, or must the merging parties prove that their proposed remedy would eliminate the substantiality of any such lessening or prevention? Unlike the Tribunal in Rogers/Shaw, in the moot problem the Competition Tribunal agreed with the Commissioner that the merger should be considered absent the Divestiture, in the first instance, despite its finding later in the decision that the Divestiture would likely close. In reaching this conclusion, the Tribunal decided that the interests of procedural fairness favoured the Commissioner when presented with the fact that the Divestiture had been proposed by the merging parties only weeks before the start of the hearing, despite having had the opportunity to do so at any point over the course of the Bureau's four month review. The Tribunal also held that the merger would likely result in a SLPC in Toronto (but not in the other cities to which the Commissioner believed Penguin would otherwise have expanded 'but for' the merger), but held that there was no evidence that the Divestiture would be an insufficient remedy (implying that the burden had been on the Commissioner to disprove the remedy's effectiveness, despite holding that the Divestiture should indeed be considered to be a remedy to an otherwise anti-competitive merger).

The Commissioner appealed the Tribunal's decision, and the moot participants acted for either the appellants (the Commissioner) or the respondents (the merging parties) before the (hypothetical) Federal Court of Appeal.

B. Appellant's Arguments:

In their winning factum for the Appellants, Jon Herlin and Olivia Schenk from the University of Toronto Faculty of Law argued that the Tribunal made no palpable and overriding error by assessing the competitive effects of the merger as originally proposed, that is, not including the Divestiture. Although the Appellants agreed that the Tribunal was correct to find a likely SLPC in Toronto, they argued the Tribunal had made a palpable and overriding error by failing to find a likely SLPC in Montréal, Calgary and Vancouver. The Appellants maintained that the Commissioner discharged her burden of proving, on a balance of probabilities, that the merger would likely result in an SLPC in all identified geographic markets by virtue of its adverse effects on non-price competition, and the evidence

of FYH's likely expansion into those cities, absent the merger. Lastly, the Appellants asserted that the merging parties have the burden of proving the adequacy of the divestiture, because the remedy at issue was the Divestiture as proposed by the merging parties, which had not been reflected the draft asset purchase agreement and was contained only in a memorandum of understanding that was still subject to good faith negotiation between the parties. The appellants supported this position by arguing that placing the burden on the Commissioner to prove the ineffectiveness of the Divestiture – a "complex" and "late-stage" solution, would be unfair. In making this assertion, the appellants argued that the settled burden shift principle should apply, which states that the party who asserts a remedy should bear the burden of proof.

C. Respondent's Arguments—Two Winning Facta:

In their factum, Clémence Nizet and Carolina Muñoz from the McGill University Faculty of Law, one of two winning Respondent teams, argued that the Tribunal made an error of mixed fact and law by deciding not to consider the Divestiture as part of the proposed transaction for the purposes of the analysis under s.92 of the Act. Notably, the McGill respondents advanced this argument by focusing on the certainty provided by the memorandum of understanding and the draft asset purchase agreement between the transacting parties in the context of a "sign and close" transaction. Although the respondents agreed with the Tribunal's holding that there would be no SLPC in Vancouver, Calgary and Montreal, they argued that the Tribunal had erred in concluding that the merger would likely result in an SLPC in Toronto. To support their position, the respondents argued that the Commissioner erroneously implied that the increased market share of the merging parties would result in increased market power. The respondents supported this position by citing the Act, which at the time, explicitly precluded the Tribunal from finding that a proposed merger would likely result in a SLPC solely on the basis of increased market share. Lastly, the respondents submitted that the Tribunal was correct in deciding that the Commissioner had failed to discharge her burden of proof to justify the prohibition order sought under s.92 of the Act. The respondents requested the Court of Appeal to uphold the Tribunal's decision not to issue a prohibition order under s. 92 of the Act and to permit FYR to move forward with the merger. In the alternative, the respondents sought an order remitting the question of an appropriate remedy back to the Tribunal.

Aidan Dewhirst and Fionn Ferris from the University of Ottawa Faculty of Law, who tied with the McGill University team for the winning

Respondents' factum, similarly argued that the Tribunal erred in law when it found that the Divestiture should not be considered alongside the proposed merger when deciding if the merger results in a likely SLPC in the relevant geographic markets. The UOttawa team maintained that the Tribunal did not commit a reviewable error in finding that the Commissioner bears the burden of proof regarding the Divestiture as a remedy to the SLPC found to flow from the merger, and in identifying Toronto as the only relevant geographic market. Lastly, the respondents argued that the Tribunal committed a reviewable error of law in finding that the proposed merger created a SLPC in Toronto by highlighting evidence that the market power of the merged entity would be constrained by the breadth of choice in the mobile dating application market in Toronto. The respondents ultimately sought an order dismissing the appeal with costs.

A. Le problème :

Cette année, les participants et participantes au Concours de plaidoirie Adam F. Fanaki en droit de la concurrence devaient traiter des effets concurrentiels du fusionnement proposé entre deux entreprises de rencontres en ligne ayant chacune leur propre application. Find Your Robin Inc. (« FYR ») proposait de signer le projet d'entente et d'acquérir Penguin Ltd. si elle remplissait diverses conditions d'ici la clôture, notamment obtenir l'autorisation prévue dans la *Loi sur la concurrence* (la « Loi »).

Dans ce scénario fictif, Bat Signal, de FYR, est l'application de rencontre la plus populaire au pays, avec ses 2,5 millions d'utilisateurs actifs. L'application de Penguin (The Hero You Deserve ou « HYD »), elle, n'est disponible qu'à Toronto et destinée qu'aux gens fortunés. Depuis son lancement, HYD a rapidement acquis une clientèle fidèle de personnes jugées « dignes » de faire partie des utilisateurs par l'algorithme commercial d'admission et de jumelage de l'application, Emperor. La commissaire de la concurrence a présenté une demande au titre de l'article 92 de la Loi pour obtenir une ordonnance afin que les parties ne procèdent pas au fusionnement proposé qui, selon elle, aurait vraisemblablement pour effet un empêchement ou une diminution sensible de la concurrence (« EDSC ») à quatre endroits au Canada, soit Toronto, Montréal, Calgary et Vancouver (elle soutenait que l'expansion dans ces villes était vraisemblable, même si le chef de la direction de Penguin affirmait le contraire).

Deux jours après la mise au rôle du dossier pour audience devant le Tribunal de la concurrence, et à seulement quelques semaines du début de ladite audience, les parties au fusionnement ont annoncé que Penguin avait conclu un protocole d'entente avec Riddler Inc., une entreprise de Waterloo, suivant lequel Penguin concéderait à Riddler une licence quinquennale pour le code source d'Emperor, licence subordonnée, mais antérieure, à la clôture du fusionnement (le « dessaisissement »). La commissaire a poursuivi son action contre le fusionnement proposé (sans tenir compte du dessaisissement), mais a invité les parties à présenter au Tribunal la transaction avec Riddler en tant que recours.

Les parties au fusionnement ont fait valoir—à l'instar des parties au fusionnement réel entre Rogers et Shaw—que le Tribunal ne devrait tenir compte que du fusionnement modifié, alors que la commissaire, elle, continuait à dire qu'il devait envisager le dessaisissement comme recours seulement, après avoir établi que le fusionnement proposé à l'origine donnerait lieu à un EDSC. Ce qui distingue essentiellement ces deux approches,

c'est la partie portant le fardeau de la preuve : est-ce la commissaire qui doit faire la preuve que le fusionnement modifié entraînera un EDSC, ou est-ce les parties au fusionnement qui doivent démontrer que le recours proposé éliminera le caractère « sensible » de l'empêchement ou de la diminution de la concurrence? Contrairement à ce qui s'est passé dans l'affaire Rogers-Shaw, le Tribunal de la concurrence s'est rangé, dans ce concours de plaidoirie, du côté de la commissaire, statuant que le fusionnement devait être examiné sans le dessaisissement en premier lieu, malgré son verdict ultérieur selon lequel le dessaisissement aurait sans doute lieu. Pour tirer cette conclusion, le Tribunal a statué que l'équité procédurale favorisait la commissaire puisque le dessaisissement avait été proposé par les parties au fusionnement seulement quelques semaines avant le début de l'audience, malgré la possibilité de le faire n'importe quand durant les quatre mois de l'examen du Bureau. Le Tribunal a aussi soutenu que le fusionnement donnerait sans doute lieu à un EDSC à Toronto (mais pas dans les autres villes, où Penguin aurait, selon la commissaire, connu une expansion s'il n'y avait pas eu fusionnement), mais jugé que rien ne prouvait que le dessaisissement serait un recours insuffisant (suggérant ainsi qu'il incombait à la commissaire de réfuter l'efficacité du recours, même s'il avait été établi que le dessaisissement devait être considéré comme un recours dans ce fusionnement autrement anti-concurrentiel).

La commissaire a interjeté appel de la décision du Tribunal. Les participants et participantes devaient agir soit comme partie appelante (la commissaire), soit comme partie intimée (les parties au fusionnement) devant la Cour d'appel fédérale (fictive).

B. Plaidoirie de la partie appelante :

Dans leur mémoire gagnant pour la partie appelante, Jon Herlin et Olivia Schenk, de la Faculté de droit de l'Université de Toronto, ont fait valoir que le Tribunal n'avait commis aucune erreur manifeste et dominante en évaluant les effets concurrentiels du fusionnement proposé, c'est-à-dire en excluant le dessaisissement. En revanche, même si la partie appelante convenait que le Tribunal avait bien fait de conclure que le fusionnement entraînerait sans doute un EDSC à Toronto, elle a fait valoir qu'il avait commis une erreur manifeste et dominante en ne tirant pas la même conclusion pour Montréal, Calgary et Vancouver. Elle a soutenu que la commissaire s'était acquittée de son fardeau de prouver, selon la prépondérance des probabilités, que le fusionnement donnerait vraisemblablement lieu à un EDSC dans tous les marchés indiqués en raison de son effet négatif sur la concurrence hors prix, et que FYR aurait sûrement connu une expansion

à ces endroits, n'eût été le fusionnement. Enfin, la partie appelante a affirmé qu'il revenait aux parties au fusionnement de démontrer l'efficacité du recours proposé, soit le dessaisissement, puisqu'il était exclu du projet d'entente pour l'achat d'actifs, ne figurant que dans le protocole d'entente toujours en cours de négociation de bonne foi entre les parties. La partie appelante a appuyé cette position en arguant qu'il serait injuste d'imposer à la commissaire le fardeau de prouver l'inefficacité du dessaisissement, une solution complexe et tardive. À l'appui de cette affirmation, elle soutenait que le principe du fardeau inversé devait s'appliquer, c'est-à-dire que c'était à la partie exerçant le recours que revenait le fardeau de la preuve.

C. Plaidoirie de la partie intimée—Deux mémoires gagnants :

Dans leur mémoire, Clémence Nizet et Carolina Muñoz, de la Faculté de droit de l'Université McGill, l'une des deux équipes gagnantes pour la partie intimée, ont soutenu que le Tribunal avait commis une erreur mixte de fait et de droit en décidant de ne pas inclure le dessaisissement dans l'analyse du fusionnement proposé effectuée par le Tribunal suivant l'article 92 de la Loi. Fait intéressant, les équipières ont avancé cet argument en misant sur la certitude que procuraient le protocole d'entente et le projet d'entente pour l'achat d'actifs conclus entre les parties au fusionnement dans le contexte d'une « signature et clôture ». Par ailleurs, même si la partie intimée était d'accord avec le Tribunal que le fusionnement n'entraînerait pas un EDSC à Vancouver, Calgary et Montréal, elle a soutenu qu'il avait commis une erreur en concluant que ce serait vraisemblablement le cas à Toronto. Pour justifier cette position, la partie intimée a indiqué que la commissaire avait erré en suggérant que la part de marché accrue des parties au fusionnement déboucherait sur une plus grande emprise sur le marché. Elle a cité la Loi qui, à ce moment, interdisait explicitement au Tribunal de conclure qu'un fusionnement proposé donnerait lieu à un EDSC en raison seulement de la part du marché. En dernier lieu, la partie intimée a soutenu que le Tribunal avait eu raison de dire que la commissaire ne s'était pas acquittée du fardeau de démontrer le bien-fondé de l'ordonnance d'interdiction demandée en application de l'article 92 de la Loi. La partie intimée a demandé à la Cour d'appel de confirmer la décision du Tribunal, soit ne pas rendre ladite ordonnance et permettre à FYR d'aller de l'avant avec le fusionnement. Dans l'alternative, elle a demandé à la Cour de rendre une ordonnance pour que la question du recours approprié soit réinstruite par le Tribunal.

Aidan Dewhirst et Fionn Ferris, de la Faculté de droit de l'Université d'Ottawa, qui ont remporté le concours à égalité avec l'équipe de l'Université

McGill, ont aussi soutenu que le Tribunal avait commis une erreur de droit en décidant que le dessaisissement devait être exclu de l'examen du fusionnement proposé visant à savoir si un EDSC était probable dans les marchés visés. L'équipe de l'Université d'Ottawa a maintenu que le Tribunal n'avait pas commis d'erreur susceptible de révision en statuant que c'était à la commissaire que revenait le fardeau de la preuve associé au dessaisissement comme recours pour contrer l'EDSC devant découler du fusionnement et en indiquant que le seul marché pertinent était Toronto. Finalement, la partie intimée a fait valoir que le Tribunal avait commis une erreur susceptible de révision en droit en statuant que le fusionnement proposé occasionnerait un EDSC à Toronto, en démontrant que l'emprise sur le marché de l'entité fusionnée serait limitée par la multitude d'applications de rencontres mobiles offertes à Toronto. La partie intimée a demandé une ordonnance de rejet de l'appel avec dépens.

2024 FANAKI COMPETITION LAW MOOT PROBLEM

COMMISSIONER OF COMPETITION V FIND YOUR ROBIN INC

I. Executive Summary

1. The Commissioner of Competition (the "**Commissioner**") has filed an application pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "**Act**"), seeking an order directing Find Your Robin Inc. ("**FYR**") not to proceed with its proposed acquisition of Penguin Ltd. ("**Penguin**"; together with FYR, the "**Merging Parties**") (the "**Merger**") in order to resolve the substantial lessening or prevention of competition ("**SLPC**") that the Commissioner asserts is otherwise likely to result from the Merger (the "**92 Application**").

2. The Merger represents the union of two online dating companies, each of which offers a successful mobile dating application (commonly referred to as "apps"). FYR's Bat Signal application is Canada's most popular dating app, with 2.5 million active users from coast to coast to coast. Penguin's application, The Hero You Deserve ("**HYD**"), is available only in Toronto and, since its launch, has quickly built a loyal following among those deemed "worthy" of entry by its proprietary user admission and matchmaking algorithm ("**Emperor**").

3. The Merger was notified to the Commissioner under Part IX of the Act on March 1, 2023. On June 30, 2023, upon the expiry of the waiting period under subsection 123(1) of the Act, the Commissioner commenced the 92 Application, submitting that the Merger is likely to result in a SLPC with respect to dating applications in four cities across Canada.

4. While the Merging Parties have consistently maintained, including through the course of the 92 Application, that the Merger will not result in a SLPC in any relevant market, on July 12, 2023, the Merging Parties announced that Penguin had entered into a memorandum of understanding (the "**MOU**") with Riddler Inc. ("**Riddler**"), an upstart Waterloo-based dating app, pursuant to which Penguin would divest Emperor's source code to Riddler contingent upon, but prior to, the Merger's closing (the "**Divestiture**").

5. In responding to the 92 Application, the Merging Parties have contended that the Tribunal must consider the Merger as modified by

the Divestiture; in their view, the Commissioner's 92 Application, which asks the Tribunal to find a SLPC with respect to the Merger itself, and without consideration of the Divestiture, is moot. However, the Merging Parties submit that even if it were appropriate for the Tribunal to consider the Merger, exclusive of the Divestiture, the Commissioner bears the burden of demonstrating that the Divestiture is insufficient for resolving the SLPC, which burden the Commissioner has failed to discharge.

6. The Commissioner rejects that the 92 Application is moot and urges the Tribunal to consider the Merger as originally proposed by the Merging Parties, without the Divestiture. The Commissioner further contends that, if the Tribunal finds a SLPC with respect to the Merger, the burden will then fall on the Merging Parties to demonstrate the effectiveness of the Divestiture as a remedy.

7. For the reasons set out below, the Tribunal agrees with the Commissioner that the analysis under section 92 is appropriately undertaken with respect to the Merger (without consideration of the Divestiture). The Tribunal finds that the Commissioner has demonstrated that the Merger is likely to result in a SLPC for dating apps in Toronto; but we do not consider there to be any basis for such a finding in other Canadian cities. In considering the appropriate remedy for the proven SLPC, the Tribunal agrees with the Merging Parties that the Commissioner bears the burden of demonstrating that the Divestiture is insufficient, which burden the Commissioner has not met. As such, the Commissioner's application is dismissed.

II. The Parties

8. 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.

9. Headquartered in Winnipeg and publicly-traded on the Toronto Stock Exchange, FYR is the largest online dating company in Canada. Its core product, Bat Signal, is a mobile dating app available nationally through the two leading mobile app stores (Citrus' Grove and Ogle's Frolic). Bat Signal's development and marketing strategy are driven by FYR's foundational belief that "the world is a safer place when everyone has found their perfect partner." In support of FYR's mission to "democratize love", Bat Signal is available free of charge and without the option of in-app purchases, ensuring that the same

features are available to all users. In place of user fees, FYR generates revenues through in-app advertising.

10. Penguin is a privately held, Toronto-based firm that was established by its founder and current president, Daniel Datoe, in 2020. Like FYR, Penguin offers its mobile dating app, HYD, free of charge through Grove and Frolic. However, Mr. Datoe consciously built HYD with the direct aim of offering an experience unlike that of Bat Signal. Penguin describes HYD as "a place the 1% can come to find one another; free of the riffraff clogging up other dating services." In keeping with this objective, prospective users must pass through an application process and be approved by Penguin. Admissions are administered by Penguin's proprietary algorithm Emperor, which has been engineered to assess prospective users based on information submitted directly by applicants, sourced from third-party data providers and the behavior of existing HYD users. Along with its gatekeeper function, Emperor facilitates user matches on HYD by offering users "mate recommendations". Penguin describes Emperor as functioning as a "virtuous feedback loop", whereby "training" from its matchmaking role informs its admissions process and data gathered through the admissions process supports its matchmaking.

III. Procedural Background

11. On February 19, 2023, FYR and Penguin announced that they had entered into a binding share purchase agreement pursuant to which FYR would acquire all of the issued and outstanding shares of Penguin for $477.4 million, upon the satisfaction of various conditions to closing, including clearance under the Act.

12. As the Merger exceeds the thresholds under Part IX of the Act, on March 1, 2023, the Merging Parties filed with the Commissioner and the Competition Bureau (the "**Bureau**") notifications under section 114 of the Act together with a request for an advance ruling certificate or, in the alternative, a no-action letter. On March 31, 2023, the Bureau issued supplementary information requests ("**SIRs**") to the parties, requiring the production of a large volume of normal course business documents and data. The Merging Parties certified compliance with their respective SIRs on May 30, 2023.

13. On June 30, 2023, the Commissioner commenced the 92 Application and brought an application under section 104 of the Act for an order from the Tribunal directing FYR not to proceed with the

Merger until such time as the Tribunal's decision in respect of the 92 Application is finally disposed of.

14. On July 5, 2023, the Commissioner and the Merging Parties entered into a consent agreement, which was registered with the Tribunal the same day, pursuant to which (i) the Merging Parties agreed not to close the Merger until the Tribunal's final disposition of the 92 Application and (ii) all parties agreed to seek an expedited hearing of the 92 Application. On July 10, 2023, the Tribunal issued a scheduling order setting the hearing of the 92 Application to commence on September 18, 2023.

15. On July 12, 2023, the Merging Parties wrote to the Commissioner to advise her that they had entered into an MOU with Riddler providing for the Divestiture (the "**Divestiture Letter**").

16. On September 18, 2023, the five day hearing of the 92 Application opened in front of this Tribunal. While the Merging Parties asserted general pro-competitive benefits of the Merger, they did not put forward that the Merger will generate efficiencies for purposes of section 96 of the Act. Accordingly, the so-called "efficiencies defence" is not at issue in this application.

IV. The Divestiture

17. Riddler is a Waterloo-based start-up founded in 2015 and offering an eponymous app that is available across Canada and in the United Kingdom. Initially focused on trivia, Riddler took off during the COVID-19 lockdowns as users flocked to its virtual pub quiz nights. As usage declined over the course of the gradual reopening, Riddler augmented its app's functionality through the introduction of a dating feature (called "**Gord**") in February 2022. Building on Riddler's core strengths, Gord requires potential couples to correctly answer the same riddle in order to chat with one another. While Gord has attracted a committed user base within certain social circles, it has struggled to gain broad recognition or widespread popularity. As Riddler looks to raise additional venture capital, it has pitched Gord as a key vehicle for growth and has been making efforts to broaden its appeal and attract new, and more valuable, users (like Bat Signal and HYD, Gord does not charge user fees and generates revenues through ad sales).

18. The MOU entered into between Penguin and Riddler provides that Penguin and Riddler will negotiate in good faith and use best efforts to enter into an asset purchase agreement substantially in line with the terms set out in a draft agreement appended to the MOU (the "**Draft APA**").

19. Pursuant to the Draft APA, Riddler would acquire from Penguin the source code and all related intellectual property for Emperor; however, the Draft APA also provides that Riddler would grant to the Merging Parties a five year license for the exclusive use of Emperor outside of Ontario. In effect, pursuant to the Draft APA, for five years, Riddler would enjoy exclusive use of Emperor in Ontario, while the Merging Parties would be entitled to exclusive use of Emperor outside of Ontario. After five years, the Merging Parties would have no rights with respect to Emperor.

20. In the Divestiture Letter, the Merging Parties wrote to the Bureau:

> Penguin is prepared to enter into a binding agreement with Riddler promptly upon the final disposition of the 92 Application on terms that allow for completion of the Merger; whether that occurs, as we hope, on a consensual basis or through the Tribunal. The agreement will be on terms consistent with those in the Draft APA. As the Bureau will note, the Draft APA provides for an immediate sign and close and is not subject to any third-party clearances or approvals (for greater certainty, the proposed transaction between Penguin and Riddler will not require notification under Part IX of the Act).
>
> While we maintain that the Merger is not likely to result in a SLPC in any relevant market, we trust that you will agree that the sale of Emperor to Riddler demonstrates this conclusion beyond any reasonable doubt. In particular, by providing Riddler with exclusive access in Toronto (the only location in which FYR and Penguin could be considered to compete) to the "secret sauce" that powers HYD, the Emperor transaction will ensure that Riddler fully replaces any competition that currently exists between the Merging Parties.

21. On July 29, 2023, the Bureau wrote to the Merging Parties in reply to the Divestiture Letter. The Bureau: (i) advised the Merging Parties that, given the pendency of the 92 Application, the Bureau was not

in a position to evaluate the Divestiture, (ii) asked that the Merging Parties, nonetheless, continue to keep the Bureau appraised of any developments with respect to the Divestiture, and (iii) noted that the Merging Parties were at liberty to offer the Divestiture to the Tribunal as a remedy in the course of the 92 Application.

V. Market Overview

22. As noted above, FYR and Penguin each offer a mobile dating application (Bat Signal and HYD, respectively), which carry out the same core function: the Merging Parties' apps allow users to view and express interest in the profiles of other users; where two users mutually express interest in one another, they are connected through the app and are able to communicate through a built-in chat function.

23. FYR and Penguin both serve two distinct customer groups: each of the Merging Parties sells in-app advertising space to advertisers and makes their app available to users free of charge. In the Merging Parties' initial filings with the Bureau, they asserted that their advertising businesses compete with an "endless range of alternative digital advertising opportunities" and that "on an individual and combined basis they account for a *de minimis* share of the digital advertising market." While the Commissioner has not endorsed the Merging Parties' characterization of their advertising businesses, the 92 Application does not assert a SLPC with respect to digital advertising and only the Merging Parties' supply of their respective applications to users is considered relevant to this application.

24. The Commissioner asserts that Bat Signal and HYD both compete in the "dating application market". The Merging Parties, in their submissions, contend (i) that dating applications, including their own, compete with a wide range of alternative matchmaking methods (the Merging Parties described their competitors as including, in addition to other dating applications, "dating websites, general purpose social media applications, in person mixers, professional matchmakers and everyday "meet cute" opportunities"), and (ii) that their respective applications offer differentiated experiences from one another. Nonetheless, the Merging Parties have not challenged that "dating applications" constitute a relevant antitrust market and, for purposes of this application, this is the product market within which the Tribunal will consider the Merging Parties to compete.

25. The Commissioner further asserts that dating applications, generally, compete within a relatively local geographic market. Based on data from the Merging Parties and third-party data applications, the Commissioner observed that over 85% of dating application users set their preferences to source potential matches within 15km of their own location, which the Commissioner contends is consistent with the fact that such applications are typically used to facilitate eventual in-person meetings. As discussed below, the Commissioner submits that there is actual or potential competition between the Merging Parties in four cities across Canada and that each city represents a relevant geographic market. The Merging Parties have not challenged the Commissioner's general local approach to geographic market definition, but, for the reasons detailed below, do assert that there is only a single relevant geographic market for purposes of the Tribunal's analysis: Toronto.

26. Bat Signal is the leading dating application nationally and in each local geographic market identified by the Commissioner. Unchallenged data introduced by the Commissioner shows that 60% of Canadians that use a dating application are users of Bat Signal. In Canada, Grove and Frolic currently make available no fewer than nine and seven dating applications, respectively (including those of the Merging Parties and Riddler). However, outside of Bat Signal, no individual app is used by more than 10% of Canadian dating app users.

27. For Toronto dating app users, Bat Signal and HYD are the two most frequently used apps, with Bat Signal and HYD in use by 34% and 16% of local dating app users, respectively. Riddler is the fifth most popular dating app in Toronto with 3% of users. The third and fourth most popular dating apps in Toronto, Fumble and Knob, are in use by 9% and 6% of users, respectively.

VI. Contested Positions Of The Parties

28. In the course of their written submissions and oral arguments, the parties put in issue both procedural matters and substantive considerations. The parties' positions on both fronts are summarized below.

a) Parties' Positions on Procedural Matters

29. The parties have urged on the Tribunal opposing approaches to the Divestiture and disagree with one another on the implications the

Tribunal's decision on that issue have for the allocation of burden as between the parties.

30. The Merging Parties assert that it is "clearly settled law" that there is only a single "proposed merger" for the Tribunal to consider for purposes of section 92 of the Act; and that is the Merger as modified by the Divestiture. As such, the Merging Parties contend that the Commissioner bears the burden of proving on a balance of probabilities that the combination of FYR and Penguin, but with Emperor sold to Riddler (on the terms contemplated by the Divestiture) will result in a SLPC in one or more markets.

31. While the Merging Parties deny that the Merger, without the Divestiture, would result in a SLPC, they insist that this is, in any event, irrelevant. As FYR's counsel remarked in oral argument: "asking the Tribunal to decide whether the Merger is bad is like asking it to decide what I should have had for breakfast yesterday; it doesn't matter; stop living in the past." Simply stated, the Merging Parties' position is that the Commissioner's application with respect to whether the Merger (on its own) will result in a SLPC is moot.

32. The Merging Parties submit that as a matter of both law and policy it is "right" that "the courts have made clear that an order under section 92 must relate to a live transaction, not a historic relic." As a matter of law, the Merging Parties contend that their approach is consistent with the future oriented nature of merger review and the well-established recognition that the Tribunal's analysis can incorporate significant events that occur after execution of a merger agreement, and, indeed, even after the completion of a merger in question.

33. From a policy perspective, the Merging Parties highlight that consideration of the Merger and the Divestiture is consistent with US case law. While the Merging Parties acknowledge that US law is not binding on this Tribunal, they submit, first, that the considered approach of our southerly neighbours should be persuasive, particularly given their robust merger control experience and well developed merger jurisprudence; and, second, that the development of a cohesive and consistent approach to merger litigation is desirable, particularly given the frequency with which mergers extend across borders and are subject to review under both Canadian and US competition laws.

34. Moreover, the Merging Parties contend that the Commissioner's position is merely an attempt to engineer a transaction that is

most to her liking and that such an approach is inconsistent with the scheme of the Act. The Merging Parties emphasise that mergers are "presumptively legal" under the Act. It is only where a merger gives rise to a "substantial lessening or prevention of competition" that the Tribunal can intervene, and, even then, only to the degree necessary to remove the substantiality. The Merging Parties submit that (i) the Commissioner is "an enforcer not a regulator", (ii) is not charged with devising what she considers to be a "competitively optimal" outcome, and (iii) cannot complain where private parties enter into transactions that fail to deliver an enforcement opportunity by remaining below the SLPC threshold.

35. While the Merging Parties urge the Tribunal to make a finding as to the bounds of the "proposed merger" for purposes of the 92 Application, and emphasise the importance of there being "clear and reaffirmed law" on this point, they submit that the Tribunal's decision on this issue has no bearing on this particular matter. Beyond the Merging Parties' submission that the Merger will not result in a SLPC (as discussed below), the Merging Parties contend that even if the Tribunal looks first at the Merger and only then at the Divestiture, the Commissioner must bear the burden of demonstrating on a balance of probabilities both that (i) the Merger is likely to result in a SLPC and (ii) that the Divestiture is an insufficient remedy.

36. The Merging Parties acknowledge that it has been established that the party proposing a remedy bears the burden of supporting it. However, the Merging Parties emphasise that they are not proposing a remedy. As the Merging Parties explained, their position is "simply that the Merger will not result in a SLPC"; they have not put forward that, in the alternative, the Tribunal should order the Divestiture to remedy any SLPC. Rather, the Merging Parties have merely identified to the Commissioner and the Tribunal, as a factual matter, that they have entered into the Divestiture and that the Merger will not be completed without the Divestiture. Faced with this fact, the Commissioner bears the burden of justifying the prohibition order it seeks, including satisfying the Tribunal that the order would not be punitive.

37. The Commissioner strenuously rejects the Merging Parties' position that the 92 Application, as it relates to the Merger (without consideration of the Divestiture), is moot and that the Tribunal's decision on this point is immaterial.

38. The Commissioner acknowledges that this Tribunal recently found that an initially proposed merger had been modified by a subsequent transaction and that the merger as modified was to be considered for purposes of a section 92 application. However, the Commissioner submits that that decision reflects the unique facts of that case, which are distinguishable from the present application, and that this Tribunal's jurisprudence more broadly establishes that a two-step process must be followed:

    a. First, the Tribunal must determine whether the Merger (as initially proposed) is likely to result in a SLPC. The Commissioner acknowledges that she bears the burden of demonstrating this on a balance of probabilities.

    b. Second, if the Tribunal finds that Merger is likely to result in a SLPC, the Tribunal must determine the appropriate remedy. Contrary to the position of the Merging Parties, the Commissioner asserts that precedent unambiguously establishes that at this second stage the Merging Parties bear the burden of establishing that the Divestiture is an effective remedy.

39. In support of the requirement for the Tribunal to first consider the Merger as initially proposed, the Commissioner points to the wording of section 92, which states that the Tribunal's jurisdiction is only engaged "on application by the Commissioner". As such, the Commissioner asserts that it is her Notice of Application that established the transaction that is to be considered.

40. The Commissioner notes that it is beyond dispute that the Divestiture was not finalized prior to the commencement of the 92 Application and submits that, in fact, the Divestiture is yet to be finalized and remains a mere uncertain possibility. The Commissioner emphasizes that Penguin and Riddler have entered only into an MOU and not an actual transaction agreement.

41. The Commissioner does not challenge Mr. Datoe's assertion that Penguin and Riddler opted for an MOU and draft agreement in the interest of expediency, as this allowed the Merging Parties to provide the Commissioner and Tribunal a clear indication of their plans at the earliest possible opportunity. As Mr. Datoe further explained: "the sale to Riddler is baked as far as I'm concerned; my people tell me the lawyers are still racking up billable hours on monkey business behind the scenes, but I don't get involved in that nonsense." However, the

Commissioner stresses that the best of intentions cannot overcome inherent uncertainty and point to Mr. Datoe's admission on cross-examination that "I could probably get out of the MOU if I really wanted" without being in breach of Penguin's obligation to negotiate in good faith and use best efforts to enter into an asset purchase agreement with respect to the Divestiture (on the advice of counsel, Mr. Datoe refused to expand on this point, claiming solicitor-client privilege).

42. The Commissioner also strenuously disputes the Merging Parties' position that policy considerations favour the Merging Parties. Rather, the Commissioner emphasized to the Tribunal that critical considerations of efficiency and fairness militate in favour of the Commissioner's position. The Commissioner warned that the Merging Parties are seeking to turn merger litigation into "a game of three-card monte", where private parties have "free reign" to continuously amend their proposed transaction in order to "duck and weave" as the Commissioner seeks to enforce the Act. The Commissioner submits that this raises serious issues of efficiency and judicial economy and is an affront to basic principles of justice. The Commissioner urged the Tribunal to reject the Merging Parties' attempt to "out maneuver the Commissioner's public interest mandate" and to reaffirm the Tribunal's well established two-step process.

43. For the foregoing reasons, the Commissioner contends that her application is not moot and that the Tribunal must first reach a finding on whether the Merger is likely to result in a SLPC and only then consider whether the Divestiture is a suitable remedy. The Commissioner was resolute in asserting that, contrary to the Merging Parties' position, at the second stage, the burden of establishing the Divestiture as an effective remedy falls squarely on the Merging Parties. The Commissioner characterized the Merging Parties' burden as a core tenet of our judicial system, citing the well-known adage that "the party that asserts must prove."

44. The Commissioner submits that the Merging Parties' assertion that the Divestiture is not a proposed remedy is a "cute attempt to bamboozle the Tribunal" and that "if it looks like a remedy, swims like a remedy and quacks like a remedy, it's a remedy." While the Commissioner acknowledges that the Merging Parties have not used the word remedy or made the Divestiture conditional on its acceptance as a remedy (i.e., in the form of a consent agreement or Tribunal

order), she submits that it was plainly developed in response to the Commissioner's concerns and in an effort to resolve those concerns. The Commissioner asks that the Tribunal not establish "remedy" as a "magic word" and that it approach the Divestiture based on what it is in all practical effect: a remedy.

b) Parties' Positions on Substantive Analysis

45. Apart from their starkly different views on the procedural aspects of this application, the Commissioner and the Merging Parties disagree with respect to two fundamental components of the section 92 analysis itself, namely, (i) which geographic markets are affected by the Merger and (ii) whether the Merger is likely to result in a SLPC within such geographic markets.

i) Relevant Geographic Markets

46. The Commissioner asserts that the Merger will result in a SLPC with respect to online dating apps in four major cities across Canada: Toronto, Vancouver, Calgary and Montréal. While the Commissioner acknowledges that HYD is currently only available in Toronto, she submits that it is a poised entrant with respect to each of Vancouver, Calgary and Montréal, such that the Merger will have competitive implications in all four cities, with Bat Signal already being on offer in each one.

47. The Commissioner contends that Penguin faces no barriers to entry with respect to Vancouver, Calgary and Montréal (though she acknowledged in her closing argument that Penguin's entry into Montréal may be limited to the city's Anglophone population). Rather, the Commissioner described Penguin's expansion into these cities as requiring merely the "flipping of a switch."

48. Executives from the world's two leading smartphone operating system suppliers, Citrus and Ogle, testified at the hearing that for each of their respective app stores, app developers simply instruct Citrus and Ogle which jurisdictions they wish to have their apps available in; downloads will then be enabled for devices that connect to the app stores from such jurisdictions. Citrus and Ogle testified that changes to geographic availability will generally be implemented within 48 and 72 hours, respectively, of a request being made. While Citrus and Ogle also both testified that app developers are responsible for ensuring their apps comply with legal requirements in any jurisdictions

where they request their apps be made available, Mr. Datoe confirmed on cross-examination that Penguin did not consider there to be any licensing requirements or other legal impediments that would prevent HYD from being offered in Vancouver, Calgary or Montréal.

49. In support of the contention that Penguin, absent the Merger, is likely to effectively establish itself in each of Vancouver, Calgary and Montréal, the Commissioner emphasised FYR's rationale for the Merger and its post-merger integration plans. In particular:

a. The Merging Parties' joint press release announcing the Merger described it as "supporting FYR's goal of helping individuals across Canada find their perfect partner in crime fighting" (emphasis added).

b. FYR's investment recommendation presentation (which was delivered to FYR's board of directors in order to obtain internal approval for the Merger and was produced to the Bureau as part of FYR's Part IX notification filing): (i) indicates that HYD will be available in Toronto, Vancouver, Calgary and Montréal; (ii) forecasts annual advertising revenues of $20 million to $45 million attributable to users outside of Toronto; and (iii) identifies 57% of the Merger's overall value as being related to HYD's future availability in Vancouver, Calgary and Montréal.

c. Integration planning documents produced to the Bureau as part of FYR's SIR response set out a detailed timeline and workplan for HYD's launch outside of Toronto. An April 2023 presentation provides for the rollout to begin with the launch of HYD in Vancouver nine months after the Merger's closing and for HYD to be gradually introduced in Calgary and Montréal over the following six months. Planning documents prepared by FYR from March through May 2023 propose varying specifics for the rollout, with estimated budgets varying from $500,000 to $6.5 million. The planning documents estimated the net present value of the expansion over eight years to range from $18 million to $52 million.

50. The Commissioner also asserts that the Divestiture itself, which includes a carve-out allowing the Merging Parties continued use of Emperor outside of Ontario, is demonstrative of Penguin's planned expansion.

51. The Commissioner contends that the evidentiary record establishes, beyond a balance of probabilities, that HYD could be introduced in Vancouver, Calgary and Montréal in less than two years and that such entry would be extremely profitable. The Commissioner asserts that if the Tribunal accepts the evidence that Penguin would have both the ability and financial incentive to offer HYD in Vancouver, Calgary and Montréal, then it must also conclude that it is likely to do so.

52. The Merging Parties do not dispute that FYR intends to expand HYD's geographic coverage, but they submit that this is entirely beside the point. They assert that the Commissioner must establish that Penguin, absent the Merger, intended to do so and that a "mere objectively demonstrated" incentive and ability to expand are insufficient to discharge the Commissioner's burden.

53. FYR emphasizes that the Commissioner has not led any evidence of Penguin's subjective intent to expand and that, rather, the evidence demonstrates an intent not do so. On direct examination, Mr. Datoe explained that "expansion—at least within Canada—is antithetical to my mission. Let me be clear—HYD is not intended for everyone. This is a premier dating service intended for the *crème de la crème*. As far as I'm concerned, if you're not living in Toronto, you don't qualify. Maybe there are some A-listers hanging out in Madrid or something—could be—but if you're in Canada and can't be bothered to move to the Six, I don't want you on my app." However, on cross-examination, Mr. Datoe conceded that, in connection with various funding rounds Penguin has completed, third-party investors are entitled to appoint directors that account for the majority of Penguin's board and that the board has ultimate authority for the approval of Penguin's strategic plan (neither party led any evidence with respect to the directors).

54. The Merging Parties further contend that on the Commissioner's own theory, Penguin's geographic expansion should not be considered sufficiently timely to be "likely" within the meaning of section 92 of the Act. The Merging Parties note that the Commissioner, in her own argument, has only submitted that entry was likely to occur within two years; however, in that same argument, the Commissioner asserts that there are "no meaningful barriers to entry" and that entry could occur "nearly instantaneously and certainly in as little as three months." In this regard, the Merging Parties note that, while FYR's integration plans provide for HYD to make an appearance

outside Toronto only nine months after closing, the planning documents make clear that the timeline is driven largely by more general integration efforts to combine the two companies, which must be completed prior to expansion. The Merging Parties submit that the Commissioner's reference to entry being possible "certainly in as little as three months" is inconsistent with the fact that expansion specific action items do not show up on the integration planning timeline until month seven post-close.

55. The Merging Parties assert that, even if objective evidence of ability and incentive are sufficient, which for the reasons above it disputes, Penguin's entry can only be considered "likely" if it would occur within the time required to implement such entry—i.e., within the next three months. The Merging Parties deny that entry within three months was likely and contend that the Commissioner has not provided any evidence to support that it is likely.

56. As such, the Merging Parties submit that Toronto is the only relevant geographic market for purposes of the Tribunal's analysis.

ii) SLPC

57. Under section 92 of the Act, the Tribunal can find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially in an industry (which is understood, for purposes of the analysis, to equate to a market). Both parties made extensive submissions on the likelihood of the Merger to lessen or prevent competition, and whether any such market effect is substantial.

58. The Commissioner submits that the Merger will have substantial negative effects in the market for dating applications. The Commissioner submits that, in Toronto, the Merging Parties are two of the largest such applications, and, in Vancouver, Calgary and Montréal, Bat Signal is the largest such application and HYD is an important potential competitor; such that in each city, the Merger creates a number of anticompetitive effects.

59. While the Commissioner raised the possibility of price effects, she conceded that neither of the Merging Parties currently charge any user fees and she did not lead any specific evidence that this was likely to change post-Merger. Rather, the Commissioner's submissions focused on the Merger having substantial non-price effects.

60. The Commissioner asserts that the evidence demonstrates that the Merger will eliminate important rivalry between FYR and Penguin and substantially increase FYR's market power. In particular:

a. Data obtained from Citrus and Ogle shows that, in Toronto, approximately 50% of all users of dating apps are users of either or both of Bat Signal and HYD, while Bat Signal captures a material share of users in each of Vancouver (43%), Calgary (51%) and Montréal (34%).

b. FYR's internal documents demonstrate that Penguin incented innovation. For example, a September 2022 email from FYR's VP Product to the development team for FYR's AI tool ("**Alfred**"), which provides users recommended chat prompts and replies, emphasized that "it is critical that we bring this tool to market ASAP—we're losing users every day to new offerings, such as HYD—we need to give people a reason to choose us." Alfred was ultimately introduced in February 2023.

c. Penguin's pitch materials to prospective advertisers contrast HYD's user base to that of other applications. Bat Signal is the only other dating app included in the cross-comparison.

d. FYR's investment recommendation presentation describes FYR's plans to combine the user databases of Bat Signal and HYD and claims that the larger dataset will allow for "better matchmaking and an enhanced user experience" on both apps.

e. FYR's integration planning documents set out plans to build Bat Signal into HYD in order to provide "all HYD users with the ability to seamlessly switch between the walled garden of HYD and the town square of Bat Signal."

f. The Commissioner's expert witness, Dr. Ivy, testified that applications that facilitate social connections (a broad category she characterizes as including a range of apps including social media apps and dating apps), benefit from network effects and that her study of "social connection" apps found that user growth is exponential, with an app's growth rate increasing as its base grows.

61. The Commissioner submits that as a result of the lost rivalry and enhanced market power, the Merger is likely to result in substantially less innovation and lower product quality, and more specifically that:

    a. The likelihood of entry will be reduced, as the merged firm's size will serve as a barrier to entry for competitor apps that do not have a comparable user base and thus will struggle considerably to compete.

    b. There is likely to be a decrease in quality of the user interface and the introduction of fewer new features for both Bat Signal and HYD due to decreased investment in product development.

    c. There is likely to be an increase in in-app advertising, which consumer studies have shown detracts from the user experience.

62. The Merging Parties submit that the Commissioner has failed to demonstrate a SLPC. While the Merging Parties concede that Bat Signal and HYD compete to at least some degree in Toronto, they assert that the Commissioner's contention that the Merger will result in a substantial lessening or prevention of competition in Toronto, let alone in Vancouver, Calgary and Montréal, is entirely speculative and without foundation.

63. The Merging Parties summarize the Commissioner's approach as having been to identify indicia of market power and rivalry and to then hypothesize as to negative outcomes that may arise if a firm were to exercise market power. The Merging Parties criticize the Commissioner for having provided no quantum of harm and no empirical evidence, let alone specific qualitative evidence, such as plans by the Merging Parties to reduce investment, or specific third-party entry or expansion that is likely to be thwarted by the Merger.

64. The Merging Parties assert that, "plainly", the Commissioner's approach would be considered inadequate were the allegation to relate to price effects. The Merging Parties submit that it is well-accepted that a merger should give rise to at least a small but significant and non-transitory increase in price ("**SSNIP**"), for which the Commissioner would be expected to provide evidence of the quantum (or at least the range of quantum) and the expected duration. The Merging Parties submit that it cannot be that less rigour is required with respect to showing non-price effects as compared to price-effects.

65. While the Merging Parties recognize that the Tribunal's analysis is contextual, they insist that there should nonetheless be a cognizable standard against which the evidence can be assessed. The Merging Parties propose that in order for non-price effects to be "likely" and "substantial", there must be "a specific and direct link between a merger and the posited effect and that mere hypotheticals are insufficient." The Merging Parties submit that the Commissioner has failed to discharge this burden.

VII. Summary Of Issues

66. Based on the parties' written submissions and oral arguments, as summarized above, the Tribunal considers that the outcome of this application turns on four principal issues:

a. Is the Tribunal required to assess the Merger as modified by the Divestiture (i.e., is the Commissioner's as-filed application moot), or should the Tribunal first determine whether the Merger (without consideration of the Divestiture) results in a SLPC and, if so, only then consider the Divestiture in the course of determining the appropriate remedial order?

b. If the Commissioner's application is not moot, what burden does each party bear with respect to the Tribunal's determination of the appropriate remedy? In particular, do the Merging Parties bear the burden of demonstrating, on a balance of probabilities, that the Divestiture will remedy any SLPC found by the Tribunal?

c. Should the Tribunal's analysis be limited to the City of Toronto, where Bat Signal and HYD are both currently available, or is Penguin properly considered a competitor in other Canadian cities as well? In particular, in order for other cities to be relevant, must there be evidence of Penguin's likely entry within three months absent the Merger?

d. Has the Commissioner demonstrated that the Merger is likely to have substantial non-price effects? What is the relevant test for doing so?

VIII. Tribunal's Analysis

67. 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 Commissioner's application with respect to the Merger (without consideration of the Divestiture) is not moot. The Tribunal will first consider whether the Merger (as initially proposed) is likely to result in a SLPC and will then consider the appropriate remedy.

b. At the remedy stage, the Merging Parties bear no burden in this case. There is only a single potential order before the Tribunal and that is the prohibition order being sought by the Commissioner. The Commissioner bears the burden of demonstrating that the remedy she seeks is appropriate, including that it is not punitive on the facts of the case.

c. The only relevant geographic market for purposes of this application is the City of Toronto. In order for Penguin to be considered a potential competitor in any other geographic market, there must be evidence that such entry was likely to occur within the next three months. There is no such evidence.

d. The Merger is likely to result in a substantial lessening of competition with respect to dating applications in the City of Toronto. The Commissioner has demonstrated, on a balance of probabilities, that, post-Merger, FYR will have the ability to control non-price dimensions of competition and that this is likely to result in substantial non-price effects.

a) Is the Commissioner's Application Moot?

68. Like the Commissioner, the Tribunal is cognizant of the decision this Tribunal rendered in *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc* ("***Rogers/Shaw***"). The Tribunal also appreciates that there may be certain similarities between this application and that case. However, the Tribunal agrees with the Commissioner that the decision in *Rogers/Shaw* reflects the facts of that case and is not necessarily dispositive of whether the Commissioner's application in this case is moot. On the facts of this case, the Tribunal finds that the Divestiture should not

be considered along with the Merger. The Commissioner's original application is not moot.

69. Section 92 of the Act allows the Tribunal to make an order "where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially." The decisions of both this Tribunal and the Federal Court of Appeal in *Rogers/Shaw* do not stand for the proposition that the "proposed merger" for purposes of a section 92 application is clay in the hands of the merging parties, for them to shape and reshape at their whim. Rather, both decisions establish a contextual analysis, which we summarize as requiring consideration of (i) which articulation of the transaction best accords with reality and (ii) procedural fairness.

70. With respect to the first branch, in *Rogers/Shaw,* the Federal Court of Appeal held that the Act "aims to address truth and reality, not fiction and fantasy." We disagree with the Merging Parties' assertion that this holding necessarily requires consideration of the Merger as modified by the Divestiture. Rather, what is required is for the Tribunal to consider, on the facts of the case, which of the initially proposed transaction and the modified transaction more roundly accords with truth and reality, and which requires a "foray in fiction and fantasy". On the facts of this case, we consider that the Divestiture is more likely than not to occur. However, the evidence does not support that the Merger alone "will not and cannot happen" (as this Tribunal found to be the case for the initially proposed transaction in *Rogers/Shaw*). Simply stated, we find that the Divestiture is likely but not certain. In this context, we do not find consideration of the Merger to be an exercise in fictional futility.

71. We acknowledge that given our conclusion that the Divestiture is likely, consideration of the Merger (on its own) could be characterized as a departure from reality. However, while courts may not like to call attention to it, judicial proceedings in fact disregard reality with some regularity. The rules of evidence exclude information from consideration that many may regard as probative. Other procedural rules bar the introduction of otherwise admissible evidence if it is introduced in a manner that offends the orderly disposition of matters before the decision-maker.

72. Consistent with the judicial practices noted above, whether it is appropriate to adopt what we would describe as a "less likely reality" (the Merger being completed without the Divestiture) over a "more likely reality" (the Merger being completed with the Divestiture) will turn on consideration of other values, in particular, the procedural fairness branch of the test we articulated above.

73. In *Rogers/Shaw*, both this Tribunal and the Federal Court of Appeal acknowledged the relevance of procedural fairness to question at hand. In this case, the Tribunal finds that the interests of procedural fairness favour the Commissioner. To the extent there is any distortion to reality through consideration of the Merger, such distortion is attributable to the Merging Parties themselves. It is the Merging Parties that decided to introduce the Divestiture at a late stage, having had the opportunity to do so at any time over the course of the Bureau's four month review. Indeed, the Merging Parties could even have presented the Divestiture together with the Merger in the first instance. As the authors of their own circumstance, the Merging Parties are not now entitled to put the Commissioner on the back foot.

74. Accordingly, the Tribunal will in the first instance consider whether the Merger, unmodified by the Divestiture, results in a SLPC. If the Commissioner discharges her burden in this regard, the Tribunal will then assess the appropriate remedy.

b) Who Bears the Burden at the Remedy Stage?

75. Having found that the Commissioner's application is not moot, the Tribunal must consider, and determine, the allocation of the burden of proof at the remedy stage. As discussed below, in the present case, this issue is in fact of determinative importance. While the Tribunal is satisfied that the Divestiture would remedy the SLPC to at least a significant degree, we cannot determine, on a balance of probabilities, whether or not it will remedy it to the extent that it could no longer be considered "substantial." As such, on the one hand, if the Merging Parties bear the burden of demonstrating the sufficiency of their remedy, the Tribunal's inability to find in their favour will support granting the order the Commissioner seeks; on the other hand, if the Commissioner bears the burden of demonstrating that there is a SLPC notwithstanding the Divestiture (i.e., that a prohibition order is necessary to remedy the SLPC), the Tribunal's inability

to find that the Divestiture is insufficient will support dismissing the Commissioner's application.

76. The Commissioner contends that this question is cut and dry and has been resolved by the Supreme Court of Canada's decision in *Canada (Director of Investigation and Research) v Southam Inc* ([1997] 1 SCR 748 at 791-92 [*Southam SCC*]). While this Tribunal recognizes that the Court's decision in *Southam* is binding on us and does not intend to suggest that it should be reconsidered, the Tribunal finds that *Southam* does not apply to the question at hand.

77. *Southam* concerns the proper exercise by the Tribunal of its power to order a remedy where the parties each move an alternative remedy before the Tribunal. The Merging Parties assert, and the Tribunal agrees, that this is not the case here. Rather, only a single potential remedy is before the Tribunal: the prohibition order sought by the Commissioner. In seeking this remedy, the Commissioner bears the burden of supporting it on a balance of probabilities.

78. The Tribunal considers *Southam* to stand for three equally important propositions:

    a. "It is beyond doubt that a remedial order under s. 92 of the Act cannot be imposed for the purpose of achieving punitive objectives. The Act proscribes only unacceptable levels of anti-competitive behaviour and, consequently, punishment is not a consideration which the Tribunal can take into account when fashioning an appropriate remedy" (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1995] 127 DLR (4th) 329 at para 14 (FCA)).

    b. "Because the *Competition Act* addresses the problem of substantial lessening of competition, the appropriate remedy is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger" (*Southam SCC*).

    c. "The Tribunal did not wrongly require the appellants to demonstrate the effectiveness of their proposed remedy; the person who asserts should prove" (*Southam SCC*).

79. In the present case, the Tribunal finds that the first and second principles bear on the decision, while the third one does not. Specifically,

the remedy ordered by the Tribunal should ensure that the Merger does not result in a substantial lessening or prevention of competition and must not be punitive. As the Merging Parties have not proposed a remedy to the Tribunal, there is nothing that they have asserted and must now prove.

80. The Commissioner suggests that the Divestiture is a remedy by a different name and urges the Tribunal to consider substance over form. However, with respect, the Tribunal does not agree with the Commissioner that the Divestiture is, in substance, equivalent to a remedy proposal. Indeed, there is a key distinction between a remedy proposal and the Divestiture: the Divestiture is a binding commitment on Penguin, not a proposal that the Tribunal may or may not adopt as an order. Stated differently, the Divestiture will occur (or, at least, as explained above, is more likely to occur than not) irrespective of whether the Tribunal finds a SLPC.

81. As the implementation of the Divestiture is independent of this Tribunal and any decision it may make, the Merging Parties have nothing to prove with respect to it. Conversely, the Commissioner is seeking an order from this Tribunal and, before making such an order, the Tribunal is duty bound to ensure the order is within its jurisdiction. Consistent with the holdings in *Southam*, the Tribunal considers that an order will be punitive and improper if it goes further than necessary to remedy the SLPC. The Commissioner bears the burden of demonstrating, on a balance of probabilities, that the remedy it seeks is appropriate, including that, on the facts (which include the Divestiture), that it is necessary to eliminate the substantiality of any lessening or prevention of competition (and, accordingly, would not be punitive).

82. The Tribunal pauses to note that it does not consider there to be any inconsistency between the finding here and the finding above with respect to mootness. Above, the question was whether the Merger, absent the Divestiture, amounted to "fiction and fantasy"; and the answer was that it does not. Here, the question is whether the Divestiture is a remedy proposal; and, again the answer is that it is not. The Tribunal acknowledges here, as above, that there is a possibility that the Divestiture is not implemented; however, this possibility does not transmute a binding legal commitment between two private parties into an offer to a judicial body. We further note that it is open to the Commissioner to raise any uncertainty associated with the

Divestiture in support of a contention that the prohibition order is necessary to eliminate the SLPC. Moreover, consideration of procedural fairness also weighs differently on the question of burden as compared to the question of mootness. Above, the introduction of the Divestiture directly alters the key factual underpinnings of the Commissioner's application, which the Commissioner can fairly consider to have been previously settled. At the remedy stage, the appropriate remedy is necessarily informed by the Tribunal's findings with respect to the SLPC. The Divestiture can no more be considered an unfair change of course for the Commissioner than could a finding by the Tribunal that the SLPC is different from that initially alleged by the Commissioner.

c) What are the Relevant Geographic Markets?

83. The Tribunal considers the parties' submissions as to which geographic markets are relevant to the Tribunal's analysis to, in effect, raise the question of whether the Merger engages the "prevent" branch of section 92. For the reasons set out below, the Tribunal finds that it does not (the Tribunal considers whether the Merger is likely to result in a substantial lessening of competition in Toronto below).

84. As the Supreme Court of Canada has explained:

> The concern under the "prevention" branch of s. 92 is that a firm with market power will use a merger to prevent competition that could otherwise arise in a contestable market. The analysis under this branch requires looking to the "but for" market condition to assess the competitive landscape that would likely exist if there was no merger. It is necessary to identify the potential competitor, assess whether but for the merger that potential competitor is likely to enter the market and determine whether its effect on the market would likely be substantial (*Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 60 [Tervita]).

85. The Commissioner asserts that Penguin is a potential competitor with respect to dating apps in each of Vancouver, Calgary and Montréal. Having identified the potential competitor, the Tribunal must now assess whether, but for the Merger, Penguin in likely to enter the foregoing geographic markets. In carrying out this analysis, the Tribunal must not only determine that Penguin would be likely to enter these markets, but the "timeframe for entry must be discernible"

(*Tervita* at para 68). The Merging Parties contend, and the Tribunal agrees, that not only does the evidence not support that Penguin was likely to expand into new geographic markets, but, moreover, the Commissioner's own position does not support that entry would occur within a discernable timeframe.

86. The Supreme Court of Canada has explained, and this Tribunal agrees, that:

> In assessing whether a merger will likely prevent competition substantially, neither the Tribunal nor courts should claim to make future business decisions for companies. Factual findings about what a company may or may not do must be based on evidence of the decision the company itself would make; not the decision the Tribunal would make in the company's circumstances (*Tervita* at para 76).

87. In the present case, the evidence before the Tribunal supports that, absent the Merger, Penguin would not have launched HYD in any of Vancouver, Calgary or Montréal. The Commissioner's case is compelling in supporting that Penguin could expand into these geographies and even that it should do so. But this Tribunal's responsibility is to make findings with respect to the decisions Penguin, absent the Merger, was likely to make; it is not this Tribunal's responsibility to evaluate the soundness of those decisions. Were we sitting as dragons in a den, Mr. Datoe's evidence may indeed not have left us eager to part with our cash; however, in our role as members of this Tribunal, we found Mr. Datoe's evidence that he would not have introduced HYD into other Canadian cities to be clear, convincing and uncontested.

88. While our finding above is dispositive of this issue, we note that even if the Commissioner's evidence were considered sufficient to demonstrate that Penguin was likely to eventually expand outside of Toronto, the Commissioner has not led any evidence that such expansion was likely to occur in the near future. Consistent with *Tervita*, the Tribunal considers that the length of time into the future it can look for determining whether Penguin's entry into a market is likely is approximated by the lead time it would require to do so. The Tribunal accepts the Commissioner's evidence that Penguin faces low barriers to launching HYD in each of Vancouver, Calgary and Montréal and agrees with the Commissioner that such entry could occur within three months, if not less. Accordingly, the Tribunal finds

that in order for Penguin's entry into a new geographic market to be "likely", within the meaning of section 92 of the Act, the evidence must demonstrate that Penguin was likely to achieve such entry within the next three months.

89. The Tribunal recognizes that lead time has been described as a "guidepost and not a fixed temporal rule" (*Tervita* at para 74); however, the Supreme Court of Canada cautioned against relying on lead time as a marker in instances where it is "so lengthy that a determination of the probability of market entry at the far end of that timeframe would be influenced by so many unknown and unknowable contingencies as to render such a prediction largely speculative" (*Tervita* at para 74). Plainly, that is not the case here. Rather, in this case, the lead time is short "and thus a determination of whether market entry is likely within that timeframe may be sufficiently definite to meet the "likely" test" (*Tervita* at para 74).

90. The Tribunal finds that the Commissioner has not demonstrated on a balance of probabilities that Penguin was likely to enter the market for dating apps in any of Vancouver, Calgary or Montréal within the next three months, and, accordingly, that the "prevention" branch of section 92 is not engaged by the Merger.

d) Will the Merger Result in a Substantial Lessening of Competition in Toronto?

91. Having determined, for the reasons above, that there is no scope for the Merger to result in a substantial prevention of competition for dating apps in Vancouver, Calgary or Montréal, the Tribunal must now consider whether the Merger may result in a substantial lessening of competition for dating apps in Toronto, where the Merging Parties' apps are both presently available.

92. The appropriate test for determining whether there will be a lessening of competition is whether the merger is likely to facilitate the exercise of new or increased market power by the merged entity. In order to engage section 92, any such lessening must be substantial. As the Supreme Court of Canada has recognized, "What constitutes "substantial" will vary from case to case. The Tribunal has not found it useful to apply rigid numerical criteria" (*Tervita* at para 46).

93. While as a general matter this Tribunal has rejected the application of a firm numerical test, the inapplicability of a clear objective threshold

for determining a substantial lessening of competition is even more apparent where, as here, non-price effects are asserted. As the Tribunal has observed in the past, non-price competitive effects, such as reduced innovation, are inherently less amenable to quantification as compared to price effects; such that "when dealing with innovation, reliable statistical or empirical evidence is sometimes not available and the Commissioner may need to resort to more qualitative tools and instruments to demonstrate the competitive effects of a challenged conduct" (*Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp. Trib. 7 at 471).

94. The Commissioner asserts, and the Tribunal agrees, that the evidence demonstrates, on a balance of probabilities, that the Merger will enhance FYR's market power by a substantial degree. In particular, the Tribunal considers that this conclusion is manifestly supported by (i) the Merging Parties' combined dominant share of dating app users in Toronto, (ii) the documentary record of rivalry between the Merging Parties, (iii) the fact that the Merger will expand the Merging Parties' trove of user data, which will in turn enhance the strength of their offering, and (iv) FYR's plans to integrate Bat Signal into HYD, which will support further growth of Bat Signals user base. On the evidence, the Tribunal finds that the Merger is likely to enable FYR to exercise materially greater market power than it can today and, accordingly, that the Merger is likely to result in a substantial lessening of competition with respect to dating apps in Toronto.

95. The Merging Parties complain that the Commissioner has, at best, made it only half way down the field. They assert that, on the Commissioner's own argument, she has, at best, shown that FYR will have greater market power, but has not demonstrated that any specific dimension of non-price competition (e.g., quality, variety, service, advertising or innovation) is likely to be at a materially lower level following the Merger.

96. The Tribunal accepts that the potential implications of FYR's market power identified by the Commissioner are best understood as illustrative theoretical examples and that the Commissioner has not demonstrated, on a balance of probabilities, that any one such example is likely to in fact transpire post-Merger. However, the Tribunal finds that there is no obligation on the Commissioner to precisely identify the manner in which non-price competition will be substantially harmed and, rather, it is sufficient to show that the

merged firm will benefit from materially greater market power, such that competition will be substantially lessened in a general sense. To require more from the Commissioner would be inconsistent with the Act.

97. The Act specifically recognizes the importance of non-price dimensions of competition and explicitly places them on equal footing with price competition. For example, section 1 of the Act asserts that the Act's purpose includes providing "consumers with competitive prices and product choices" (emphasis added). Similarly, section 93 of the Act includes the following among the factors the Tribunal may have regard to in determining whether a merger is likely to result in a SLPC:

> (g) the nature and extent of change and innovation in a relevant market;
>
> (g.1) network effects within the market;
>
> (g.2) whether the merger or proposed merger would contribute to the entrenchment of the market position of leading incumbents;
>
> (g.3) any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy;

98. It would be inconsistent with the statutory scheme, and this Tribunal's jurisprudence, to hold the Commissioner to the challenging standard of demonstrating the specific manners in which non-price competition will degrade through an exercise of market power, in particular, in technology-enabled, innovation-driven markets.

99. An inherent element of innovation is its unpredictability. Section 92 is concerned with protecting the competitive process through preventing the accumulation of materially greater market power. The Commissioner has demonstrated that the Merger will result in such an accumulation and has illustrated for the Tribunal the manners in which such power could, in theory, be wielded to degrade non-price dimensions of competition. We cannot expect the Commissioner to prove the specific manner (or manners) in which private parties will take advantage of their market power, in particular, in innovation-driven markets.

100. Accordingly, we find that the Merger is likely to result in a substantial lessening of competition for dating applications in Toronto.

IX. Remedy

101. Having determined that the Merger is likely to result in a substantial lessening of competition within the meaning of section 92 of the Act, the Tribunal must now determine the appropriate remedy. As explained above, the Tribunal considers there to be only a single remedy proposal before it, namely the Commissioner's application for a prohibition order, which she bears the burden of substantiating.

102. The Tribunal is satisfied that the order sought by the Commissioner would be effective in remedying the substantial lessening of competition identified above. However, the Tribunal finds that the Commissioner has not demonstrated on a balance of probabilities that such an order would not be punitive.

103. In considering the appropriateness of the order sought by the Commissioner, the Tribunal considers it necessary to have regard to the complete factual record, including the Divestiture. The Tribunal considers that the Divestiture, by providing Riddler with access to Emperor, will significantly strengthen a third-party rival to the Merging Parties, mitigating FYR's post-Merger market power.

104. The Commissioner asserts that the Divestiture will not go far enough and, in particular, that Riddler's ability to effectively restrain FYR's post-Merger exercise of market power will be limited by its small user base and weak brand recognition. As such, the Commissioner contends that, while the Divestiture will mitigate to some degree the Merger's anti-competitive effects, it will not do so to such a degree that the Merger would no longer result in a substantial lessening of competition.

105. The Tribunal is mindful of the limitations raised by the Commissioner and agrees that, for those reasons, the Divestiture may not fully remedy the Merger's substantial lessening of competition. However, the Tribunal does not consider there to be sufficient evidence to demonstrate that, on a balance of probabilities, that Divestiture is insufficient to remedy the substantial lessening of competition. As such, the Tribunal finds that the Commissioner has not discharged her burden with respect to the order she seeks.

X. Order

106. For these reasons, the application brought by the Commissioner is dismissed.

DATED at Ottawa, this 18th day of October 2023.

SIGNED on behalf of the Tribunal by the Panel Members

IN THE COMPETITION APPEAL TRIBUNAL

(ON APPEAL FROM THE COMPETITION TRIBUNAL)

BETWEEN:

THE COMMISSIONER OF COMPETITION

Appellant

AND

FIND YOUR ROBIN INC and PENGUIN LTD

Respondents

FACTUM OF THE APPELLANT

Counsel For The Appellant
Team No. 24102
[January 26, 2024]

CONTENTS

Part I—Overview And Statement Of Facts

[1] Find Your Robin ("**FYR**") is the largest online dating company in Canada. Its mobile dating app, Bat Signal, has a leading market share in several of Canada's largest cities. In February 2023, FYR entered into a binding agreement to acquire Penguin, a Toronto-based online dating company, for approximately $477.4 million (*Tribunal Decision*). Penguin's dating app, Hero You Deserve ("**HYD**"), offers a compelling alternative to Bat Signal for elite singles in Toronto who are ready to mingle with other elites in the city. The Competition Appeal Tribunal (the "**Appeal Tribunal**") must block the merger of FYR and Penguin because it will result in a substantial lessening and prevention of competition (an "**SLPC**") in several cities in Canada.

> *Commissioner of Competition v Find Your Robin Inc* (18 October 2023) at para 11 [*Tribunal Decision*].

[2] Bat Signal and HYD compete vigorously in Toronto's dating app market. In Toronto, half of all dating app users are active on one or both of Bat Signal and HYD (*Tribunal Decision*). Internal documents demonstrate that FYR and Penguin consider each other their primary competition. In Penguin's pitch materials, only Bat Signal was included for cross comparison (*Tribunal Decision*). In addition, FYR created its innovative AI tool ("**Alfred**") as a direct response to Penguin's vigorous competition

(*Tribunal Decision*). This competition would clearly extend to other cities in Canada if and when Penguin makes HYD available there. Currently, however, Bat Signal captures the lion's share of dating app users in Vancouver (43 percent), Calgary (51 percent) and Montréal (34 percent) (*Tribunal Decision*).

> *Tribunal Decision*, *supra* para 1 at para 59.

[3] To neutralize its biggest competitive threat, FYR moved to acquire Penguin. In response, the Commissioner of Competition (the "**Commissioner**") brought an application to block the merger under s.92 of the *Competition Act* (the "**Act**") on the grounds that it would substantially lessen competition in Toronto and substantially prevent competition in Montréal, Calgary and Vancouver (the "**Other Cities**") (*Tribunal Decision*). But in July 2023—a mere two months from the hearing at the Competition Tribunal—FYR and Penguin (the "**Merging Parties**") proposed a complicated modification to the merger (*Tribunal Decision*). The Merging Parties entered a Memorandum of Understanding (the "**MOU**") to use their best efforts to enter into an asset purchase agreement in line with the terms set out in an appended draft agreement (the " **Draft APA**") with the company Riddler (*Tribunal Decision*).

> *Competition Act*, RSC 1985, c C-34, s 92 [*Competition Act*]. *Tribunal Decision*, *supra* para 1 at paras 4, 14–16.

[4] Riddler is a Waterloo-based startup that owns a niche trivia dating app called Gord. Riddler has struggled to get a competitive foothold in the dating app market. For example, Gord is used by only 3 percent of Toronto dating app users, whereas Bat Signal and HYD are used by 34 percent and 16 percent of Toronto dating app users respectively (*Tribunal Decision*).

> *Tribunal Decision*, *supra* para 1 at para 27.

[5] The Draft APA contains a proposal according to which Penguin would divest its proprietary user admission and matchmaking algorithm ("**Emperor**") to Riddler; however, Riddler would also agree to grant the Merging Parties a five-year license for exclusive use of Emperor outside of Ontario (*Tribunal Decision*). This divestiture would be negotiated and finalized subsequent to and separate from the merger (*Tribunal Decision*). But at the time of the hearing at the Competition Tribunal (the "**Tribunal**"), the Draft APA was far from a done deal.

> *Tribunal Decision*, *supra* para 1 at paras 19–20.

[6] At the hearing, the Tribunal agreed with the Commissioner that the relevant merger was the initially proposed merger, rather than the merger as modified by the Draft APA. It also agreed that there was a substantial lessening of competition in Toronto under s.92; however, it disagreed that the merger would substantially prevent competition in the Other Cities (*Tribunal Decision*). Nevertheless, the Tribunal dismissed the Commissioner's application because, in its view, the Commissioner failed to show that blocking the merger was not punitive (*Tribunal Decision*).

Tribunal Decision, *supra* para 1 at paras 99–101.

Part II—Statement Of Points In Issue

[7] The central issue on appeal is whether the Appeal Tribunal should overturn the Tribunal's decision and block the merger under s.92 of the Act. To decide this case, the Appeal Tribunal must resolve the following questions:

i) Did the Tribunal commit any palpable and overriding error in determining that the relevant merger for analysis was the original merger rather than the modified merger?

ii) Did the Tribunal err in law by incorrectly holding that the Commissioner bears the burden with respect to the remedy?

iii) Did the Tribunal commit a palpable and overriding error when it concluded that there would only be an SLPC in Toronto, but not in Montréal, Calgary and Vancouver?

iv) Did the Tribunal commit a palpable and overriding error when it concluded that the Commissioner had met its burden of demonstrating an SLPC based on the non-price effects of the merger?

[8] The Commissioner makes the following submissions:

i) The Tribunal made no palpable and overriding error by assessing the competitive effects of the merger as it was originally proposed.

ii) The burden of proof for the adequacy of the divestiture as a remedy lies on the Merging Parties because the remedy at issue is the divestiture proposed in the Draft APA.

iii) The Tribunal was correct to find a substantial lessening of competition in Toronto but made a palpable and overriding error by failing to find a substantial prevention of competition in Montréal, Calgary and Vancouver.

iv) The Commissioner has discharged its burden of proving on the balance of probabilities that the merger will result in an SLPC in *all* these markets by virtue of its adverse effects on non-price competition.

Accordingly, the Commissioner requests that the Appeal Tribunal grant an order preventing the merger from proceeding. In the alternative, the Commissioner requests that the Appeal Tribunal remand the decision back to the Tribunal for further consideration.

Part III—Statement Of Submissions

A. The Tribunal Committed No Palpable and Overriding Error in Holding the Commissioner's Application is Not Moot

i) The standard of review is palpable and overriding error

[9] Appellate standards of review apply to this case (*Vavilov*) because there is a statutory right of appeal (*Competition Tribunal Act*). The standard of review is correctness for questions of law and palpable and overriding error for questions of fact and questions of mixed fact and law (*Housen*). The Tribunal's determination that the Commissioner's application was not moot relied on the application of the framework from *Rogers* to the specific facts of the case. As this is a question of mixed fact and law, the Tribunal's determination should only be disturbed if it contains palpable and overriding error.

> *Canada (Minister of Citizenship and immigration) v Vavilov* , 2019 SCC 65 at para 37 [*Vavilov*]. *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), s 13(1).
>
> *Housen v Nikolaisen*, 2002 SCC 33 at para 36 [*Housen*].
>
> *Canada (Commissioner of Competition) v Rogers Communications Inc et al* , 2023 FCA 16 [*Rogers*].

[10} In *Rogers*, the question of law was: which factors must the court consider when deciding what is the relevant merger for the purposes of applying the test contemplated in s.92 of the Act, the original merger or the merger as modified by the divestiture (*Rogers*)? Here, the Tribunal correctly identified the two criteria from *Rogers*: (i) which articulation of the transaction best

accords with reality and (ii) procedural fairness considerations (*Tribunal Decision*). Regarding the first prong, the Federal Court of Appeal ("**FCA**") stated that "the *Competition Act* aims to address truth and reality" (*Rogers*). Regarding the second prong, the court acknowledged that "there may be a case where the change in transaction is so significant that procedural fairness concerns would arise" (*Rogers*).

> *Rogers*, *supra* para 9 at paras 18–19.
>
> *Tribunal Decision*, *supra* para 1 at para 68.

In the current matter, the legal test is not at issue. Rather, what is at issue is the application of the test to the facts.

ii) The Tribunal's application of the Rogers test to the facts lacked any palpable and overriding error and is consistent with the jurisprudence

[12] The Tribunal viewed the matter holistically and considered all mandatory factors from the *Rogers* framework. With respect to the first prong, the Tribunal identified that both the original merger and modified merger were real possibilities and thus both were open for consideration (*Tribunal Decision*). With respect to the second prong, the Tribunal determined that procedural fairness considerations weighed heavily in favour of the Commissioner and supported the conclusion that the original merger was the relevant one for the proceeding (*Tribunal Decision*).

> *Tribunal Decision*, *supra* para 1 at para 69, 71–72.

[13] The Tribunal was justified in reaching a different conclusion than it did in *Rogers* because the facts can be distinguished on both prongs of the test. On the first prong, both the original merger and modified merger remain real possibilities and the Merging Parties purposefully structured the divestiture to make it less certain. On the second prong, the Draft APA makes use of a more complex divestiture structure, which will take more time for the Bureau to assess. It is procedurally unfair to require the Commissioner to consider the divestiture on such short notice.

[14] In *Rogers*, the original merger had become a true impossibility. In the current matter both variations of the merger are possible. In *Rogers*, the Minister of Innovation, Science and Industry publicly confirmed there were no circumstances in which he would "permit the wholesale transfer of wireless spectrum from Shaw to Rogers" (*Rogers CT*). The original proposed merger

in *Rogers* was completely dead. In contrast, the divestiture of Emperor's algorithm to Riddler is not certain. Penguin and Riddler have only entered into an MOU and not an enforceable transaction agreement. Therefore, it was open to the Tribunal to consider the merger without divestiture in the current matter because, unlike in *Rogers*, it was still a real possibility.

> *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*
>
> 2023 Comp Trib 1 at para 109 [*Rogers CT*].

[15] Penguin's current president Mr. Datoe admitted that the company could probably get out of the Draft APA without breaching contractual obligations (*Tribunal Decision*). In *Rogers*, by contrast, Rogers would be required to pay a very serious penalty of $265 million to American bondholders if the Divestiture Agreement was not completed (*Rogers CT*). There is no evidence of any break fee for Penguin exiting the Draft APA.

> *Tribunal Decision*, *supra* para 1 at para 41.
>
> *Rogers CT*, *supra* para 14 at para 26.

[16] The Tribunal in the current matter rightly held that any distortion to reality was attributable to the Merging Parties and therefore found that the reality prong was less important (*Tribunal Decision*). In *Rogers*, the merging parties' response to the suggested SLPC concern was a swift, definitive divestiture (*Rogers CT*). Here the Merging Parties continue to assert that the merger without divestiture will not result in an SLPC (*Tribunal Decision*). This explains why a definitive deal with Riddler has not been secured and supports the inference that the deal may fall through if the merger is approved. Thus, the Merging Parties have kept both variants of the merger alive for their own convenience and cannot argue the "more likely" merger should be the only merger considered.

> *Tribunal Decision*, *supra* para 1 at paras 72, 31.
>
> *Rogers CT*, *supra* para 14 at paras 18–22.

[17] Turning to the second prong, it is procedurally unfair to require the Commissioner to consider this complex, late-stage modified merger to be the relevant merger. In *Rogers*, the court allowed the merger to close because the divestiture of Freedom sufficiently addressed the SLPC concern. Shaw's subsidiary Freedom was a vigorous competitor that would

no longer compete with Rogers in the market for wireless services after the merger (*Rogers CT*). To resolve this, the proposed divestiture was to sell all of Freedom to Videotron. Under Videotron, Freedom would continue to vigorously compete in the relevant markets. Here, the divested asset, Emperor, is a highly technical algorithm, which makes its impact on the SLPC complicated and uncertain.

Rogers CT, *supra* para 14 at para 349.

[18] In the current matter, it is doubtful—or at the very least, unclear—whether the proposed divestiture will adequately address the SLPC concerns. The Merging Parties have proposed that Penguin sell Emperor's source code and associated IP to Riddler, with Riddler licensing Emperor back to the Merging Parties for five years of exclusive use outside Ontario (*Tribunal Decision*). This divestiture presents a novel and complex proposed solution that requires detailed examination to determine its effectiveness. It is unfair for the Commissioner to be required to evaluate this complex modification on such short notice, when all the Commissioner's previous preparation focused only on the original merger.

Tribunal Decision, *supra* para 1 at paras 18–19.

[19] The current divestiture was introduced much closer to the hearing than in *Rogers* thereby amplifying procedural fairness concerns. Shaw first entered a letter of intent to divest Freedom over seven months before the hearing and entered the final definitive agreement with Videotron nearly three months before the hearing (*Rogers CT*). By contrast, the Merging Parties here first introduced the Draft APA only two months before the hearing and to date have not entered a definitive agreement with Riddler (*Tribunal Decision*). Moreover, in *Rogers*, the Commissioner conceded that there were no grounds for a procedural fairness complaint (*Rogers*). Here, the Commissioner had much less time to contemplate the merits of a far more complex divestiture. Thus, the Tribunal rightly concluded that the current matter raised substantial procedural fairness concerns for the Commissioner (*Tribunal Decision*).

Rogers CT, *supra* para 14 at paras 22–26.

Tribunal Decision, *supra* para 1 at paras 15–16, 72.

Rogers, *supra* para 9 at para 16.

[20] Additionally, if this late-stage, uncertain merger modification were permitted, it would pose a serious risk that merging companies in the future will strategically introduce late-stage modifications to avoid merger regulation. The consequence of *Rogers* cannot be that merging parties can at the last minute suggest a hypothetical remedy that fundamentally shifts the goalposts of a merger hearing.

B. The Merging Parties Bear the Burden of Demonstrating the Proposed Divestiture was a Sufficient Remedy

i) The standard of review is correctness

[21} It is an unsettled question of law as to when the burden of proof shifts to the merging parties when a merger modification is proposed in advance of a tribunal hearing. In *Rogers*, the issue of a burden shift was irrelevant. Therefore, this question remains unresolved.

> *Rogers*, *supra* para 9 at para 14.

[22] In the current matter, the Tribunal determined that the burden shift principle from *Southam*—that the person who asserts a remedy should bear the burden of proof—did not apply (*Tribunal Decision*). The Tribunal held that binding commitments cannot be considered a proposed remedy for which the *Southam* principle can apply (*Tribunal Decision*). This new rule limiting what properly constitutes a "proposed remedy" is a question of law to be reviewed on a standard of correctness.

> *Canada (Director of Investigation and Research) v Southam Inc*, 1 SCR 748 at para 89, 144 DLR 4th 1 [*Southam*].

> *Tribunal Decision*, *supra* para 1 at paras 78–79.

ii) The principle from Southam should encompass the Merging Parties' divestiture and so the burden of proof rightly shifts to the Merging Parties

[23] The Tribunal incorrectly found that the *Southam* burden shift principle did not apply to the current matter. This is because the current matter is much more like *Southam* than *Rogers*. First, in *Rogers*, the divestiture was irrevocable and would occur simultaneously with the merger. Second, in *Rogers*, the issue of a possible burden shift was completely irrelevant.

[24] In *Rogers*, the Court did not apply *Southam*. In *Rogers*, the merger itself was being irrevocably modified in advance; in *Southam*, the merger

was completed and then a remedy was proposed afterwards (*Rogers CT*). In *Rogers*, had the original merger been blocked by the Tribunal, the companies could have immediately applied and been approved for the new modified merger because it addressed the SLPC concerns. It was efficient for the Tribunal to avoid this waste of time and resources and simply approve the modified merger. The determination that the divestiture in *Rogers* was not a proposed remedy made sense on the facts. By contrast, in the current matter the divestiture is not finalized, nor does it sufficiently address the SLPC concerns.

> *Rogers CT*, *supra* para 14 at para 122, aff'd in *Rogers*, *supra* para 9 at para 20.
>
> [25] In *Rogers*, the divestiture agreement was intended to close simultaneously with the merger (*Rogers CT*). Unlike *Rogers*, however, the Merging Parties' Divestiture Letter to the Bureau clearly states that Penguin would only begin the final process of entering a binding sale agreement of Emperor to Riddler *after* the disposition of the s.92 application (*Tribunal Decision*). Here, the divestiture is clearly being implemented separately, after the merger. Therefore, the divestiture is a proposed remedy.
>
> *Rogers CT*, *supra* para 14 at para 31.
>
> *Tribunal Decision*, *supra* para 1 at para 20.

[26] The burden shift matters because it is unclear if the remedy proposed by the Merging Parties will sufficiently address the SLPC. In *Rogers*, the FCA stated that the burden of proof can matter when ignoring it may cause procedural unfairness to a party. To place the burden on the Commissioner to prove the ineffectiveness of this unconfirmed and complex late-stage solution is simply unfair. The burden must rightly shift to the Merging Parties.

> *Rogers*, *supra* para 9 at para 16.

[27] In sum, the proposed divestiture of Emperor should be considered a "proposed remedy" and thus the burden shift from *Southam* applies. As discussed below, the Merging Parties cannot meet their burden.

C. The Tribunal Erred By Misapplying the Legal Test for the 'Likely to Prevent Competition Substantially' Prong of s.92 of the *Competition Act*

[28] In *Tervita*, the Supreme Court of Canada ("**SCC**") stated the legal test for the prevent prong under s.92 of the Act as follows:

> "The analysis…requires looking to the "but for" market condition to assess the competitive landscape that would likely exist if there was no merger. It is necessary to identify the potential competitor, assess whether but for the merger that potential competitor is likely to enter the market and determine whether its effect on the market would likely be substantial."
>
> *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 60 [*Tervita*].

[29] In this case, the Tribunal misunderstood and misapplied the legal test from *Tervita* in several ways. First, the Tribunal committed an error of mixed fact and law by treating Mr. Datoe's testimony as dispositive with respect to the likelihood of Penguin's entry into the Other Cities. Second, the Tribunal erred in law by treating lead time as a limiting factor when assessing the likelihood of entry. Third, the Tribunal failed to consider that Penguin's entry into the Other Cities would likely have had a substantial effect on competition in them. Ultimately, the Tribunal made a palpable and overriding error in concluding that blocking the merger was a punitive solution to the SLPC.

i) The Tribunal erred by treating Mr. Datoe's statements as dispositive

[30] The Tribunal improperly treated Mr. Datoe's statements as "dispositive" of the likelihood of Penguin's entry into the Other Cities and failed to consider additional relevant factors (*Tribunal Decision*). The Tribunal properly identified the potential competitor as Penguin and acknowledged that barriers to entry are low, but then it inexplicably fixated on Mr. Datoe's elitist vision for HYD to remain exclusively available to Torontonians. Critically, the Tribunal failed to consider the fact that Mr. Datoe no longer had control of the company at the time of the merger. Rather, third-party investors had acquired enough shares to elect a majority of the board of directors of Penguin (the "**Board**"), and the Board has the final say regarding Penguin's strategic plans (*Tribunal Decision*). The Board also has a fiduciary duty to act in the best interests of the company.

Tribunal Decision, supra para 1 at paras 86–87, 53.

[31] The Commissioner accepts that, in conducting the "but for" analysis, the Tribunal should not "make future business decisions" for the Merging Parties (*Tervita*). However, the Commissioner does not ask the Tribunal to substitute its own business strategy; rather the Commissioner insists the Tribunal must determine what a reasonable business would do in the same circumstances.

Tervita, supra para 28 at para 76.

[32] One persuasive authority for this is the Competition Tribunal's decision in *Tervita*. In *Tervita*, one of the merging parties—the vendors of the Babkirk landfill—argued that, in the "but for" world, they would have continued trying to operate their bioremediation business unprofitably. However, the Tribunal rejected this argument: "it is unreasonable to suppose that [the vendors] would have been prepared to operate unprofitably beyond the fall of 2012, when they could have generated additional revenues by accepting more waste into the Secure Landfill part of their facility" (*Tervita CT*, emphasis added). Consequently, the Tribunal held that the transaction was likely to prevent competition substantially in the relevant market. Moreover, the SCC did not overrule this line of reasoning in its decision—the dispositive holding at the SCC was instead the efficiencies defence under s.96 of the *Act*, which is not relevant to the present matter.

The Commissioner of Competition v CCS Corporation et al, 2012 Comp Trib 14 at para 206 [*Tervita CT*].

[33] At the time of the merger, Penguin had completed several "funding rounds" and was majority-owned by third-party investors (*Tribunal Decision*). These investors can be reasonably presumed to be motivated by making a return on their investments. Hence, they would reasonably expect Penguin to expand into the Other Cities to maximize profits and value for eventual sale. Mr. Datoe's reason, however, for keeping HYD exclusive to Toronto is personal prejudice. He testified: "HYD is not intended for everyone...[I]f you're in Canada and can't be bothered to move to the Six, I don't want you on my app" (*Tribunal Decision*). If Mr. Datoe's vision for the company did not align with the investors' goal of profit-maximization, they would likely have used their voting power to replace him.

Tribunal Decision, *supra* para 1 at para 53.

[34] In addition, FYR's plan to make HYD available in the Other Cities approximately nine months after the merger clearly attests to the demand for HYD there. FYR attributes 57 percent of the merger's overall value as being based on bringing HYD to the Other Cities (*Tribunal Decision*). While FYR's plans are not strictly determinative of any plans that Penguin may or may not have had "but for" the merger, they do provide strong evidence for what *any* profit maximizing business in the position of Penguin would have done—expand.

> *Tribunal Decision*, *supra* para 1 at para 49.

[35] Last, the Tribunal's reasons regarding the geographic market fail to pay any serious attention to the nature of the product or the market as a whole. Dating applications are not like traditional brick and mortar stores. There is virtually no economic downside to scaling up due to the low cost and ease of entering a new geographic market. Citrus and Ogle testified that HYD can be made available on their app stores in new cities in as little as two to three days (*Tribunal Decision*). Moreover, because HYD is selling ad space, Penguin benefits from maximizing user count. Thus, it would be unreasonable for them *not* to expand.

> *Tribunal Decision*, *supra* para 1 at para 48.

ii) The Tribunal committed an additional error of law by treating lead time as a limiting factor for evaluating likelihood of entry

[36] The Tribunal also committed an error of law when conducting its alternative analysis of whether Penguin was likely to expand outside Toronto in the near future (*Tribunal Decision*). In particular, the Tribunal erroneously treated lead time as the limiting factor for evaluating Penguin's likelihood of entry into the other geographic markets, which is contrary to the SCC's explicit instructions in *Tervita*. Therefore, the Appeal Tribunal owes no deference to the Tribunal's conclusion that Penguin was not likely to enter the Other Cities within three months.

> *Tribunal Decision*, *supra* para 1 at para 87.

> [37] Lead time "refers to the inherent time delay that a new entrant, facing certain barriers and acting diligently to overcome them, could be expected to experience when trying to enter the market" (*Tervita*). Lead time is one relevant factor to consider when assessing a firm's likelihood of entry into a geographic market. The SCC stated that the "relevant lead time

> may be short, and thus a determination of whether market entry is likely within that timeframe may be sufficiently definite to meet the "likely" test" (*Tervita*, emphasis added).

Tervita, *supra* para 28 at paras 71, 74.

[38] The Tribunal appropriately cited this passage from *Tervita* (*Tribunal Decision*); however, it failed to pay attention to the context in which the SCC made these comments. The SCC's point was that lead time is *less* useful as a measuring stick for the likelihood of entry when it is lengthy. However, it does not follow that, when it is short, lead time is the only or even the most important consideration with respect to likelihood of entry.

Tribunal Decision, *supra* para 1 at para 88.

[39] Nonetheless, the Tribunal arbitrarily used lead time as a maximum duration it could look into the future in determining whether Penguin was likely to enter the Other Cities. For example, it stated: "Consistent with *Tervita*, the Tribunal considers that the length of time into the future it can look for determining whether Penguin's entry into a market is likely approximated by the lead time it would require to do so." (*Tribunal Decision*, emphasis added). In fact, this is not consistent with *Tervita*; rather, *Tervita* says that "the timeframe that can be considered must of course be determined by the evidence in any given case" (*Tervita*).

Tribunal Decision, *supra* para 1 at para 87.

Tervita, *supra* para 28 at para 75.

[40] The Tribunal also gave no explanation for why it chose a figure of three months. It seems to have accepted the Merging Parties' submissions on this point without second thought. The lead time could just as easily have been nine months—this is how long FYR thinks it will take to bring HYD into the Other Cities following the merger (*Tribunal Decision*). Ultimately, the Tribunal's choice of three months was arbitrary and insufficiently justified. The Bureau's *Merger Enforcement Guidelines* ("**MEGs**") state that timely entry "means that such entry would have occurred within a reasonable period of time, given the characteristics of the market in question" (*MEGs*). While the MEGs are not binding on the Tribunal, it should have explained how its figure of three months was reasonable in light of "the characteristics of the market in question."

Tribunal Decision, *supra* para 1 at para 54.

Canada, Competition Bureau Canada, *Merger Enforcement Guidelines* (Ottawa: 6 October 2011) at 2.11 [*MEGs*].

iii) Penguin's entry into Montréal, Calgary and Vancouver would have had a substantial effect on competition

[41] Because the Tribunal found that Penguin was not likely to enter the Other Cities, it never considered the third prong of the test with respect to those cities: whether Penguin's entry would have had a substantial effect on competition there "but for" the merger. Hence, the Commissioner proposes that the Appeal Tribunal decide this issue *de novo*. Penguin's entry into the Other Cities would have had a substantial effect on competition in those local geographic markets.

[42] Crucially, Penguin was competing vigorously with FYR in Toronto prior to the merger. The Tribunal appropriately found that there was a documented record of rivalry between the two companies in Toronto (*Tribunal Decision*). This is also demonstrated by the companies' market shares in Toronto. Bat Signal and HYD possess the largest market shares at 34 percent and 16 percent respectively (*Tribunal Decision*). Meanwhile, the rest of the market is fragmented, with no other application having a market share over 10 percent.

Tribunal Decision, *supra* para 1 at paras 93, 26–27.

[43] Ultimately, if the court finds that Penguin was likely to enter the Other Cities, then it should be uncontroversial to find that HYD would have a substantial effect on competition in those cities. In Montréal, Calgary and Vancouver, Bat Signal is also the most used app, with market shares of 34 percent, 51 percent and 43 percent respectively (*Tribunal Decision*). That is, Bat Signal's position in the market is roughly equally as dominant in Montréal as it is in Toronto and even more dominant in Calgary and Vancouver. Penguin's entry into these markets would have served as a check on FYR's pre-existing market power.

Tribunal Decision, *supra* para 1 at para 59.

D. The Tribunal Properly Found That the Merger Would Substantially Lessen Competition in Toronto

[44] Despite the issues with its analysis of the prevent prong of s.92, the Tribunal rightly found that there would be a substantial lessening of competition in Toronto due to the non-price effects of the merger (*Tribunal*

Decision). The Appeal Tribunal should uphold this finding for two reasons: first, the Tribunal committed no palpable and overriding error in determining that the merger would substantially diminish non-price competition in Toronto; second, the divestiture of Emperor is likely an insufficient remedy for the anti-competitive non-price effects of the merger.

Tribunal Decision, *supra* para 1 at paras 92–93.

i) The Tribunal applied the correct law in evaluating whether the merger would substantially lessen competition in Toronto

[45] Whether the Tribunal applied the right legal test is an extricable question of law. Therefore, the standard of review is correctness. The Tribunal's approach for the lessening analysis was correct and should be upheld.

[46] First, the Tribunal applied the appropriate sections of the Act, ss.92 and 93 subsections (g) through (g.3) (*Tribunal Decision*). In particular, subsection 93(g) states that, in making an order under s.92, the Tribunal may have regard to "the nature and extent of change and innovation in a relevant market" (*Competition Act*).

Tribunal Decision, *supra* para 1 at para 96.

Competition Act, *supra* para 3, s 93(g).

[47] Second, the Tribunal properly stated and followed the test for a substantial lessening of competition as set out in *Tervita*. As the Tribunal put it: "The appropriate test for determining whether there will be a lessening of competition is whether the merger is likely to facilitate the exercise of new or increased market power. In order to engage s.92, any such lessening must be substantial" (*Tribunal Decision*, emphasis in original). This is consistent with the guidance from the SCC in *Tervita*.

Tribunal Decision, *supra* para 1 at paras 91–92.

Tervita, *supra* para 28 at paras 44–46.

[48] Third, the Tribunal correctly relied on *Toronto Real Estate Board* as persuasive authority with respect to non-price effects and in particular innovation (*Tribunal Decision*). In *TREB*, the tribunal formulated the test as follows: "With respect to non-price dimensions of competition, such as quality, variety, service, advertising or innovation, the test applied is to determine whether the level of one or more of those dimensions of

competition was, is or likely would be materially lower than in the absence of the impugned practice" (*TREB CT*, emphasis added). The Tribunal's reasoning was upheld by the FCA.

> *The Toronto Real Estate Board v Canada (Commissioner of Competition)* , 2017 FCA 236 [*TREB*].
>
> *Tribunal Decision*, *supra* para 1 at para 92.
>
> *Commissioner of Competition v Toronto Real Estate Board* , 2016 Comp Trib 7 at para 464 [*TREB CT*].

ii) The Tribunal committed no palpable and overriding error in finding that the merger would result in substantially diminished non-price competition

[49] Ultimately, the Tribunal found that FYR's market power post-merger "could, in theory, be wielded to degrade non-price dimensions of competition" and thus the merger resulted in an SLPC in Toronto (*Tribunal Decision*). This is a finding of mixed fact and law and is entitled to deference.

> *Tribunal Decision*, *supra* para 1 at para 98.

[50] On the record before the Tribunal, it was reasonable to find that the Commissioner met the evidentiary burden of showing an SLPC based on non-price effects. Non-price effect "substantiality can be demonstrated by the Commissioner through quantitative or qualitative evidence" (*TREB CT*, emphasis added).

> *TREB CT*, *supra* para 48 at paras 469–470.

The Commissioner adduced significant qualitative evidence with respect to the merger's impact on innovation. Specifically, FYR's internal documents show that Penguin incentivized FYR to innovate. FYR's emails stated that FYR introduced Alfred as a feature of Bat Signal precisely because of HYD. In their own words, FYR was worried about Penguin out-innovating them and cutting into their market share: "it is critical that we bring this tool to market ASAP—we're losing users every day to new offerings, such as HYD … " (*Tribunal Decision*). This demonstrated incentive to innovate will be substantially diminished if FYR acquires Penguin.

> *Tribunal Decision*, *supra* para 1 at para 59.

[52] In addition, the Merging Parties' position—that the Commissioner must prove how innovation will be reduced—is a misreading of *TREB* (*Tribunal Decision*). In *TREB*, the Commissioner had a concrete theory about how the impugned practice would prevent innovation in the market (*TREB*). However, *TREB* did not hold that the Commissioner must prove one specific theory of how innovation would be diminished. Innovation by its very nature involves unpredictability. It may not be possible to know exactly *how* innovation will be reduced, yet at the same time it may be likely that innovation will be reduced in some meaningful way as a result of the merger. This is one of those cases.

Tribunal Decision, *supra* para 1 at para 62.

TREB, supra para 48 at para 2.

[53] Moreover, the legislature has made the important choice to include subsections (g) and (g.3) in the Act. Accordingly, imposing an impossible standard of proof on the Commissioner would defeat the legislative objective of protecting non-price competition. The key question is whether, on the balance of probabilities, the merger will result in an SLPC. The potential impact on non-price competition is one factor to consider when answering that question. The Tribunal was rightly cognizant of this, and its approach was sufficiently precise (*Tribunal Decision*).

Tribunal Decision, *supra* para 1 at para 97.

iii) The divestiture is not a sufficient remedy to the anticompetitive non-price effects of the merger

[54] As stated above, the Tribunal erred by failing to put the burden on the Merging Parties to demonstrate that the divestiture is an adequate remedy for the SLPC in Toronto and the Other Cities. The Merging Parties are unable to meet this burden. In the alternative, the Commissioner takes the position that the divestiture is insufficient to eliminate the substantial lessening and prevention of competition in the relevant markets.

[55] Riddler's Gord app does not pose any serious threat to FYR's market power in Toronto. The Merging Parties contend that acquiring the Emperor algorithm will help Riddler broaden Gord's appeal such that it can compete with Bat Signal. However, there is no evidence that any gains in the market made by Riddler will offset the loss of Penguin as a vigorous competitor in Toronto. Emperor was designed to work with HYD—not Gord.

Transplanting an algorithm from one app to another does not mean that Gord will suddenly become a compelling and competitive product.

[56] Riddler is *not* Videotron. In *Rogers*, the Tribunal rightly emphasized the fact that Videotron was a proven market disruptor which had already achieved substantial success in Québec (*Rogers CT*). Riddler is an early-stage start-up. In addition, the divestiture will not solve the SLPC in the Other Cities because of the Merging Parties' exclusive license to use Emperor outside Ontario. Thus, outside Ontario, it will be as if Penguin never sold the algorithm. Without the benefit of the algorithm outside Ontario, it is unlikely that Riddler will be able to enter the other geographic markets.

Rogers CT, *supra* para 14 at para 402.

Part IV—Remedy Sought

[57] In light of the above, the Commissioner respectfully requests an order allowing the appeal and blocking the merger.

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 Parrish & Heimbecker, Limited, 2022 Comp Trib 18.

Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc, 2023 Comp Trib 01.

Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc, 2023 Comp Trib 03.

Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc, 2023 FCA 16.

Canada (Director of Investigation and Research) v Southam Inc, [1997] 1 SCR 748, 144 DLR 4th 1.

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65. *Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp Trib 7. *Housen v Nikolaisen,* 2002 SCC 33.

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

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

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

C. Government Documents

Canada, Competition Bureau Canada, *Merger Enforcement Guidelines* (Ottawa: 6 October 2011).

IN THE COMPETITION APPEAL TRIBUNAL

(ON APPEAL FROM THE COMPETITION TRIBUNAL)

BETWEEN:

THE COMMISSIONER OF COMPETITION

Appellant

AND

FIND YOUR ROBIN INC

Respondent

FACTUM OF THE RESPONDENT

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

CONTENTS

Overview

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

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

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

> *Ibid.*

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

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

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

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

Part I: Statement of Facts

A. The Parties

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

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

B. The Transaction

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

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

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

C. Procedural History

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

Part II: Statement of Points In Issue

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

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

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

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

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

The answer to all these questions is "yes".

Part III: Statement of Submissions

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

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

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

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

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

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

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

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

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

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

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

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

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

Ibid at para 108.

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

FYR, supra para 14 at para 20 & 19.

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

Ibid at para 41

Rogers FCA, supra para 12.

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

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

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

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

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

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

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

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

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

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

1.2 The Commissioner Was Not Owed a Duty of Procedural Fairness

1.2.1 The Commissioner Imposed His Own Expedited Timeline

[23] The second step of the *Rogers/Shaw* test requires a contextual analysis of the potential unfairness that could arise from an amended merger agreement. The Tribunal erroneously concluded that they could not consider the Sale as an amendment since the "Merging Parties that decided to introduce the Divestiture at a late stage, having had the opportunity to do so at any time over the course of the Bureau's four-month review" (*FYR*). The Commissioner argues that the timeline is distinguishable from *Rogers/Shaw* since the Bureau was not informed of the divestiture with enough time to prepare accordingly. According to the Commissioner, the turnaround between the current review and the beginning of the litigation process was a lot shorter leading to procedural unfairness.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.1 Market Shares and Market Power Are Two Distinct Concepts

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

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

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

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

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

> *Ibid* at s 93.

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

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

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

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

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

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

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

3.3 The Remaining Competitors in Toronto Will Be Effective

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

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

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

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

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

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

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

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

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

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

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

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

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

3.3.3 Multi-homing Acts as a Guardian Against Network Effects

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

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

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

Furman, *supra* para 1 at s 1.88.

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

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

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

Southam, *supra* para 21.

4.1 The Sale is not a Remedy

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

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

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

FYR, *supra* para 14 at para 79.

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

Southam, supra para 21.

Tervita, *supra* para 28.

Secure Energy, *supra* para 35.

4.2 The Sale and the Burden of Proof

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

FYR, *supra* para 14 at para 76.

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

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

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

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

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

Southam, supra para 21 at paras 89 and 104.

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

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

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

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

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

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

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

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

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

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

Part IV: Remedy Sought

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

APPENDIX A: TABLE OF AUTHORITIES

A. Legislation: Canada

Competition Act, RSC 1985, c C-34.

B. Jurisprudence: Canada

Baker v Canada, 1999 SCC 699.

Bhasin v Hrynew, 2014 SCC 71.

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

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

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

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

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

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

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

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

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

C. Jurisprudence: United States of America

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

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

D. Jurisprudence: Germany

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

E. Government Documents: Canada

Competition Bureau Canada, Information Bulletin on Merger Remedies in Canada (Bulletin), (Ottawa: 2006)

Competition Bureau Canada, "Merger Enforcement Guidelines" (last modified on 16 January

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

F. Other Materials

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

Furman, Jason, Unlocking digital competition Report of the Digital Competition Expert Panel (London: Government Publications, 2019).

OECD, Non-price effects of mergers—notes by Germany, Doc no DAF/ COMP/WD (2018) 12 (2018)

APPENDIX B: GLOSSARY

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

ICN: International Competition Network

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

SPC: Substantial Prevention of Competition

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

COMPETITION APPEAL TRIBUNAL

BETWEEN:

CANADA (COMMISSIONER OF COMPETITION)

Appellant

AND

FIND YOUR ROBIN INC and PENGUIN LTD

Respondents

FACTUM OF THE RESPONDENT

Counsel For The Respondents
Team 24108

CONTENTS

Overview

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

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

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

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

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

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

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

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

Part I—Statement Of Facts

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

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

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

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

B. The Penguin-Riddler Divestiture

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

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

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

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

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

Tribunal Decision, supra para 10, at para 20.

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

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

C. Market Overview

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

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

Tribunal Decision, supra para 10, at para 48.

D. The Commissioner's Review of the Proposed Transaction

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

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

E. The Tribunal's Decision

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

Part II—Statement Of Points In Issue

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

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

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

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

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

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

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

Part III—Argument

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

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

Vavilov, supra para 20, at para 37.

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

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

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

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

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

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

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

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

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

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

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

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

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

Tribunal Decision, supra para 10, at para 69.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Vavilov, supra para 20, at para 37.

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

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

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

Rogers, supra para 30, at para 121.

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

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

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

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

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

Tribunal Decision, supra para 10, at para 79.

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

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

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

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

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

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

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

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

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

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

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

Tribunal Decision, supra para 10, at para 89.

Competition Act, supra para 2, at s 92.

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

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

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

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

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

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

Tervita, supra para 24, at para 60.

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

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

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

Tribunal Decision, supra para 10, at para 86.

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

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

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

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

Tribunal Decision, supra para 10, at para 49.

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

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

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

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

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

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

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

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

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

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

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

Tribunal Decision, supra para 10, at para 53.

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

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

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

Southam, supra para 37, at para 41.

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

> *Tervita, supra* para 24, at para 45.
>
> *Tribunal Decision, supra* para 10, at para 95.

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

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

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

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

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

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

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

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

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

> *Tribunal Decision, supra* para 10, at para 98.

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

> *Tribunal Decision, supra* para 10, at para 51.
>
> *United States v American Express Co*, (2015) 88 F. Supp. 3d 143 at para 233.

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

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

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

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

Tribunal Decision, supra para 10, at para 26.

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

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

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

Tribunal Decision, supra para 10, at para 47.

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

Parrish, supra para 57, at para 474.

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

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

Parrish, supra para 57, at para 475.

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

Conclusion

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

Part IV—Order Sought

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

APPENDIX A—LIST OF AUTHORITIES

A. Legislation

Competition Act, RSC 1985, c C-34.

B. Jurisprudence

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

Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc, 2022 Comp Trib 1.

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

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

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

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

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

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

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

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

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

C. Secondary Sources

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